Volume 36 | Number 4 Article 1

6-1-1958

Fifth Annual Survey of North Carolina Case Law

North Carolina Law Review

FIFTH ANNUAL SURVEY OF NORTH CAROLINA CASE LAW*

The Fifth Annual Survey of North Carolina Case Law is designed to review cases decided by the North Carolina Supreme Court during the past three terms† of court and to supplement past and future *Surveys* in presenting developments in North Carolina case law over a period of time.

It is not the purpose of the *Survey* to discuss all the cases that were decided during the period of its coverage. It is intended to discuss only those decisions which are of particular importance—cases regarded as being of significance and interest to those concerned with the work of the Court, and decisions which reflect substantial changes and matters of first impression in the law of 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* and the sections for which they are responsible are:

John T. Allred (Criminal Law and Procedure); David E. Buckner, Jr. (Domestic Relations, Municipal Corporations, and Trusts); James N. Golding (Future Interests, Personal Property, Real Property, and Wills and Administration); Robert L. Grubb, Jr. (Constitutional Law, Damages, and Evidence); Jimmy W. Kiser (Torts); Henry C. Lomax (Civil Procedure (Pleading and Parties) (in part) and Taxation); Frederick C. Meekins (Agency and Workmen's Compensation, Contracts, and Insurance); Phillip C. Ransdell (Administrative Law, Business Associations, Credit Transactions, and Sales).

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

* The period covered embraces the decisions of the North Carolina Supreme Court reported in 244 N.C. 399 through 247 N.C. 523.

† With the exception of the decisions reported in 247 N.C. 528 through 247 N.C. 669 of the Fall Term 1957.

ADMINISTRATIVE LAW

JURISDICTION

In *Deal v. Enon Sanitary Dist.*[1] there was a petition filed with the Board of County Commissioners of Burke County to have a certain area established as a sanitary district. Fifty-one per cent of the freeholders of the area signed the petition as required by G.S. § 130-34. After passing on the petition, the Commissioners sent it to the State Board of Health, which established the sanitary district but excluded therefrom part of the area described in the petition. The Court construed G.S. § 130-34 and § 130-36 together and concluded that the two statutes did not give the State Board of Health discretionary authority to change the area described in the petition.[2] The Court found that a petition signed by fifty-one per cent of the freeholders of the specific proposed district was a prerequisite to the State Board of Health's jurisdiction to establish that proposed district as a sanitary district. Such petition was here lacking for the smaller district the Board had established. This seems to be in accord with a prior holding of the Court that the petition is a prerequisite for jurisdiction.[3] This also seems to be the general view where administrative action is set in motion by the filing of a petition.[4]

In another case,[5] plaintiff city brought suit in the superior court to restrain defendant, a utilities company, from curtailing services on certain bus routes within the city. No hearing before the Utilities Commission was held. The Supreme Court dissolved the injunction because G.S. § 62-121.47(1) vests jurisdiction over disputes involving extensions and services of such common carriers as a city bus company in the Utilities Commission; this jurisdiction is exclusive and does not depend on a provision in the franchise contract granting jurisdiction. The Court also reminded the defendant that it could not change its schedules and services until authorized to do so by the Utilities Commission, since the defendant and the city were unable to agree. Thus the Court seems to be applying the "primary jurisdiction doctrine" which requires the Utilities Commission to pass on matters within its

[1] 245 N.C. 74, 95 S.E.2d 362 (1956).

[2] However, chapter 130 of the *General Statutes* was rewritten by the Legislature in 1957 to become effective January 1, 1958. Under the new statutes, it seems the State Board of Health may make minor changes in the boundaries as described in the petition because of the following clause found in G.S. § 130-125 (Supp. 1957): "[P]rovided that the State Board of Health may make minor deviation, in defining the boundaries, from those prescribed in the petition when the Board determines that it is advisable in the interest of the public health . . . ."

[3] Idol v. Hanes, 219 N.C. 723, 14 S.E.2d 801 (1941).

[4] See 17A AM. JUR., *Drains and Sewers* § 29 (1957).

[5] Winston-Salem v. Winston-Salem City Coach Lines, Inc., 245 N.C. 179, 95 S.E.2d 510 (1956).

jurisdiction concerning public utilities before any court acts in the matter.[6]

LICENSES

In *Boyd v. Allen*[7] petitioner's retail beer permit was suspended for twelve months by the State Board of Alcoholic Control because his employees sold beer on the premises after hours and also sold whiskey on the premises, both without the knowledge or consent of the licensee. The Court pointed out that the business of dealing in intoxicating liquors is not a vested or constitutional right but is a privilege held subject to the police power of the state. Thus the licensee can be held strictly liable in an administrative proceeding for the actions of his employees. The Court cited authority to the effect that the sale of intoxicating liquors could be prohibited altogether or the privilege could be granted to one class and denied to another.[8] The holding is in accord with the generally accepted view.[9]

In another case[10] a dispensing optician's license was revoked for material fraud and misrepresentation in the procurement of the license. The grounds for revocation of a license issued by the Board of Opticians are set out in G.S. § 90-249,[11] and fraud or misrepresentation is not one of the grounds listed. However, the Court held that the Board had inherent power, without statutory authority, to revoke a license improperly issued by reason of material fraud or misrepresentation in its procurement.[12]

In *Roller v. Allen*,[13] G.S. §§ 87-28 to -38, requiring that tile contractors be licensed, was declared unconstitutional on the ground that it was an unwarranted interference with the fundamental right to engage in an ordinary and innocuous occupation; it could not be upheld as an

[6] DAVIS, ADMINISTRATIVE LAW § 197 (1951). However, it has been held that the superior court could exercise original jurisdiction and grant equitable relief to duly licensed franchise carriers when their routes were being invaded by unlicensed carriers. City Coach Co. v. Gastonia Transit Co., 227 N.C. 391, 42 S.E.2d 398 (1947).

[7] 246 N.C. 150, 97 S.E.2d 864 (1957).

[8] 11 AM. JUR., *Constitutional Law* § 29 (1937).

[9] DAVIS, ADMINISTRATIVE LAW § 69 (1951). Also, licenses for such purposes as selling liquor may be suspended or revoked under the police power of the state without observing such requirements as giving notice and an opportunity to be heard. *Ibid.*

[10] *In re* Berman, 245 N.C. 612, 96 S.E.2d 836 (1957).

[11] This statute also provides that the procedure for revocation and suspension of licenses of dispensing opticians shall be in accordance with chapter 150 of the *General Statutes* entitled "Uniform Revocation of Licenses." See Note, 31 N.C.L. REV. 378 (1953), for a discussion of the latter statute.

[12] In Attorney-General v. Gorson, 209 N.C. 320, 183 S.E. 392 (1935), the Court held that it had inherent power to revoke the license of an attorney if procured by fraud and misrepresentation.

[13] 245 N.C. 516, 96 S.E.2d 851 (1957). See Note, 35 N.C.L. REV. 473 (1957), for a discussion of this case.

exercise of the police power, since its provisions have no substantial relation to the public health, safety, morals or welfare, but tend to create a monopoly.

ADMINISTRATIVE PROCEDURE

In *Penland v. Bird Coal Co.*[14] the Supreme Court affirmed an award by the Industrial Commission even though incompetent evidence was admitted at the hearing. The Court found that the essential findings of the Commission were supported by competent evidence and therefore were conclusive on appeal. The Court also held that it would review only the record that was before the superior court. Thus a point the defendant raised in his appeal to the full Commission but which was not included in the certified record sent up to the superior court could not be passed on by the Supreme Court.

In *Burleson v. Francis*[15] the Supreme Court was entertaining an appeal from the superior court pursuant to a judicial review provision of the Agricultural Adjustment Act,[16] which provided: "The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence shall be conclusive." The Court said: "In the light of this provision the finding of fact by [*sic*] Judge of Superior Court that the determination by the Review Committee is supported by substantial evidence is binding on this Court if there be evidence to support it."[17] Thus the Court seems to be saying that a decision as to whether a determination by an administrative agency is supported by substantial evidence is a finding of fact. Other courts interpreting this provision of the Agricultural Adjustment Act indicate that whether the findings of the Review Committee are supported by substantial evidence is a question of law.[18] The North Carolina Supreme

[14] 246 N.C. 26, 97 S.E.2d 432 (1957).
[15] 246 N.C. 619, 99 S.E.2d 767 (1957).
[16] 52 STAT. 63 (1938), 7 U.S.C. § 1366 (1952).
[17] Burleson v. Francis, 246 N.C. 619, 620, 99 S.E.2d 767, 768 (1957). The Court cited Lee v. DeBerry, 219 S.C. 382, 65 S.E.2d 775 (1951), as authority for this proposition. This case involved an appeal pursuant to the same section of the Agricultural Adjustment Act as that involved in the North Carolina case. The South Carolina court merely recited the fact that judicial review was limited to questions of law, reviewed the evidence, and reversed the court of common pleas which had reversed the review committee. The court did not say that the court of common pleas made a finding of fact when it determined that the Review Committee's findings were not supported by evidence. Indeed, the court treated it as a question of law because it reviewed the evidence and reached its own conclusion as to whether there was evidence to support the Review Committee's findings of fact.
[18] Mace v. Berry, 225 S.C. 160, 81 S.E.2d 276 (1954); Lyerly v. Lawrimore, 144 F. Supp. 345 (1956). The United States Supreme Court has repeatedly said that whether there is any evidence to support findings of fact made by the administrative agency is a question of law and not of fact. Florida East Coast Line v. United States, 234 U.S. 167 (1913); Interstate Commerce Comm'n v. Louisville and N.R.R., 227 U.S. 88 (1912).

Court has repeatedly stated while reviewing the decisions of other administrative agencies that whether findings of fact are supported by evidence is a question of law to be considered on judicial review.[19] Thus, the language of this case seems to be contrary to previous North Carolina cases and to cases in other jurisdictions.

In another case[20] involving a proceeding under the Tort Claims Act, the Court held that since it was unable to determine whether the Industrial Commission had limited its consideration of negligence to that of the employee named in the claim, or whether it had also considered the negligence of the employee named in a stipulation between the parties as being the one in charge of maintenance of the particular highway involved, it was proper for the superior court to remand the case to the Commission for the answer and for any modification of the award made necessary by such finding. Another point in the case involved a statement in the superior court's order remanding the case to the Commission. The order stated that stipulated facts and certain findings of the Commission compelled the conclusion that a dangerous condition existed on the highway for at least ten days, and that the Court was of the opinion that whether the supervisor was negligent would depend on whether he had notice or should have known of the condition. The Court struck out this statement, since negligence is a mixed question of law and fact, on which the Commission must be free to make its own findings.[21]

Public Convenience and Necessity

In *North Carolina ex rel. Util. Comm'n v. Casey*,[22] the Court affirmed a decision supporting a finding by the Utilities Commission that public convenience and necessity no longer required and were no longer served by the operation and ownership of an electrical distribution system in the city of Kinston by the utility company, that the system should be discontinued, and that the sale of the equipment would be in accord with public convenience and necessity. Thus, a contract between the utility company and the city of Kinston for the sale of the electrical

[19] Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1945); Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940).

[20] Tucker v. State Highway & Public Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957).

[21] The Court has stated on numerous occasions that the Commission's findings on a mixed question of law and fact are conclusive on appeal if there is sufficient evidence to sustain the facts found. Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941). However, in actually applying that rule, the Court seems to separate the questions of law from the questions of fact and review the questions of law but accept the questions of fact if supported by evidence. See Lewter v. Abercrombie Enterprises, Inc., *supra*.

[22] 245 N.C. 297, 96 S.E.2d 8 (1956).

distribution system to the city was approved. The Court held the Utilities Commission has both the authority and the duty to pass upon such contracts and to determine whether or not it is in the public interest to permit their consummation.[23]

Liabiity of Members of an Administrative Body

In *Langley v. Taylor*[24] the Court held that individual members of the Alcoholic Beverages Control Board of Beaufort County were not liable for injuries inflicted by an employee enforcement officer even though the Board had not required the officer to post bond. One basis for the decision was that, conceding the Board had the duty to require the officer to post bond, in the absence of statute expressly imposing such liability, a public officer who is a member of a corporate or governmental body on which a duty rests cannot be held liable for the neglect of duty of that body if he acts in good faith. While this may be the general view[25] there is authority to the contrary, at least for ministerial acts required of the governmental body.[26]

AGENCY AND WORKMEN'S COMPENSATION

Agency

Distinction Between Liability of Absentee-Owner and Owner-Occupant

The only significant case in agency is *Litaker v. Bost*,[1] an action for wrongful death in which plaintiff alleged negligence against both *A*—the owner-occupant—and *B*—the party named in the complaint as the driver of the vehicle at the time of the accident. The evidence was conflicting as to whether *B* or another passenger in the vehicle was driving. A verdict was returned against *A* but not *B*. The Court upheld the decision of the lower court allowing plaintiff to amend the complaint after verdict so as to allege (1) that the car was being driven by either one of the passengers referred to in the evidence, and (2) that in either event, *A* was responsible for the negligence of the driver.[2]

In a deliberate dictum the Court distinguishes between the basis of liability on the part of an *absentee-owner* and that of an *owner-occupant,*

[23] N.C. Gen. Stat. §§ 62-27, -29, -96 (1950) seem to place this duty on the Utilities Commission before a utility company can abandon part or all of its service to the public. This appears to be the general rule both as to abandonment of services and selling facilities. 73 C.J.S., *Public Utilities* § 43 (1951).

[24] 245 N.C. 59, 95 S.E.2d 115 (1956).

[25] Davis, Administrative Law § 231 (1951).

[26] First Nat'l Bank v. Filer, 107 Fla. 526, 145 So. 204 (1933).

[1] 247 N.C. 298, 101 S.E.2d 31 (1957).

[2] See N.C. Gen. Stat. §§ 1-163 to -168 (1953).

stating that the former depends upon the application of the doctrine of respondeat superior while the latter, provided the driver is not the agent of the owner, depends solely upon the owner's own acts or omissions as related to his right to control and to direct the operation of his car.[3]

The Court states that "to establish the liability of an *absentee-owner,* it must be shown that the driver was the owner's agent and then acting in furtherance of the owner's business. Ordinarily, in such case, the identity of the driver would be a vital factor in the determination of the alleged agency."[4] This would appear to be applicable only in those situations where the plaintiff seeks to hold the owner liable without the aid of G.S. § 20.71.1(b), which provides that "proof of the registration of a motor vehicle in the name of any person . . . shall . . . be prima facie evidence . . . that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible . . . ." It would seem that proof of the driver's identity would not be essential if the statute is applicable.

WORKMEN'S COMPENSATION

Attack by Fellow-Employee

In order for compensation to be recovered for the death of an employee caused by the assault of a fellow-employee, it is required that the injury causing the death result from an accident arising out of and in the course of the employment. Where the killing results from personal enmity alone[5] and the attack does not arise as an incident of the employment,[6] recovery will be denied. But where the assault arises from a dispute over work[7] and a causal relation exists between the employment and the dispute, recovery will be allowed when the evidence shows that the employees had no personal contacts outside of the employment.[8]

Zimmerman v. Elizabeth City Freezer Locker[9] represents a liberal application of these rules to an interesting fact situation. *A* had a feeling of hatred toward people in general and, because of arguments and bickering in connection with his employment, toward certain fellow-employees in particular. He was suffering from a mental disturbance "triggered" by an incident at a local draft board which caused him

[3] See, *e.g.,* Harper v. Harper, 225 N.C. 260, 34 S.E.2d 185 (1945).
[4] 247 N.C. at 309-10, 101 S.E.2d at 39.
[5] Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930).
[6] Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942).
[7] Hegler v. Cannon Mills Co., 224 N.C. 669, 31 S.E.2d 918 (1944).
[8] Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949). *But see* Holmes v. M. G. Brown Co., Docket No. 4277 (May 31, 1944) (compensation denied where deceased was murdered by an insane employee).
[9] 244 N.C. 628, 94 S.E.2d 813 (1956).

to become exceedingly angry. He went to his room, loaded a rifle, walked several blocks back to the place of his employment, and shot three fellow-employees, killing two of them. The evidence established that *A* had made a statement to a police officer that he did not attempt to kill anyone else because he preferred to kill someone he knew at the plant and that he had no personal contact with the fellow-employees outside of the employment. The Court held that the injuries resulted from an "accident arising out of and in the course of the employment" within the meaning of G.S. § 97-2(f) and affirmed the awards made by the Industrial Commission to the three claimants.

The decision apparently extends the previous rule regarding accidents of this character in that the Court allowed compensation for injuries resulting from an assault triggered by an event unrelated to the employment, but having its root in a psychic condition aggravated by a series of disputes related to the employment.

Average Weekly Wages

In *Liles v. Faulkner Neon & Elec. Co.*[10] the deceased was employed part-time during vacation and after school for a period of eleven weeks preceding his death. During the period he received an average weekly wage of $26.88. There was evidence that a *full-time* employee doing similar work would have earned $34.88 per week. However, there was no evidence as to the average weekly amount a part-time worker had earned during the fifty-two weeks previous to decedent's injury while working for this employer or any other in the same locality or community, and there was no evidence that any part-time worker earned a higher average weekly wage than $26.88.

The Court, interpreting G.S. § 97-2(e), found that an award based on wages representing the amount the decedent would have earned had he been a *full-time* employee was erroneous under the circumstances presented here. The correct basis would be the wages of a part-time employee of the same grade and character employed in the same class of employment. As the Court points out, this proposition is in accord with decisions of other jurisdictions having similar statutory provisions.[11]

Blood Test

Where a medical blood test is required by statute[12] in the interest of public health because of the nature of the work, the Court held that an injury resulting therefrom is not compensable under the Workmen's Compensation Act.[13] Apparently, the reason for so holding is that

[10] 244 N.C. 653, 94 S.E.2d 790 (1956).

[11] See 58 AM. JUR., *Workmen's Compensation* § 309 (1948); 71 C.J.S., *Workmen's Compensation Acts* §§ 521-22 (1935); Annot., 112 A.L.R. 1094 (1938).

[12] N.C. GEN. STAT. § 130-20 (1952).

[13] King v. Arthur, 245 N.C. 599, 96 S.E.2d 846 (1957).

the employer was obligated by law to see that the employees submitted to the tests. Therefore, the employee, in submitting, was merely satisfying a condition precedent to qualifying for the particular type of employment.

Although it may be said that the employee was qualifying for continued employment it seems equally logical to say that in having the tests administered the employer was qualifying for continued operation. Thus, the benefit to the employer is certainly as great as that to the employee, and in the light of the social policy which engenders compensation legislation, the soundness of this decision seems open to question.[14]

Effect of "Release" by Administratrix as to Minor Dependent

In *McGill v. Bison Fast Freight, Inc.*,[15] a case of first impression, the Court held that a "full release" executed by the wife of a deceased employee as administratrix and individually was effective as a complete bar to her claim for compensation under G.S. § 97-38, but that the release was not effective as a bar to a claim for compensation by a minor dependent for whom no guardian had been appointed at the time the release was executed.[16] The Court points out that the recovery should be diminished by the amount of the release consideration actually available for the child.

Highway Accidents

In *Hardy v. Small*[17] a thirteen-year-old general farm laborer was killed by an automobile as he crossed a highway on his way home from the employer's barn. The highway traversed the farm and lay between the barn and the employee's home. The Court, in affirming the award, held that since the highway was a hazard necessary to be crossed in going from one part of the farm to another and was not being used as a means of travel to and from work, the employee was in the course of his employment from the time he left his home for work until he returned to the area of his home located on the farm.

In *Horn v. Sandhill Furniture Co.*[18] it was held that an injury received by an employee resulting from an accident on a highway while going to a place of his own choice for lunch (a parking lot on the employer's property) was not compensable.[19]

[14] See Note, 36 N.C.L. Rev. 110 (1957).
[15] 245 N.C. 469, 96 S.E.2d 438 (1957).
[16] "No limitation of time provided in this article for the giving of notice or making claim under this article shall run against any person who is mentally incompetent, or a minor dependent, *as long as he has no guardian,* trustee, or committee." (Emphasis added.) N.C. Gen. Stat. § 97-50 (1950).
[17] 246 N.C. 581, 99 S.E.2d 862 (1957).
[18] 245 N.C. 173, 95 S.E.2d 521 (1956).
[19] For a discussion of Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957), and

Silicosis and Asbestosis

In *Brinkley v. United Feldspar & Minerals Corp.*[20] the Court states that the Industrial Commission has again misconstrued *Honeycutt v. Carolina Asbestos Co.*[21] with reference to the interpretation of G.S. § 97-54 prior to the 1955 amendment.[22] The Court holds that "disablement" resulting from asbestosis or silicosis means the event of becoming actually incapacitated from performing normal labor in the last occupation in which remuneratively employed and that such occupation may be one wholly separate and apart from the employment in which the employee was last *exposed* to the hazards of the occupational disease(s).[23] Perhaps the present decision adds somewhat to the confusion of the *Honeycutt* case in that there is seemingly a discrepancy between the holding of that case as recited in the present decision and that reported in the original decision. In the present case the Court implies that the last occupation in which Honeycutt was remuneratively employed at the time he became disabled was that of a policeman of the Town of Davidson. In the *Honeycutt* case the Court held that he had become incapacitated from performing normal labor while employed as an asbestos worker, and that this was the last occupation in which he was remuneratively employed when he became so disabled. The legislature amended G.S. § 97-54 in 1955, and since it is not likely that *Honeycutt* will again be cited as precedent, this discrepancy would not seem to be important.

The statutory provisions relating to compensation payable to employees suffering from silicosis as rewritten by the legislature in 1955 were held to be correctly interpreted by the Commission in *Pitman v.*

Horn v. Sandhill Furniture Co., *supra* note 18, see Note, 36 N.C.L. REV. 367 (1958).

[20] 246 N.C. 17, 97 S.E.2d 419 (1957).

[21] 235 N.C. 471, 70 S.E.2d 426 (1952).

[22] Prior to the 1955 amendment this section read: "The term 'disablement' as used in this article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated, because of such occupational disease, from performing *normal labor in the last occupation in which remuneratively employed*...." It now reads: "The term 'disablement' as used in this article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated because of asbestosis or silicosis *to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to* asbestosis or silicosis . . . ." (Emphasis added.)

[23] The Industrial Commission in both Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957), and Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954), erroneously interpreted the statute as if to read that disablement resulting from asbestosis or silicosis meant the event of becoming actually incapacitated from performing normal labor in the last occupation in which remuneratively employed *while exposed to the hazard of silica.* For a discussion of the *Huskins* case, *supra,* and Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952), see *Third Annual Survey of North Carolina Case Law,* 34 N.C.L. REV. 1, 12-13 (1955).

Carpenter.[24] Thus, where the employee was found in the first hearing[25] to have silicosis and ordered to abstain from work having the hazards of silica dust and to report for second[26] and third[27] medical examinations, it was proper that he be awarded compensation as provided by G.S. § 97-61.5(b)[28] without consideration of the fact that his condition was complicated by pulmonary tuberculosis.[29] The total amount of compensation is to be determined on the final hearing after the third medical examination.[30] At this time consideration should be given to the tubercular condition of the employee, prior payments being credited toward the total amount.

BUSINESS ASSOCIATIONS

CORPORATIONS

Liability of Corporate Officers

In *Peed v. Burleson's, Inc.*[1] an officer of the defendant corporation converted plaintiff's goods which the corporation received and handled in the course of its business. The Court affirmed a nonsuit as to another officer of the corporation who neither participated in nor had knowledge of the conversion. The Court held that the mere fact that the corporation accepted the benefits of the conversion is not a sufficient basis to impose individual liability on the innocent officer of the corporation.[2] The Court reversed a judgment of nonsuit as to the corporation and the officer participating in the conversion. The question of whether the original seller could sue the corporation is covered under SALES.

[24] 247 N.C. 63, 100 S.E.2d 231 (1957).
[25] N.C. GEN. STAT. § 97-61.5 (Supp. 1957).
[26] N.C. GEN. STAT. § 97-61.3 (Supp. 1957).
[27] N.C. GEN. STAT. § 97-61.4 (Supp. 1957).
[28] This section provides that "if the employee is removed from the industry the employer *shall* pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to 60% of his average weekly wages before removal from the industry, but not more than thirty-two dollars and fifty cents ($32.50) or less than ten dollars ($10.00) a week, which compensation *shall* continue for a period of 104 weeks." (Emphasis added.) Thus the terms of the statute are mandatory in nature upon the finding of either asbestosis or silicosis and removal from the industry.
[29] "In case of disablement or death, due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments *may* be reduced one-sixth." (Emphasis added.) N.C. GEN. STAT. § 97-65 (Supp. 1957). The reduction of "one-sixth" apparently is merely permissive in nature.
[30] N.C. GEN. STAT. § 97-61.6 (Supp. 1957).

[1] 244 N.C. 437, 94 S.E.2d 351 (1956).
[2] This is in accord with the general view that an officer is not liable for the torts of the corporation unless he participated in, authorized, or acquiesced in the tort. 19 C.J.S., *Corporations* § 845 (1940).

Dividends

In *Bell Bakeries, Inc. v. Jefferson Standard Life Ins. Co.*[3] the provisions of a deed of trust restricted the payment of dividends by the debtor if such payment would reduce working capital below a stated amount. The debtor corporation paid interest on debentures of its parent corporation which owned all of the debtor's stock. The Court held that such payments were dividends and were made in violation of the provisions in the deed of trust. The Court pointed out that in such closely held corporations as the debtor corporation, a dividend may be paid although it is distributed informally and without denomination as such in the corporate documents.

UNINCORPORATED ASSOCIATIONS

In *Solon Lodge v. Ionic Lodge*[4] an unincorporated fraternal organization, hereinafter called the Lodge, formed a non-stock corporation to which it had title to real estate conveyed in trust for the Lodge and its members. Subsequently, to prevent the Lodge from losing the property in case it became inactive, the corporate charter was amended to authorize the issuance of stock. Shares of stock were issued to each member of the Lodge and some shares were issued to the Lodge itself. This was done to substitute stock in the corporation for interest in the property. The corporation managed the property and charged rent to the Lodge for the use thereof. The Court held that if all the members of the Lodge and the Lodge itself accepted the stock in exchange for their interests in the realty, the giving up of their interests in the realty was sufficient consideration for the stock issued. Therefore, the Court held that the finding of fact by the superior court that the issuance of stock was without consideration was an erroneous conclusion of law.[5] The consent of all the members of the Lodge to the exchange was necessary since the property was being diverted to a use that was not one of the objects of the association.[6]

PARTNERSHIPS

In *Hardy & Newsome, Inc. v. Whedbee*[7] the Court held that the appearance of the partners defending an action in which liability is asserted against the partnership gives the Court jurisdiction to enter a judgment against the partnership. The Court pointed out that if only

[3] 245 N.C. 408, 96 S.E.2d 408 (1956).
[4] 245 N.C. 281, 95 S.E.2d 921 (1956).
[5] For the subsequent appeal from the new trial, see Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).
[6] Venus Lodge v. Acme Benevolent Ass'n, Inc., 231 N.C. 522, 58 S.E.2d 109 (1950).
[7] 244 N.C. 682, 94 S.E.2d 837 (1956).

one of the partners appeared in the action, a judgment against the appearing partner individually and against the partnership property would be valid. However, a judgment against partners not appearing and not served would not bind them individually.[8]

CIVIL PROCEDURE (PLEADING AND PARTIES)

PARTIES

Necessary and Proper Parties

In *Etheridge v. Wescott*[1] the alleged cloud on plaintiffs' title was a contract to sell land to defendant married woman, who pleaded a counterclaim based upon the contract. The Court held that, under the present statutes,[2] her husband was neither a necessary nor a proper party to the plaintiffs' action or her counterclaim, and his motion for dismissal as to him should have been granted.[3]

In *Willcox v. Di Capadarso*[4] plaintiffs sued for damages and for an injunction against interference with their easement. After preliminary injunction was granted, plaintiffs sold their rights in the land, expressly making no warranty as to the easement. The Court, per curiam, dismissed the action for the injunction but not the action for damages. The plaintiffs were held to have no property rights affected by the injunction. The Court raised without answering the question of whether plaintiffs' vendees could join in the pending action. At any rate, continuation of the action for damages would not affect the vendees' rights and it was not necessary to join them as plaintiffs.[5]

In another per curiam case[6] the Court ruled that in a suit by a subcontractor against a home owner to enforce a lien for materials furnished, the contractor is a necessary party. The contractor was joined, but

[8] However, even after judgment, the partner not appearing may be brought in and made a party. Dwiggins v. Parkway Bus Co., 230 N.C. 234, 52 S.E.2d 892 (1949).

[1] 244 N.C. 637, 94 S.E.2d 846 (1956).

[2] N.C. GEN. STAT. §§ 52-2, 52-10 (1950). *Cf.* former N.C. CONSOL. STAT. § 454.

[3] This result was foreshadowed by Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914), a case in which land title was not involved.

[4] 244 N.C. 741, 94 S.E.2d 925 (1956).

[5] The Court's question as to whether they could be joined apparently relates to joinder for the purpose of reinstating a prayer for an injunction. As bearing on the question, see N.C. GEN. STAT. § 1-74 (1953); Fidelity and Cas. Co. v. Green, 200 N.C. 535, 157 S.E. 797 (1931). See also Veasey v. King, 244 N.C. 216, 92 S.E.2d 761 (1956), where injunction was not involved, but the Court permitted the vendees to be added as plaintiffs in the vendors' action for permanent damages.

[6] W. E. Linthicum & Sons, Inc. v. Kelly Constr. Co., 246 N.C. 203, 97 S.E.2d 863 (1957).

was alleged to be a corporation. The evidence showed the contractor to be an individual. Nonsuit was held proper for failure to join a necessary party.

In a suit[7] by an executor for a declaratory judgment adjudicating the rights of devisees to a parcel of land, a grantee of one of the devisees was found to be a necessary party; and, though the defect of parties had not been noticed in the lower court, the Court remanded the case with a direction to make him a party. No decree could be entered construing the will and settling the rights of the parties without affecting his interest in the land. This ruling is in accord with the view of a majority of state courts and with practice under the federal rules.[8]

Real Party in Interest

In *Taylor v. Hunt*[9] plaintiff sued an alleged tortfeasor for negligence in an automobile accident. Plaintiff had received payment for the same injuries from his employer under the Workmen's Compensation Act. The action, commenced within six months after the injury, was brought with the consent of the insurance carrier, but was not brought by the employer or the insurance carrier in the employer's name. The Court held that under G.S. § 97-10, when the employee has accepted workmen's compensation, no action may be brought during the six month period in the name of the employee unless the complaint discloses that it is so brought by the subrogated employer or carrier. Since no waiver was alleged, the Court expressed no opinion as to whether an employer or a carrier may waive this exclusive right.

Darden v. Boyette[10] stands for the proposition that once an estate has been executed by the terms of the will and a final account has been made, the administrator c.t.a. is not the real party in interest to maintain an action to construe the will to determine whether the devisee was given a life estate or a fee simple.

In *Simmons v. Rogers*[11] the Court held that where a defendant dies pending appeal, the administrator is properly made a party defendant.[12] In the same case another defendant reached her majority while the action was pending. Her guardian ad litem died. It was held not necessary to have a new guardian ad litem appointed since she could now defend the action in her own right.

[7] Edmondson v. Henderson, 246 N.C. 634, 99 S.E.2d 869 (1957).
[8] General Houses, Inc. v. RFC, 81 F. Supp. 202 (E.D. Ill. 1948); 3 MOORE, FEDERAL PRACTICE § 19.17 (2d ed. 1948); 39 AM. JUR., *Parties* § 111 (1942).
[9] 245 N.C. 212, 95 S.E.2d 589 (1956).
[10] 247 N.C. 26, 100 S.E.2d 359 (1957).
[11] 247 N.C. 340, 100 S.E.2d 849 (1957).
[12] N.C. SUPREME CT. RULE 37.

JOINDER OF PARTIES AND CAUSES

In *NAACP v. Eure*[13] the NAACP sued for declaratory judgment, joining the Secretary of State and the Attorney General as parties defendant. It sought to test the constitutionality of G.S. 120, Article 10, which requires an organization which is engaged in influencing public opinion to register with the Secretary of State before engaging in such activity, and G.S. § 55-118, which requires every foreign corporation doing business in this state to file a copy of its charter and certain information with the Secretary of State. The Court found that G.S. § 55-118 affected both the Secretary of State and the Attorney General since the former has certain ministerial duties and the latter has authority to prosecute for noncompliance with the statute. However, such is not the case in regard to G.S. 120, Article 10. The Secretary of State is a proper party but the Attorney General has no enforcement duties, these being vested in the various district solicitors. Thus the action was defective because all causes did not affect all parties.

There was thus presented a situation which the Court ordinarily treats as misjoinder of both causes of action and parties; and dismissal follows when demurrer for such dual misjoinder is sustained.[14] In this case the lower court sustained the demurrer, but being of the opinion that a decision would not settle the G.S. 120, Article 10 controversy, dismissed that cause of action and ordered plaintiff to replead the G.S. § 55-118 cause of action. The Supreme Court affirmed, pointing to the discretionary power to dismiss declaratory judgment actions given by G.S. § 1-127 and the court's power to sever misjoined causes under G.S. § 1-132. The case, however, should not be interpreted as a significant step away from the dismissal rule. Defendants, in their demurrer, spelled out the steps they desired the courts to take, and both courts granted the relief so requested. Therefore, the proper interpretation seems to be that defendants waived the right to dismissal, just as they could have waived the misjoinder completely by failing to demur.[15]

By contrast, and indicating that the Court adheres to the dismissal rule, in *Davis v. Davis*,[16] the lower court sustained a demurrer for misjoinder of causes and parties, ordered a reframing of the complaint and

[13] 245 N.C. 331, 95 S.E.2d 893 (1956).

[14] See Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. REV. 1 (1946); Brandis and Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N.C.L. REV. 405 (1956).

[15] It can be argued that this case presented only a single cause of action. That apparently was the theory of plaintiff's counsel as there was no separation of causes in the complaint. *Cf.* FED. R. CIV. P. 20(a).

[16] 246 N.C. 307, 98 S.E.2d 318 (1957).

severance of causes. The Supreme Court, agreeing as to the misjoinder, directed dismissal. In that case plaintiffs attempted to join: (1) a cause for an accounting of rents and profits alleged in their capacity as tenants in common against defendant co-tenants as individuals; with (2) and (3) causes for accountings against defendants as personal representatives of two decedents. In one of the latter an executor, a necessary party, had not been joined.

All in all there can be no quarrel with this aspect of the Court's decision. However, the Court held that, considered alone, the cause for accounting by tenants in common against co-tenants presented a misjoinder of parties plaintiff (and, by implication, of causes of action). It said that the right of one tenant in common for an accounting is in no wise related to the similar right of a co-tenant.[17] This is an unfortunate result, since if independent actions are brought the same ground must be covered in each.[18]

Joinder of the executor of a deceased partner and a transferee of the same partner was proper, in an action[19] for the dissolution of the partnership and for application of the partnership assets, when the transferee was alleged to be in wrongful possession of some of the assets of the partnership. The Court said that the plaintiff partner is entitled to have the entire controversy settled in one action in accordance with G.S. § 1-69.

Third Party Practice

In *Jenkins v. Fowler*[20] *A* sued *B* and *C* for damages due to their alleged negligence in an automobile accident. *B* and *C* pleaded and

[17] The Court said that on this question McPherson v. McPherson, 33 N.C. 391 (1850) is decisive. However, it is very doubtful that this early case stands for more than the proposition that, in the pre-Code era, these plaintiffs could not join in an action *at law* as distinguished from a proceeding in equity. The Court likened the situation of tenants in common seeking accounting against their fellow tenants in common to the situation of co-sureties seeking contribution against their fellow sureties. It is clear that, prior to the Code, in actions for contribution, each co-surety had to sue alone and each had to be sued alone when the action was at law. Equity would settle all the rights in a single proceeding. There is adequate authority to indicate that in this situation since the Code our Court has adopted the equity rule. See the discussions of these matters in McIntosh, North Carolina Practice and Procedure in Civil Cases §§ 644, 646 (2d ed. 1956). (In the *McPherson* case the comparison to co-sureties was made with reference to defendants. In the case discussed in the text, the Court found the joinder of the defendants proper since they had acted in concert. However, as indicated above, the distinction between law and equity in the pre-Code era applied to both plaintiffs and defendants.)

[18] The Court has allowed joinder of promisees on a single contract even though they are not joint promisees, when trial convenience would best be served. Brock & Scott Produce Co. v. Brock, 186 N.C. 54, 118 S.E. 798 (1923); McIntosh, North Carolina Practice and Procedure in Civil Cases § 644 (2d ed. 1956).

[19] Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

[20] 247 N.C. 111, 100 S.E.2d 234 (1957). (A typographical error in the advance sheet report of this case has the defendants denying that they were "negligible.")

proved as a defense a judgment in another superior court action in which *D*, a passenger in the car of *B* and *C*, sued *A*, who had *B* and *C* made additional parties defendant, asking for contribution. *B* and *C* had been adjudged free of any negligence. The Court affirmed a nonsuit, stating that in the prior action *A* became a plaintiff as to *B* and *C* and the issue in that case was the same as the one in this case. Therefore the prior verdict was binding on *A*. The Court expressly approved the motion for nonsuit at the close of all the evidence as an appropriate method of presenting the res judicata question.

In *Norris v. Johnson*,[21] another motor vehicle collision case, the original defendant, acting under G.S. § 1-240, brought in plaintiff's husband, owner-operator of the car in which plaintiff was riding. The husband counterclaimed against the original defendant for damages to his car. The lower court struck out the counterclaim. At the trial the jury found that both the original defendant and the husband were negligent. Judgment was entered for plaintiff against the original defendant and for the latter against the husband for contribution. On the husband's appeal, the Court granted a new trial as between the husband and original defendant because the former had not been permitted to assert his counterclaim.

The Court cited and discussed prior decisions and adhered to its rule that, while original defendants may not cross-claim against each other for their own injuries,[22] a third-party defendant may do so against a third-party plaintiff. The explanation of this distinction is the best yet advanced by the Court—*i.e.*, that the original defendant's cross-claim must be relevant to the plaintiff's claim against him; while the third-party defendant's claim need be relevant only to the third-party plaintiff's claim against him. Or, to paraphrase, an original defendant may counterclaim for his injuries against the plaintiff; hence the third-party defendant may so counterclaim against the third-party plaintiff. The clear import of the opinion is that even if *plaintiff* objected, the objection would be of no avail.

Nevertheless, this does not satisfactorily explain why identical issues between defendants may be tried in one case, without regard to the plaintiff's wishes, but may not be tried in another case, even if plaintiff consents by failure to object. Whatever the technical rationalities, the fact remains that the issues and the complications are identical.[23]

The rationale of the instant opinion leads to two questions which in the future the Court must face: (1) If, when the third-party defendant

[21] 246 N.C. 179, 97 S.E.2d 773 (1957).
[22] Wrenn v. Graham, 236 N.C. 719, 74 S.E.2d 232 (1953).
[23] For further discussion of this question, see Brandis and Graham, *supra* note 14, at 418.

is joined, the complaint is amended to seek judgment against him in favor of the plaintiff, will this prevent him from counterclaiming against the third-party plaintiff? (2) When the plaintiff originally joins two defendants, and one cross-claims against the other for contribution, will that cross-claim open the way for the latter to cross-claim for his own injuries?

One further question regarding the *Norris* decision automatically presents itself. While the lower court struck out the husband's counterclaim against the original defendant, both the husband and his plaintiff wife had full opportunity to convince the jury that the husband was not negligent (as was, indeed, alleged in the wife's complaint). They failed. Had the counterclaim not been stricken, the only additional evidence it would have made relevant would have related to the amount of damages to the husband's car. Yet the Court granted a new trial between the defendants. Does this mean that the Court believes the reading of the counterclaim to the jury and evidence of the car damage would have significant psychological importance? Should a new trial be granted because of the omission of an issue not relevant to fault? Should not the striking of the counterclaim have been treated as nonprejudicial error?

The Court in *Johnson v. Catlett*[24] held that an employer who has discharged his workmen's compensation obligations cannot be made an additional party defendant to enforce contribution in a suit by the administrator of the deceased employee against a third party tortfeasor for wrongful death. This case is in accord with the accepted practice in this state.[25] The facts of the case indicate that the deceased was riding in an automobile driven by a fellow servant on company business when the accident occurred. The defendant contended that the negligence of the fellow servant concurred in producing injury so that the fellow servant or the employer, under the doctrine of respondeat superior, ought to be liable for contribution. The Court, however, ruled the joinder improper since the employer had complied with his statutory obligation.[26]

In another case[27] plaintiffs sued for wrongful trespass in the cutting of timber on their land. Defendant sought to join its grantors as parties defendant, alleging that they had pointed out the boundaries set forth in the timber deed. It contended that if plaintiff recovered from it, it

[24] 246 N.C. 341, 98 S.E.2d 458 (1957).

[25] Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953); Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1952).

[26] The question of the effect of the workmen's compensation paid on the amount of recovery against the third party tortfeasor was not raised by the Court. As to this see Poindexter v. Johnson Motor Lines, Inc., 235 N.C. 286, 69 S.E.2d 495 (1952); Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933).

[27] McBryde v. Coggins-McIntosh Lumber Co., 246 N.C. 415, 98 S.E.2d 663 (1957).

was entitled to indemnity from its grantors. The plaintiffs and additional defendants demurred *ore tenus* for misjoinder of parties and causes. The lower court sustained the demurrer and dismissed the original defendant's claim against the additional defendants. On appeal the Court held that the original defendant had a cause of action against the additional defendants and that the joinder was proper since the plaintiffs could have proceeded against the additional defendants in their original complaint, and since G.S. § 1-240 clearly authorized the procedure followed by the original defendant.[28] The issue was raised on plaintiffs' demurrer only, the Court holding that since the additional defendants had already filed an answer they were precluded from demurring *ore tenus* on this ground.[29]

In *Standard Amusement Co. v. Tarkington*[30] plaintiff, as assignee of a lessor, sued to recover the rent. Defendant lessees pleaded fraudulent representations by plaintiff's assignors in inducing defendants to enter into the lease. They asked that plaintiff recover nothing, that plaintiff's assignors be made parties, and that defendants recover damages against the assignors reduced by the amount of the unpaid rent. The Court, reversing the court below, held that the defendants were entitled to have the assignors joined and to litigate the claim against them. All the matters involved in the claim arose out of the lease upon which plaintiff's action was grounded; the same evidence would be necessary to defeat plaintiff's action and to justify judgment against the assignors. (Defendants could use defensively against the plaintiff-assignee the claim against the assignor, existing before notice of the assignment.) Thus the relation between plaintiff's claim and defendants' claim was such that adjustment of both was necessary to full determination of the entire controversy. The principal statute relied upon for this result was G.S. § 1-137(1), which is the transaction clause of the counterclaim statute. Since defendants here sought no affirmative relief against the plaintiff, and the statute refers to a claim "existing in favor of a defendant and against a plaintiff," the construction given the statute here is indeed liberal, as the Court said it should be. A more adequate basis might have been G.S. § 1-69, which

[28] See Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957). The controlling opinion in the *McBryde* case deals with the matter entirely as one of *contribution* between ordinary joint tortfeasors. In a concurring opinion Johnson, J. points out that defendant actually asked for *indemnity* on a primary-secondary liability theory, and that this justified joinder on grounds not dependent upon G.S. § 1-240.

[29] Another question of timing regarding third party practice was raised in Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956), an action for conversion. Plaintiffs obtained a judgment by default and inquiry. A motion lodged by the defendant thereafter to bring in alleged joint tortfeasors to determine their liability for contribution was held to be too late. The Court said that he might enforce his right of contribution in the manner prescribed by G.S. § 1-240—*i.e.*, by independent action.

[30] 247 N.C. 444, 101 S.E.2d 398 (1957).

authorizes joinder of defendants "who are necessary parties to a complete determination or settlement of the questions involved." However, whatever the statutory basis for the decision, the result is excellent and, unlike the results of some other recent cases, completely in line with modern procedural trends.

COUNTERCLAIMS

In *Everett v. Yopp*[31] the Court held that unless a defendant has some matter existing in his favor on which he can maintain an independent action if separately alleged, his claim is not a counterclaim and, in the absence thereof, defendant is unable to object to the allowance of a voluntary nonsuit for the plaintiff.[32]

In one recent case[33] the Court dealt with the problem of permissive as compared with compulsory counterclaims. The plaintiffs brought action for unpaid salary due their testator from defendant corporation. The defendant interposed a plea in abatement in which it alleged that there was a prior action pending between the parties for conversion of defendant's funds by plaintiffs' testator and his associates. The Court said that the prior action did not abate the present action because even if a plaintiff has a counterclaim which was permissible in the prior action, he "may elect to plead it as such or institute a separate action thereon *unless the issues raised in the prior action, if answered in favor of the plaintiff therein, would preclude and bar the prosecution of the second action.*" (Emphasis by the Court.) The Court found that the issues raised in the prior action related to the alleged fraudulent withdrawal and misapplication of corporate funds and that even if the issues were found in favor of the corporation, the plaintiffs would not be barred from bringing the action for withholding of salary. The Court also pointed out that the two actions were pending in the same county and that the situation, in respect to competition to secure the first trial, was not the same as if they were in different counties.

In *Etheridge v. Wescott*[34] executors of *T* joined with Etheridge in an action against Wescott to quiet title to land conveyed from *T* to Etheridge. Wescott set up a counterclaim based upon a contract by *T* to convey the land to her. She asked for conveyance of the land to her, or if title could not be conveyed to her that she have judgment against the executors for the purchase money which she paid to *T*. The Court said that if it was determined that Wescott was entitled to

[31] 247 N.C. 38, 100 S.E.2d 221 (1957).
[32] The question of voluntary nonsuit after a counterclaim is filed is discussed in TRIAL PRACTICE.
[33] Hill v. Hill Spinning Co., 244 N.C. 554, 94 S.E.2d 677 (1956).
[34] 244 N.C. 637, 94 S.E.2d 846 (1956).

a conveyance of the premises, Etheridge would be a necessary party in order for the court to cancel his deeds as a cloud on the title of Wescott. On the other hand, if it was determined that Wescott had abandoned her rights under the contract except in respect to a refund of the alleged purchase price, she could not get a money judgment against Etheridge. However, the Court said it was within the purview of G.S. § 1-137 to permit the counterclaim to be litigated between the parties.

Assuming that the counterclaim states two causes of action, this decision possibly does technical violence to the requirement that all causes affect all parties, but it is a realistic approach to the problem since the alternatives are easily submitted to the jury (if this is justified by the evidence) and it avoids a multiplicity of law suits between the parties. *Quaere:* Would the Court have permitted joinder of executors of *T* and Etheridge by Wescott in an action for this alternative relief where Wescott was a plaintiff in the first instance? The provisions of G.S. § 1-69—both those dealing with actions for recovery of possession of real estate and those dealing with alternative joinder of defendants—seem to authorize it. Further, Etheridge, though not liable for return of the purchase price, is affected by that cause in the sense that if the contract has been abandoned that fact negates the cause against him for recovery of the land.

Another case allowing a counterclaim to be filed though technically all causes did not affect all parties was *Burns v. Gulf Oil Corp.*[35] In that case plaintiff alleged a cause of action for conspiracy to defame and interfere with his business. The defendants were Gulf Oil Company, a former employee of plaintiff, and three employees of Gulf. Gulf counterclaimed for wrongful interference with its contractual relations with its customers, damage to its property removed by plaintiff from the premises of Gulf's customers, and conversion of Gulf's property by the plaintiff. The Court first decided that the counterclaims would have been proper if Gulf had been sued alone. This was because they, like the plaintiff's claim, grew out of the relations between the plaintiff and Gulf in connection with the existence and eventual termination of a contract under which plaintiff had been a distributor for Gulf. Even if the complaint be regarded as stating several causes of action, the counterclaims were permissible if proper in respect to *any* cause of action alleged in the complaint.

The Court then examined the propriety of Gulf's counterclaims in the light of the presence in the case of the other defendants. It said that if the plaintiff's causes of action for conspiracy are proved, the defendants will be liable jointly and severally. It then stated the rule that

[35] 246 N.C. 266, 98 S.E.2d 339 (1957).

if the counterclaim is otherwise permissible, and the liability of the defendant who asserts it is several, or joint and several, the mere fact that plaintiff joins the other defendants will not operate to deprive this defendant of the statutory right to interpose such counterclaims.

In *Moore v. Humphrey*[36] plaintiff brought an action for possession of property, which he had sold to defendant on conditional sale, and took possession of the property in claim and delivery proceedings. In the latter plaintiff filed a bond with two sureties. Defendant denied he was in default and filed a counterclaim for the wrongful seizure and detention of the property, seeking recovery for the part of the purchase price already paid, for loss of profits, and for improvements which he had made on the property. The jury returned a verdict for the defendant and plaintiff's appeal was never perfected. The Court affirmed the ruling that the sureties were liable on the plaintiff's undertaking. The Court also ruled that the fact that the defendant did not seek the return of the property wrongfully seized from him in the claim and delivery proceedings had no effect on the result since the parties had stipulated that the property could not be returned. The propriety of the counterclaim, as grounded upon events occurring in the course of the prosecution of plaintiff's action, was not presented to or discussed by the Court.[37]

PLEADING

Election of Remedies

In *Jenkins v. Trantham*[38] the plaintiffs alleged what they claimed to be the boundary lines located between their lands and the lands of the defendants and contended that this line was the true boundary between the properties. In their amended complaint the plaintiffs contended in the alternative that if the boundaries were not found to be as they claimed then they had become the owners of the land in dispute by virtue of their adverse possession for more than twenty years. The Court held that the plaintiffs should not have been required to elect between theories before the case went to the jury since they were claiming coexisting and consistent remedies and could have the issues submitted to the jury in the alternative. The position taken by the Court is sound. By submission of the issues in the alternative the plaintiffs

[36] 247 N.C. 423, 101 S.E.2d 460 (1957).

[37] Counterclaims based upon wrongful seizure of property in claim and delivery have been held to be proper. Ludwick v. Penny, 158 N.C. 104, 73 S.E. 228 (1911); Smith v. French, 141 N.C. 1, 53 S.E. 435 (1906). *Cf.* Gatewood v. Fry, 183 N.C. 415, 111 S.E. 712 (1922); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 1242 (2d. ed. 1956).

[38] 244 N.C. 422, 94 S.E.2d 311 (1956).

do not lose one of their potentially legitimate grounds for relief as they would if required to elect.

No election was required in *Competition Liason Bureau of Nascar, Inc. v. Midkiff*,[39] but for a different reason than that in the *Johnson* case. Plaintiff was the mother of the intestate who was killed while driving in a race sanctioned and sponsored by the defendant. When intestate registered with defendant to enter the race, he signed a contract for group insurance in which the plaintiff was named beneficiary and which purported to relieve defendant of liability in case of an accident. Plaintiff brought this action to enforce payment of the insurance. Defendant claimed that plaintiff must either elect to take the insurance and waive the right of action for wrongful death or waive all rights under the insurance contract and bring the action for wrongful death. The Court held that the defendant could not compel the plaintiff to elect between the remedies. In order for the doctrine of election of remedies to apply, there must be available co-existing but inconsistent remedial rights vested in the same person.[40] While the plaintiff had the right under the insurance agreement, the exclusive right to the wrongful death recovery vested in the administrator. Therefore, since there is but one right to recover in the plaintiff, no election can be forced. The Court said that the question of the legal effect of the insurance recovery could be raised in the wrongful death action.

Amendment

The Court reached a highly desirable result in *Litaker v. Bost*.[41] The plaintiff was allowed to amend his complaint after a verdict was returned in his favor against the defendant owner of an automobile when the proof as to identity of the driver did not conform with his allegations. The issues were submitted to the jury in such a manner that they could find the driver and the owner liable separately. One allegation did not depend on the other. The Court said that even though the motion to amend was not made until after the verdict was in, the variance did not prejudice the defendant in such a manner as to require a reversal. This is in accord with the modern policy[42] of allowing amendment after verdict if the cause of action is not materially changed.[43]

In *Burrell v. Dickson Transfer Co.*[44] one superior court judge sus-

[39] 246 N.C. 409, 98 S.E.2d 468 (1957).
[40] 18 AM. JUR., *Election of Remedies* § 10 (1938).
[41] 247 N.C. 298, 101 S.E.2d 31 (1957).
[42] The federal rules allow amendment after verdict in such a situation. 3 MOORE, FEDERAL PRACTICE § 15.13 (2d ed. 1948).
[43] Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954), discussed in *Second Annual Survey of North Carolina Case Law*, 33 N.C.L. REV. 157, 170 (1955); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 1283 (2d ed. 1956).
[44] 244 N.C. 662, 94 S.E.2d 829 (1956).

tained a demurrer to the complaint for failure to state a cause of action, but granted permission to amend. The exercise of discretion to permit amendment was held to be the equivalent of a ruling by the judge that the complaint presented merely a defective statement of a cause of action, as distinguished from a statement of a defective cause of action. This ruling was not open to later review by another superior court judge; and it was error for the latter to decide that the permission to amend was surplusage and to dismiss the action, on the ground that there had been a statement of a defective cause. This case is one more illustration of the problems which arise from this difficult distinction.

Allegations

Hill v. Hill Spinning Co.[45] by implication raises a question of some concern to North Carolina attorneys. Defendant interposed as a counterclaim a cause of action identical with the cause in a prior, still pending action in which it was plaintiff and the plaintiffs here were defendants. The counterclaim was pleaded by alleging the existence of the prior pending action and incorporating by reference the complaint, bill of particulars, and reply in that action, all of which were attached to the answer. The Court held that it was proper to strike the counterclaim because the method of pleading it violated the Supreme Court Rules, which, in effect, require every cause of action to be self-contained and prohibit incorporation of allegations in one cause by reference to the allegations of another.[46]

The Court reasoned that if incorporation by reference is improper as between causes alleged in the same pleading, then it is necessarily improper as between the pleadings in different actions. However, the basic purpose of the Rule would seem to be to prevent an attempt to make one set of allegations serve at two different places in a pleading. Permitting such double duty would force the judges to shift back and forth to determine whether a cause of action is stated. In the instant case, the allegations were needed in the counterclaim only once and it is difficult to perceive why it is a fatal defect that they are contained on sheets attached to the answer rather than copied into the body of the answer.[47] The decision is also difficult to understand in the light of the

[45] 244 N.C. 554, 94 S.E.2d 677 (1956).

[46] N.C. SUPREME CT. RULE 20(2). The Court, however, considered the pleadings from the prior action for the purpose of determining whether the present action should be dismissed pursuant to defendant's plea of prior action pending. (For discussion of this phase of the case see *Counterclaims.*) *Cf.* Alexander v. Norwood, 118 N.C. 381, 24 S.E. 119 (1896), holding that when a complaint refers to another action pending between the same parties concerning the same subject this is, in effect, an incorporation by reference and demurrer may properly be used to raise the question of whether the second action should be abated.

[47] Concededly the method of pleading in the principal case was extremely awkward. Attaching complaint, bill of particulars, and reply, with no answer,

fact that the Rule, on its face, contemplates that exhibits may be attached to a pleading and incorporated by reference. Attachment and incorporation by reference of an entire pleading from another case seems entirely comparable to attachment and incorporation of a contract or other written instrument, which time honored practice clearly permits.[48]

In *Taylor v. Brake*[49] plaintiff alleged that defendant was liable because of "negligently, recklessly, and carelessly failing to yield the right-of-way to this plaintiff's automobile as by law required." He sought to have the issue submitted to the jury on the theory that defendant had failed to yield the right-of-way because plaintiff was in the intersection when defendant approached it. The Court held that pleading as well as proof of a theory is required; and plaintiff's general allegation[50] of negligence did not sufficiently plead his theory. Therefore a nonsuit was affirmed.[51] (As a clincher, the Court also found that there was no evidence that plaintiff was in the intersection first.)

In another case[52] an executor joined the six children of the testator, who were the only legatees and devisees, in an action for a declaratory judgment to construe the will and for instructions in the administration of the estate. When three of the children filed a cross action against the other three, alleging certain facts concerning testator's relation to his children, the latter three moved to strike these allegations as incompetent and highly prejudicial. The superior court judge allowed the motion. The Court stated that when a motion to strike is made in respect to matters to be decided by the jury it is proper for the trial judge to allow the motion before trial since otherwise the challenged material will be read to the jury and the adverse party might be prejudiced. However, in this case, the allegations presented a question of fact for the judge rather than an issue of fact for a jury. The same

left the courts to do considerable scrabbling and some guessing. Condemnation of this could readily be applauded. However, the Court's condemnation would apply equally to attachment and incorporation by reference of a simple, clear complaint from the prior pending action.

[48] Sossamon v. Oaklawn Cemetery, Inc., 212 N.C. 535, 193 S.E. 720 (1937). McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 988 (2d ed. 1956) states that if a cause of action or defense is based on a written instrument it is not a mistake to plead the writing in full by copying it as part of the allegations, or by attaching a copy as an exhibit and referring to it in the pleading.

[49] 245 N.C. 553, 96 S.E.2d 686 (1957).

[50] Note, 29 N.C.L. REV. 89 (1950).

[51] *Cf.* Pruett v. Pruett, 247 N.C. 13, 100 S.E.2d 296 (1957). There the defendant in an action for absolute divorce counterclaimed for divorce from bed and board under G.S. § 50-8 (1950). She failed to allege in her pleading that the grounds had existed to her knowledge for at least six months prior to the filing of her counterclaim as required by the statute. It was held that while it was advisable that the statute be complied with, she had alleged sufficient facts from which the court could imply that the grounds had existed for the requisite length of time.

[52] Collier v. Mills, 245 N.C. 200, 95 S.E.2d 529 (1956).

question will arise at the trial when evidence is offered. Therefore, said the Court, the question should not be decided in advance of trial and the allegations should not have been stricken. In the situation presented, this is good riddance of unnecessary preliminary motions, which can only cause delay and waste time. As the Court pointed out in the instant case, a contrary decision could result in a series of such motions and in multiple hearings on essentially the same questions.

CONSTITUTIONAL LAW

FULL FAITH AND CREDIT

Plaintiff's intestate, an employee of a Virginia corporation, was killed in an automobile accident in North Carolina. The car in which deceased was riding was being driven by a fellow employee. Plaintiff received compensation under the Virginia Workmen's Compensation Act,[1] which provided that the award would be a bar to further liability on the part of the employer or his employees.[2] In *Johnson v. Catlett*[3] plaintiff sought recovery for wrongful death against the driver of the other car. The defendant sought by cross-action to bring in the employer and employee-driver as joint tort-feasors. The Supreme Court held that the Virginia award must be given full faith and credit in this state.[4] Thus, since the Virginia award excluded any further liability on the part of the employer or employee, the lower court was correct in granting their motion to strike the cross-claim. The Virginia decree was res judicata as to any further liability on their part.[5]

EMINENT DOMAIN

The condemnation of lands necessary for the restoration of Tryon's Palace in New Bern, North Carolina, was held to be for a public

[1] VA. CODE ANN. c. 65 (1950).

[2] VA. CODE ANN. § 65-37 (1950). Fietig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1946), and Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 20 S.E.2d 530 (1942), hold that an employee covered by the Workmen's Compensation Act is deprived of any common law right of action for damages against the employer by the act and that the compensation award is exclusive.

[3] 246 N.C. 341, 98 S.E.2d 458 (1957).

[4] U.S. CONST. art. 4, § 1. See also 28 U.S.C. § 1738 (1952).

[5] *Accord*, Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). *But see* Carrol v. Lanza, 349 U.S. 408 (1955); Industrial Comm'n v. McCartin, 330 U.S. 622 (1947). In Miller v. National Chair Co., 127 N.J.L. 414, 22 A.2d 804 (1941), the court held that an agreed award which was approved by the North Carolina Industrial Commission was not res judicata to an award in New Jersey. 58 AM. JUR., *Workmen's Compensation* § 492 (1948) states that the prevailing trend of the recent cases is toward regarding the original award as res judicata and entitled to full faith and credit in another state, though there is some authority to the contrary. See also Note, 34 N.C.L. REV. 501 (1956); Annot., 8 A.L.R.2d 628 (1949).

purpose in *In re Department of Archives and History*.[6] The historic palace was not only a residence for the governor, but also served as a capitol or state house and contained a hall where the assembly met.[7]

Necessity of Adverse Interests

The City Council of Greensboro, pursuant to the Redevelopment Act,[8] appointed a Redevelopment Commission to plan and develop a redevelopment area within the corporate limits of the city. The Commission was to have the power of eminent domain. Defendant, who neither resided nor had property within the redevelopment area, suggested that this action[9] be instituted to obtain a declaratory judgment as to the constitutionality of the powers given the Redevelopment Commission. Defendant's contention was that redevelopment is not a public purpose or a public use. The Court determined that there was no real controversy existing between the parties and that this was only a "friendly suit." In dismissing the action, the Court stated: "Jurisdiction under the Declaratory Judgment Act . . . may be invoked 'only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.' "[10]

In *Fox v. Commissioner of Durham*[11] the Court refused to decide the constitutionality of a zoning ordinance because the plaintiffs failed to show that enforcement of the ordinance would cause them to suffer personal and direct injury.[12]

Cruel and Unusual Punishment

The court in *State v. Lee*[13] held that imprisonment for two years

[6] 246 N.C. 392, 98 S.E.2d 487 (1957).
[7] See Yarborough v. Park Comm'n, 196 N.C. 294, 145 S.E. 563 (1928).
[8] N.C. Gen. Stat. §§ 160-454 to -474 (1952).
[9] Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958).
[10] *Id.* at 519, 101 S.E.2d at 416. *Accord,* Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942). *But see* Britt v. Wilmington, 236 N.C. 446, 73 S.E.2d 289 (1952), in which plaintiff alleged that the construction and maintenance of an off-street parking lot by the city was not a proper public purpose. The Court said that there was grave doubt as to whether the action was a bona fide adversary proceeding and that it seemed that the parties to the action were seeking the same end. The Court further said that if such were the case, a single resident should not be allowed to stipulate away the rights of all the taxpayers of the municipality. However, the Court decided the questions on the assumption that they were raised in good faith. In Wells v. Housing Authority, 213 N.C. 744, 197 S.E. 693 (1938), the Court mentioned that it was only a friendly suit, but still decided the constitutionality of the Housing Authorities Act.
[11] 244 N.C. 497, 94 S.E.2d 482 (1956).
[12] See NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957), which is included in Pleadings herein. There the Court held that a foreign corporation could not bring a declaratory judgment proceeding against the Secretary of State to determine the constitutionality of G.S. § 120-48, concerning registration of persons and organizations engaged principally in influencing public opinion or legislation.
[13] 247 N.C. 230, 100 S.E.2d 372 (1957).

for driving under the influence of intoxicating liquor does not constitute cruel and unusual punishment within the meaning of article I, section 14 of the state constitution when no maximum time of imprisonment is fixed by the statute.[14]

For a discussion of two recent cases holding custody decrees invalid because based on evidence obtained in secret hearings, see DOMESTIC RELATIONS.

CREDIT TRANSACTIONS

DEEDS OF TRUST

In *Monteith v. Welch*[1] the trustee of a deed of trust given as security for promissory notes collected the notes before maturity. The trustee did not have possession of the notes or the deed of trust nor did he have actual authority to collect for the creditor. The Court held that the trustee was not the implied agent of the creditor for collection merely because of his position as trustee and that he had no apparent authority to collect. Therefore, collection of the unmatured notes by him was not a discharge of the debt.

The trustee also made a marginal entry on the record of the deed of trust acknowledging satisfaction of the debt as provided for in G.S. § 45-37. The statute provides in part: "The trustee or mortgagee . . . may . . . acknowledge satisfaction" of the provisions of the instrument and thus sign a marginal entry acknowledging such satisfaction and thereby discharge any interest of the trustee or mortgagee in such deed or mortgage. The language of the statute would seem to make the trustee a proper party to sign the marginal entry. But the Court indicated that an unauthorized cancellation by the trustee does not protect the defendant-purchasers of the property, unless they purchased the land after the cancellation without notice of its invalidity.[2] There being no evidence of this, the cancellation was held void. The Court further stated that if the defendants paid the amount secured by the

[14] N.C. GEN. STAT. § 20-179 (1953). State v. Miller, 94 N.C. 904 (1886), held that when the limit of punishment is not fixed by the legislature it is left as a matter of discretion with the presiding judge, but State v. Driver, 78 N.C. 423 (1877) held that a five year sentence for assault and battery was unconstitutional.

[1] 244 N.C. 415, 94 S.E.2d 345 (1956).

[2] Other North Carolina cases indicate that the trustee must have authority from the creditor to enter a cancellation on the record. Woodcock v. Merrimon, 122 N.C. 731, 30 S.E. 321 (1898); Browne v. Davis, 109 N.C. 23, 13 S.E. 703 (1891). However, in Williams v. Williams, 220 N.C. 806, 18 S.E.2d 364 (1941), the Court stated that in the absence of evidence that the trustee's act of signing a cancellation on the record was unauthorized, it is presumed from the trustee's possession of the secured notes and deed of trust that his acts were authorized.

deed of trust to the trustee at the time of cancellation, erroneously believing that he had authority to receive payment and cancel, such cancellation would not destroy the lien.

In *Staunton Military Academy, Inc. v. Dockery*[3] plaintiff held a judgment lien on certain property on which there were five prior deeds of trust. The trustee under the fifth deed of trust held a foreclosure sale, advertising beforehand and announcing at the sale that the property would be sold subject to the liens of the four prior deeds of trust. The plaintiff notified the trustee of his judgment lien before the proceeds of sale were distributed, but the trustee applied the proceeds to the five deeds of trust, ignoring the plaintiff's judgment lien. The Court held that the allegation of these facts constituted a cause of action against the foreclosing trustee since he had no right to pay any amount to satisfy the other four deeds of trust. This was so because the trustee sold the property subject to the four prior deeds of trust. Their liens remained intact on the property in the hands of the purchaser and did not attach to the proceeds of the sale. Thus any surplus remaining after satisfying the fifth deed of trust would belong to the owner of the equity of redemption on which the plaintiff had a lien. However, the trustee would not be liable to a subsequent mortgagee or judgment creditor in the absence of actual notice.[4] Also, it would seem that the trustee could have sold the full title to the mortgaged property and applied the proceeds to satisfy the prior encumbrances if the obligations secured by the other four deeds of trust were due and the holders consented to or ratified the sale.[5]

In *Bell Bakeries, Inc. v. Jefferson Standard Life Ins. Co.*,[6] the Court held that a provision in a deed of trust requiring the debtor to pay a

[3] 244 N.C. 427, 94 S.E.2d 354 (1956).

[4] Barrett v. Barnes, 186 N.C. 154, 119 S.E. 194 (1923); Norman v. Hallsey, 132 N.C. 6, 43 S.E. 473 (1903).

[5] If the property is sold free from encumbrances, the proceeds must be applied to discharge prior encumbrances. Bank v. Watson, 187 N.C. 107, 121 S.E. 181 (1923). No direct authority was found in North Carolina concerning the consent necessary for the property to be sold free from prior encumbrances. The rule in other jurisdictions seems to be that with the prior mortgagees' consent, the property can be sold free of encumbrances. 59 C.J.S., *Mortgages* § 576 (1949). However, in Brett v. Davenport, 151 N.C. 56, 58, 65 S.E. 611, 612 (1909), the Court said: "Authority (certainly the decided weight of authority) is to the effect that, except with the consent of the senior mortgagee and of the mortgagor, and perhaps subsequent encumbrances [*sic*], or by their ratification, a trustee in a deed of this character, a second mortgage with power of sale, can only sell the interest conveyed to him and which he is authorized to sell by the terms of the instrument under which he is acting." It is not apparent why the mortgagor and subsequent encumbrancers would have to consent before the second mortgagee could sell the full interest in the mortgaged property. It is certainly true that as to subsequent encumbrances, a mortgagee can convey a good title to mortgaged property by foreclosure sale without the consent of the subsequent encumbrancers. Bank v. Watson, *supra;* Dunn v. Œttinger, 148 N.C. 276, 61 S.E. 679 (1908).

[6] 245 N.C. 408, 96 S.E.2d 408 (1956).

premium over and above the principal plus accrued interest if the secured obligations were paid before maturity was valid. This was held not to be usurious interest since it was compensation to the creditor for the trouble it would incur and the loss it would probably sustain because of lower interest rates if the debtor should exercise his privilege of retiring the debt before maturity. The trust agreement restricted the payment of dividends by the debtor if such payment would reduce working capital below a stated amount. The debtor paid interest on debentures of its parent company even though its working capital was below the stated minimum and the creditor threatened to foreclose if any further payments of this sort were made. The Court held that such payments constituted a payment of dividends which was a breach of the trust agreement. Therefore, the creditor had a legal right to foreclose and a threat to exercise the right did not constitute duress.

Deficiency Judgments

In *Fleishel v. Jessup*[7] the Court held that it was error to refuse to admit oral evidence offered by the defendant to show that part of the property covered by a deed of trust was affixed to the realty included. This evidence was admissible to determine what proportion of the value of all the property was realty, since as to that proportion the plaintiff was not entitled to a deficiency judgment under G.S. § 45-21.38.[8]

Recordation

In *Coastal Sales Co. v. Weston*[9] a deed of trust and two contracts executed on the same date in the aggregate gave the plaintiff a security on lumber and other property. The deed of trust and one contract were recorded, but not the other contract. The Court found it unnecessary to decide whether the recordation was sufficient because it held that as to the administratrix of the deceased debtor's insolvent estate recordation was not required. Recognizing that the authorities are in conflict on the question, the Court followed a previous North Carolina decision and held that the title to the intestate's personal estate passing to the administratrix is the same title that was vested in the intestate immediately prior to his death.[10] Therefore, the title passing to the administratrix was subject to plaintiff's lien. The Court refused to draw an analogy between receiverships and administration of estates. The basis for its refusal was that by receivership proceedings a lien attaches to the insolvent's property for general creditors. In the administration of

[7] 244 N.C. 451, 94 S.E.2d 308 (1956).
[8] See Note, 35 N.C.L. Rev. 492 (1957), for a comment on this statute.
[9] 245 N.C. 621, 97 S.E.2d 267 (1957).
[10] McBrayer v. Harrill, 152 N.C. 713, 68 S.E. 204 (1910).

estates, the only event at which a lien could be said to attach would be the debtor's death and that event alone does not change the rights of secured or unsecured creditors.

Assignments of Mortgages

In *Gregg v. Williamson*[11] *X, Y,* and *Z* were joint mortgagees of property. *X* and *Y* made a marginal entry on the mortgage as follows: "For value received we hereby transfer and assign the within mortgage deed from [mortgagors] to [*Z*] without recourse." Concerning this assignment, the Court uttered dicta to the effect that: (1) the assignment sufficed to transfer only the debt which the mortgage had been given to secure; and (2) the assignment did not pass any title to the land. *Z* later conveyed the mortgaged land to a third party by warranty deed. Concerning this conveyance, the Court in a dictum stated that the grantee in the warranty deed became a mere trustee chargeable with a duty and responsibility to both the owner of the equity of redemption and the owner of the debt secured by the instrument.[12]

CONTRACTS

Interpretation of Term "Widow"

In *Collins v. Covert*[1] the stockholders of a close corporation entered into an agreement for the repurchase of stock of a deceased stockholder by the corporation. The agreement provided: "Prior to the payment of the balance of the purchase price, the *widow* of the deceased stockholder shall be paid by the corporation a monthly salary . . . ." (Emphasis added.)[2]

The term "widow" was presented for interpretation in this action to recover salary payments made to the surviving wife of a deceased stockholder after her remarriage and prior to the payment of the purchase price on the stock held by the deceased at his death.[3] In affirming the judgment for the defendant, the Court upheld the interpretation of the lower court to the effect that "widow," under these circumstances, referred to the person rather than the status of the wife. Therefore, the wife was entitled to the payments notwithstanding her remarriage. It

[11] 246 N.C. 356, 98 S.E.2d 481 (1957).
[12] See Note, 36 N.C.L. Rev. 225 (1958), for a comment on this case.

[1] 246 N.C. 303, 98 S.E.2d 26 (1957).
[2] *Id.* at 305, 98 S.E.2d at 27.
[3] The term "widow," in contracts, has often raised problems of interpretation requiring settlement by court action. However, it is believed that this is the first decision on the point in North Carolina.

seems that a few words in the contract—"until remarriage," or "regardless of remarriage"—would have eliminated all the uncertainty.

LIMITED LIABILITY OF BUS CARRIERS

In *Neece v. Richmond Greyhound Lines, Inc.*[4] the defendant carrier refused to allow the plaintiff to carry on a bus a package exceeding the dimensions as allowed in tariffs filed with the Interstate Commerce Commission. However, she was permitted to check the package for transportation and was given a baggage check which recited a limitation of liability.[5] Defendant failed to return the package on demand and plaintiff brought this action to recover its full value. The liability of the carrier, if any, was held to be that of a gratuitous bailee[6] for the *full value* of the package, notwithstanding the recital of limited liability in the baggage check, since the limitation was not applicable where the package did not come within the specifications of "baggage" as contained in the tariff.

PAROL MODIFICATION OF WRITTEN CONTRACT

In *Childress v. Myers Trading Post*[7] the Court restates the proposition that contracts[8] may be modified by a subsequent parol agreement even though containing a provision that any modification, to be effective and binding, shall be in writing and signed by the parties.[9] Thus, in

[4] 246 N.C. 547, 99 S.E.2d 756 (1957).

[5] Common carriers operating in interstate commerce may, by contract, limit their liability for negligence when expressly so authorized by statute, Boston & M.R.R. v. Hooker, 233 U.S. 97 (1913), or by a regulatory body with power to grant that privilege, Knight v. Carolina Coach Co., 201 N.C. 261, 159 S.E. 311 (1931). However, before this limitation on liability takes effect, the carrier must show that: (1) it received the property as a common carrier; (2) it issued a written receipt which contained the asserted limitation; (3) the Interstate Commerce Commission has expressly authorized the limitation which is based on a rate differential. See, *e.g.*, New York, N.H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1953).

The Court reviewed the pertinent provisions of the Interstate Commerce Act and concluded that Congress did not intend 49 STAT. 563 (1935), 49 U.S.C. § 319 (1952), to amend 24 STAT. 386 (1887), 49 U.S.C. § 20(11) (1952) so as to permit limitation of liability for baggage carried on *motor buses* under the latter section. Patton v. Pennsylvania Greyhound Lines, 75 Ohio App. 100, 60 N.E.2d 945 (1944), reaches the opposite conclusion on this point. It seems likely to arise again, and is probably not yet finally settled.

[6] See TORTS *infra*.

[7] 247 N.C. 150, 100 S.E.2d 391 (1957).

[8] The general rule seems to be that "a written contract can not be modified by parol as to those matters required to be in writing under the statute of frauds, but that those portions of a written contract which the statute does not require to be in writing may be orally modified if they constitute a distinct and severable part of the contract." 37 C.J.S., *Frauds, Statute of* § 232 (1943). See N.C. GEN. STAT. § 22-2 (1953).

[9] Whitehurst v. F. C. X. Fruit and Vegetable Service, 224 N.C. 628, 32 S.E.2d 34 (1944); Allen v. Raleigh Sav. Bank & Trust Co., 180 N.C. 608, 105 S.E. 401 (1920). The old common law did not follow this rule as to sealed contracts:

this action for breach of a written building contract, where the defendant asserted that the contract provisions relied upon by plaintiff had been modified by parol agreement of the parties, an instruction to the effect that the parties' right to modify was limited to those provisions of the contract that were *not substantial* was erroneous.

Right of Way Agreement

DeBruhl v. Highway Comm'n[10] presented a problem of interpretation of a right of way agreement executed in conformity with an option to purchase, the pertinent provisions of which provided: "This option also includes the purchase price of a 1½ story brick veneer residence and any and all other improvements *on said right of way* . . . . [I]t is further understood and agreed that the consideration herein stipulated to be paid shall be paid and received in full payment of the *purchase price of said right of way* and in full compensation for all damages." (Emphasis added.)[11] Only a small part of the dwelling lay within the boundaries of the right of way.

The Highway Commission subsequently deemed it necessary to acquire plaintiffs' remaining property rights and gave notice thereof. Plaintiffs instituted this condemnation proceeding,[12] alleging ownership of the lot with the dwelling thereon, subject to the easement acquired by the defendant. Defendant asserted that it had paid for and acquired the entire dwelling. The lower court adopted the contention of the defendant. A new trial was awarded on the ground that the evidence did not support the verdict. However, to prevent protracted litigation, the Court construed the agreement, holding that the defendant did not acquire any portion of the building or land lying outside the right of way conveyed to it.[13] Therefore, the plaintiffs were entitled to be fairly compensated for the remaining part of the house as well as the land, and the interest acquired by the defendant under the agreement was no more than would have been acquired by condemnation.[14]

Rights of Licensee

In *Wynne v. Allen*[15] the licensor sought to recover royalties allegedly

but the modern tendency is to allow modification even of these agreements by a later informal contract. 3 Williston, Contracts § 631, at 185 (rev. ed. 1936); Restatement, Contracts § 407 (1932); 17 C.J.S., *Contracts* § 378 (1939).

[10] 245 N.C. 139, 95 S.E.2d 553 (1956).

[11] *Id.* at 143, 144, 95 S.E.2d at 556, 557.

[12] The proceeding was brought pursuant to N.C. Gen. Stat. § 136-19 (Supp. 1957).

[13] The decision gives effect to what the Court considered to be the true intention in the minds of both parties when they signed the agreements.

[14] Shepard v. Suffolk and Carolina R.R., 140 N.C. 391, 53 S.E. 137 (1906); Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903).

[15] 245 N.C. 421, 96 S.E.2d 422 (1957).

due under a licensing agreement to manufacture and sell goods under a patent. The licensees counterclaimed for the amount already paid under the agreement, alleging failure of consideration and fraudulent representations. The facts disclosed that the licensees continued to operate under the contract in spite of knowledge that liability might be imposed upon them by a third person claiming infringement of a prior patent. No warranty was alleged by the licensees, although there was evidence that such an agreement was made. The licensees prevailed, and the licensor appealed.

In awarding a new trial, the Court points out that under these circumstances the licensees could not recover royalties paid unless they were protected by express contract of indemnity or warranty. The relationship between licensor and licensee of a patent is similar in many respects to that of landlord and tenant,[16] the principal point of distinction being that whereas a tenant is protected by an implied covenant of quiet enjoyment,[17] there is no such implied warranty or covenant in the sale or lease of a patent right.[18]

CRIMINAL LAW AND PROCEDURE

CRIMINAL LAW

Homicide

In *State v. Tingen*[1] defendant was charged with driving under the influence of intoxicating liquor and with involuntary manslaughter resulting from culpable negligence in the operation of a vehicle while intoxicated. Defendant's motions for nonsuit were denied and a jury verdict of guilty was returned on both charges. The evidence tended to show that defendant, though intoxicated, was operating the automobile in a careful and reasonable manner. In reversing the manslaughter conviction, the Court held that something more than intoxication must be shown in order to fix criminal responsibility[2] and that there was insufficient evidence to show a causal connection between the drunken driving and the resulting death.

[16] Davis Co. v. Burnsville Hosiery Mills, 242 N.C. 718, 89 S.E.2d 410 (1955); Barber Asphalt Paving Co. v. Headley Good Roads Co., 284 Fed. 177 (D. Del. 1922).

[17] Huggins v. Waters, 154 N.C. 443, 70 S.E. 842 (1911); Poston v. Jones, 37 N.C. 350 (1842).

[18] Barber Asphalt Paving Co. v. Headley Good Roads Co., 284 Fed. 177 (D. Del. 1922); Cansler v. Eaton, 55 N.C. 499 (1856); Hiatt v. Twomey, 21 N.C. 315 (1836).

[1] 247 N.C. 384, 100 S.E.2d 874 (1957).

[2] State v. Lowery, 223 N.C. 598, 27 S.E.2d 638 (1943).

Burglary

The felony of larceny requires that the property stolen have a value of more than one hundred dollars.[3] The statutory crime of felonious breaking and entering[4] requires that the breaking and entering be accomplished with the intent to commit a felony. In *State v. Andrews*[5] defendant's conviction of felonious breaking and entering was reversed because the instruction to the jury had presupposed that the intent to steal *any* examination papers constituted the requisite felonious intent to steal property with a value of more than one hundred dollars. It should be noted, however, that where the larceny is from a dwelling by breaking and entering, the one hundred dollar requisite of G.S. § 14-72 has no application[6] and the intent to steal property of any value is sufficient to support a conviction of first degree burglary.[7]

In *State v. McAfee*[8] North Carolina for the first time squarely held that the opening of a window which was held in place by its own weight was a sufficient "breaking" to support a conviction of first degree burglary. The imposition of the death penalty was affirmed.

Criminal Assault

In *State v. Allen*[9] defendant, on several occasions, stopped his car within a few feet of prosecutrix where she was awaiting her customary ride to work and stared at her while moving the lower part of his body back and forth. These actions on the morning of his arrest caused prosecutrix to run from her usual waiting place on the corner to the steps of a nearby public school. Defendant's conviction of assault on a female[10] was affirmed. The Court, in accord with the great weight of authority,[11] reaffirmed its well established position that an actual ability to commit battery is not an essential element in the crime of simple assault so long as there is some show of violence causing a reasonable fear of bodily harm "whereby another is put in fear, and thereby forced to leave a place where he has a right to be . . . ."[12]

Entrapment

In a prosecution for unlawful possession of intoxicating liquor for

[3] N.C. GEN. STAT. § 14-72 (1953).
[4] N.C. GEN. STAT. § 14-54 (Supp. 1957).
[5] 246 N.C. 561, 99 S.E.2d 745 (1957).
[6] "If the larceny is . . . from the dwelling by breaking and entering, this section shall have no application." N.C. GEN. STAT. § 14-72 (1953).
[7] State v. Richardson, 216 N.C. 304, 4 S.E.2d 852 (1939). To support a conviction of first degree burglary the dwelling must be occupied at the time of the offense. N.C. GEN. STAT. § 14-51 (1953).
[8] 247 N.C. 98, 100 S.E.2d 249 (1957). [9] 245 N.C. 185, 95 S.E.2d 526 (1956).
[10] N.C. GEN. STAT. § 14-33 (1953).
[11] 6 C.J.S., *Assault and Battery* § 64 n. 50 (1937).
[12] 245 N.C. at 189, 95 S.E.2d at 529. For an extensive discussion of the principal case, see Note, 36 N.C.L. REV. 198 (1958).

the purpose of sale, the only evidence for the state was two bottles of beer and the testimony of the law enforcement officer that he purchased them from defendant. The defense was entrapment. The Court in line with previous decisions[13] held that the defense of entrapment is not made out where the defendant is merely given the opportunity to commit the offense.[14]

In *State v. Boles*,[15] where the fact situation was essentially the same as above, it was held that where defendant contended she was not present and did not participate in the act with which she was charged, the defense of entrapment was not available to her.

An instruction to the jury that entrapment *may* be a defense is reversible error,[16] because once entrapment is present, it *is* a defense.[17]

CRIMINAL PROCEDURE

Search and Seizure

A new trial was granted in *State v. Mills*[18] because of the admission of evidence[19] obtained by an illegal search of defendant's room. Two warrants were involved:[20] one described the defendant's filling station; the other described the home on the adjoining lot where defendant rented a back room. The warrant describing defendant's premises not only gave the officers authority to search those premises, but by its own description limited their authority to those premises alone. Thus there was no authority under this warrant to search the room. The second warrant, describing the home, could only include that part used by the owner and not the part rented to the defendant unless specifically included. The room was a separate "place" or "dwelling."[21]

[13] State v. Burnette, 242 N.C. 164, 84 S.E.2d 191 (1955); State v. Love, 229 N.C. 99, 47 S.E.2d 712 (1948); State v. Hughes, 208 N.C. 542, 181 S.E. 737 (1935); State v. Hopkins, 154 N.C. 622, 70 S.E. 394 (1911); State v. Smith, 152 N.C. 798, 67 S.E. 508 (1910). See also Note, 34 N.C.L. REV. 536 (1956).

[14] State v. Kilgore, 246 N.C. 455, 98 S.E.2d 346 (1957).

[15] 246 N.C. 83, 97 S.E.2d 476 (1957).

[16] State v. Wallace, 246 N.C. 445, 98 S.E.2d 473 (1957).

[17] "The charge as given left it optional with the jury whether to apply the law of entrapment as a defense. The court should have, but did not, charge that entrapment is a defense; and upon a finding that the defendant had been entrapped into the commission of the offense charged, it would be the duty of the jury to return a verdict of not guilty." *Id.* at 447, 98 S.E.2d at 329.

[18] 246 N.C. 237, 98 S.E.2d 329 (1957), 36 N.C.L. REV. 344 (1958).

[19] N.C. GEN. STAT. § 15-27 (1953).

[20] Neither warrant sufficiently described the premises to be searched, but the sworn affidavits did. The affidavits, having been made part of the warrants by proper reference, cured the defect.

[21] United States v. Jeffers, 342 U.S. 48 (1951); People v. Stokes, 334 Ill. 200, 165 N.E. 611 (1929); Tarwater v. State, 160 Tex. Crim. 59, 267 S.W.2d 410 (1954); 79 C.J.S., *Searches and Seizures* § 12 (1952). See also State v. Hanford, 212 N.C. 746, 194 S.E. 481 (1938).

Sufficiency of Warrant and Indictment

In two cases the Court held that where willfulness is an essential element of the offense, the warrant is fatally defective if it fails to charge that defendant's conduct was willful.[22] In *State v. Danziger*[23] a warrant charging that defendant "did . . . willfully . . . refuse to show his Operator's license to a public officer . . ."[24] was struck down on the ground that it did not charge a criminal offense because it failed to allege that the officer *requested*[25] defendant to exhibit his driver's license. The Court further stated that the warrant should have included the name of the officer. In *State v. Everett*[26] a warrant charging that defendant directed his agent to commit specific acts of larceny without alleging what, if anything, the agent did pursuant to such direction did not charge a criminal offense.

The case of *State v. Cooke*[27] was before the superior court for a trial de novo on appeal from a conviction of criminal trespass in the Greensboro Municipal County Court. The trial was on the original warrant charging defendant with criminal trespass on the property of Gillespie Park *Golf Course* in violation of G.S. § 14-126 and G.S. § 14-134. During the trial the warrant was amended to read that defendant had trespassed on the property of Gillespie Park *Golf Club, Inc.* Defendant was found guilty of the crime charged in the amended warrant. The Court, arresting the judgment, held that since possession was an essential element of criminal trespass, the amending of the warrant so as to substitute one property owner for another was in effect charging the defendant with an entirely different crime.[28] The jurisdiction that vests in the superior court in criminal cases on appeal from an inferior court is purely derivative[29] and there can be no conviction on the amended warrant for a crime different from that of which the defendant was convicted in the inferior court.[30]

[22] State v. Smith, 246 N.C. 118, 97 S.E.2d 442 (1957); State v. Coppage, 244 N.C. 590, 94 S.E.2d 569 (1956) (wilful neglect to support illegitimate child).

[23] 245 N.C. 406, 95 S.E.2d 862 (1956).

[24] *Id.* at 407, 95 S.E.2d at 862.

[25] N.C. GEN. STAT. § 20-29 (1953).

[26] 244 N.C. 596, 94 S.E.2d 576 (1956).

[27] 246 N.C. 518, 98 S.E.2d 885 (1957).

[28] In a concurring opinion Justice Parker suggested that a test to determine whether the change was material was whether a conviction under the original warrant would bar a subsequent conviction under the amended warrant. He was of the opinion that it would not. *Id.* at 521, 98 S.E.2d at 888.

[29] State v. Goff, 205 N.C. 545, 172 S.E. 407 (1933).

[30] State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957). For a discussion of the principal case and the power of the superior court to amend a warrant on a trial de novo, see Note, 36 N.C.L. REV. 80 (1957).

In a later case, State v. Cofield, 247 N.C. 185, 100 S.E.2d 355 (1957), it was held error, citing State v. Cooke, *supra,* for the warrant charging a violation of G.S. § 18-50 (unlawful possession of nontax paid liquor for the purpose of sale) to be amended by the superior court to include a violation of G.S. § 18-48 (unlawful possession of nontax paid liquor).

Trial

The evidence in *State v. McAfee*,[31] where defendant was indicted for first degree burglary, established that the dwelling house was occupied at the time of the offense. This being so, "there was no evidence of burglary in the second degree. Hence, burglary in the second degree was not and should not have been submitted to the jury."[32] G.S. § 15-171 previously authorized the submission of an issue of second degree burglary in such a case but was repealed in 1953.[33]

In *State v. Wynne*[34] the indictment charged the four defendants with riot. One defendant pleaded guilty. The trial judge, instructing the jury separately as to the other three defendants, charged that each must have participated "with two or more other persons." The Supreme Court, reversing the convictions, held that where the particular offense charged requires a certain number of participants,[35] it is prejudicial error if the court's instruction permits the jury to go beyond the indictment to find the requisite number. The instructions would have been justified had the indictment charged each named defendant *and others* with the particular offense.[36]

In *State v. Meshaw*[37] it was held that where a general verdict of guilty is returned on an indictment charging mutually exclusive crimes, *viz.* larceny and receiving stolen goods, the conviction could not stand in the face of an erroneous instruction as to one of the counts since the Court had no way of determining whether the error was prejudicial.

One case[38] involved the failure of the trial judge to instruct the jury regarding the common law presumption that when a wife is charged with having committed a criminal offense in the presence of her husband, she is presumed to have acted under his influence and therefore absolved of guilt of the crime. This presumption is rebuttable and the state must carry the burden of proving that she was free from this influence and had acted of her own free will and volition.[39]

Two other cases were reversed because of erroneous instructions to the jury. It was held reversible error to instruct the jury that an intentional violation of a traffic law constitutes reckless driving even though a later part of the charge correctly defines reckless driving,[40] or that a

[31] 247 N.C. 98, 100 S.E.2d 249 (1957).
[32] *Id.* at 103, 100 S.E.2d at 252.
[33] N.C. Sess. Laws 1953, c. 100.
[34] 246 N.C. 686, 99 S.E.2d 923 (1957).
[35] The offense of riot requires three or more persons. MILLER, CRIMINAL LAW § 167 (1934).
[36] State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941).
[37] 246 N.C. 205, 98 S.E.2d 13 (1957), 36 N.C.L. REV. 84.
[38] State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956).
[39] See Note, 35 N.C.L. REV. 104 (1956), for an extensive discussion of this presumption of coercion.
[40] State v. Sutton, 244 N.C. 679, 94 S.E.2d 797 (1956). "[A] person is guilty of reckless driving (1) if he drives an automobile on a public highway in this

conviction of armed robbery may be supported if the jury found the elements of common law robbery present.[41]

Sentencing Problems

It is provided by G.S. § 20-16(a)(9) that the Department of Motor Vehicles shall have the authority to suspend the driver's license of any operator who has been *convicted* of two or more offenses of speeding in excess of fifty-five miles per hour within a period of twelve months. The term *conviction* means a final conviction.[42] Defendant was found guilty of speeding sixty-five miles per hour on two separate occasions within a period of twelve months by two separate courts. Both courts had, upon the verdict of guilty, entered orders continuing prayer for judgment upon payment of costs. Pursuant to the statute, the department ordered defendant's license suspended. The department, after granting defendant a hearing, and the superior court, on appeal, affirmed the suspension order, holding that defendant had been twice *convicted* of speeding. The Supreme Court, in a comprehensive statement of the law by Justice Denny, held that a prayer for judgment continued upon payment of costs was not a final conviction from which an appeal would lie and therefore was not a final conviction within the purview of G.S. § 20-24(c). The suspension order was reversed.[43] However, where a prayer for judgment is continued upon condition of *payment of a fine* and costs, there is a final conviction from which an appeal will lie[44] because the judgment is the imposition of the fine. It is to be noted that a "prayer for judgment continued" is a suspended *judgment,* as distinguished from a suspended *sentence,*[45] and within the inherent power of the court to grant.[46]

If a sentence is suspended upon certain conditions and defendant

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State, carelessly and heedlessly, in a willful or wanton disregard of the rights or safety of others, or (2) if he drives . . . without due caution and circumspection *and* at a speed or in a manner so as to endanger or be likely to endanger any person or property." State v. Folger, 211 N.C. 695, 697, 191 S.E. 747, 748-49 (1937).

[41] State v. Rogers, 246 N.C. 611, 99 S.E.2d 803 (1957). The offense of armed robbery requires the additional element of the use or threatened use of firearms or other dangerous weapons. N.C. GEN. STAT. § 14-87 (1953).

[42] N.C. GEN. STAT. § 20-24(c) (1953).

[43] Barbour v. Scheidt, 246 N.C. 169, 97 S.E.2d 855 (1957).

[44] State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957). The lower court's statement that the prayer for judgment be continued was inconsistent with the imposition of the fine and treated as mere surplusage. In State v. St. Clair, 247 N.C. 228, 100 S.E.2d 493 (1957), the judgment of the lower court was "that the defendant pay fine of $100 and costs; and that he be not convicted of a similar offense for a period of 12 months." *Id.* at 229, 100 S.E.2d at 494. Held, that the judgment that the defendant pay the fine was a final judgment. The provision that the defendant not be convicted of a similar offense was stricken as surplusage.

[45] State v. Graham, 225 N.C. 217, 34 S.E.2d 146 (1945).

[46] State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951).

accepts the conditions, *e.g.*, pays the fine, he waives his right of appeal.[47] Where a sentence is activated for breach of a condition under which the sentence was suspended, defendant, having undertaken to comply with the conditions, cannot, after his breach, challenge the validity of the conditions.[48]

Several cases involved improper sentences which, on appeal, resulted in remand for proper judgment. It is improper to sentence a misdemeanant to confinement in Central Prison;[49] only felons may receive sentences there.[50] A sentence to the roads for a term of thirty days was not proper;[51] the sentence should have been thirty days in jail, "to be assigned work under the State Highway and Public Works Commission . . . ."[52]

Miscellaneous

In *State v. Sutton*[53] defendant sought to have his conviction set aside on the ground that the illegality of his arrest[54] deprived the court of jurisdiction. In passing on this question for the first time, the Court held, aligning itself with the overwhelming weight of authority,[55] that the presence of the defendant in court on a valid warrant was sufficient to confer jurisdiction.

In *State v. Blackwell*[56] defendant was tried and convicted on a warrant charging him with reckless driving. The warrant had been issued by a police sergeant. Before the superior court, on a trial de novo, defendant moved to quash the warrant, contending that the statute[57] which authorized the police sergeant to issue the warrant was unconstitutional. The motion was granted. On appeal by the State, the Court held that the motion to quash was properly granted but for an improper reason; the question of constitutionality of the statute was not properly

[47] State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957); State v. Canady, 246 N.C. 613, 99 S.E.2d 776 (1957). For a discussion of suspended sentences in North Carolina, see Note, 31 N.C.L. REV. 195 (1953).

[48] State v. Collins, 247 N.C. 248, 100 S.E.2d 492 (1957).

[49] State v. Floyd, 246 N.C. 434, 98 S.E.2d 478 (1957).

[50] N.C. GEN. STAT. § 148-28 (1953), State v. Cagle, 241 N.C. 134, 84 S.E.2d 649 (1954).

[51] State v. Stephenson, 247 N.C. 231, 100 S.E.2d 327 (1957).

[52] N.C. GEN. STAT. § 148-30 (1953). The statute has been amended to read "State Prison Department" instead of "State Highway and Public Works Commission." N.C. GEN. STAT. § 148-30 (Supp. 1957).

[53] 244 N.C. 679, 94 S.E.2d 797 (1956).

[54] Defendant was pursued and arrested for a misdemeanor by municipal police officers outside the corporate limits of the municipality. Such arrest was illegal since the fresh pursuit doctrine only applies to fleeing felons. N.C. GEN. STAT. § 15-42 (1953), Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949); Wilson v. Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942).

[55] ORFIELD, CRIMINAL PROCEDURE 30-31 (1947); 22 C.J.S., *Criminal Law* § 144 (1940).

[56] 246 N.C. 642, 99 S.E.2d 867 (1957).

[57] N.C. Sess. Laws 1949, c. 703.

presented. The 1949 statute[58] in question, giving police sergeants authority to issue warrants, purported to amend section 27(5) of the 1909 Municipal Charter of the City of High Point,[59] which had established the recorder's court for that city. Section 27(5) was expressly repealed in 1913[60] by an amending act establishing the High Point Municipal Court in lieu of the recorder's court. Thus, said the Court, the 1949 act had amended a repealed statute and, there being nothing to amend, the amendatory act (the 1949 act) was a nullity.[61] Many jurisdictions hold otherwise,[62] the theory being that since the provisions in the new statute are complete and independent in themselves, the new statute may stand alone as a valid independent enactment.[63] An interesting aspect of this case is that it would seem that the 1949 statute did not intend to amend the repealed section of the 1909 law at all. The 1949 statute erroneously referred to the 1909 charter as creating the municipal court when it was manifest that the legislature intended to refer to the 1913 act which did establish the municipal court.[64] Thus the erroneous reference to the 1909 charter should have in no way affected the validity of the 1949 amendment.[65]

DAMAGES

Eminent Domain

The trial judge's charge to the jury as to the amount of compensation the defendant-landowner was to receive in an eminent domain proceeding was held to be prejudicial error in *Statesville v. Anderson*.[1] A street being widened by the city would run through a portion of defendant's house. The trial judge correctly charged that the jury should determine the fair market value of the entire tract before the taking and sub-

[58] N.C. Sess. Laws 1949, c. 703.
[59] N.C. Pub. Laws 1909, c. 395, § 27(5).
[60] N.C. Pub. Laws 1913, c. 569, § 33.
[61] *Accord,* Tiger Creek Bus Line v. Tiger Creek Transp. Ass'n, 187 Tenn. 654, 216 S.W.2d 348 (1948).
[62] 82 C.J.S., *Statutes* § 245 (1953).
[63] Mayor and Counsel of Wilmington v. State *ex rel.* Du Pont, 44 Del. 332, 57 A.2d 70 (1947); Hansen v. Morris, 3 Utah 2d 310, 283 P.2d 884 (1955).
[64] Section one of the 1949 statute stated "that Chapter 395 of the Public Laws of 1909 . . . [was] enacted to establish the Municipal Court for the City of High Point," N.C. Sess. Laws 1949, c. 703, § 1, when actually this court was established by N.C. Pub. Laws 1913, c. 569, § 33. The 1909 law was the entire Municipal Charter for the City of High Point, of which section 27(5) had established the recorder's court, not the municipal court.
[65] An erroneous reference by an amending act to a repealed statute does not vitiate the amending act when it is clear that the legislature intended to refer instead to a valid statute. Clare v. State, 68 Ind. 17 (1879); 82 C.J.S., *Statutes* § 245 (1953).

[1] 245 N.C. 208, 95 S.E.2d 591 (1956).

tract therefrom the fair market value after the taking.[2] However, he further charged that the jury was to consider that the defendant had the right to remove the house, and also the right to use the property for any purpose not inconsistent with the purposes for which plaintiff acquired its right. This was held to be prejudicial in view of the fact that there was no evidence on which the court could formulate a rule by which the jury could measure these rights which the defendant was said to have. The city had the right to take possession at the moment it paid the amount fixed by the jury. No time was fixed within which the defendant could remove the house. There was no evidence as to the cost of moving the house, the distance it would be necessary to move it, the method of construction, or the feasibility of moving it.[3] The Court stated that these were material factors and that in their absence the right to remove the house or to use the property consistently with the right of the plaintiff was too conjectural to measure, and should not be submitted to the jury.

Mitigation of Damages

In *Scott v. Foppe*[4] defendant contracted to build a house for plaintiff. Just before the house was completed the plaintiff admitted that he would be unable to pay for it, and the parties then agreed to sell the house to mitigate any loss. The plaintiff alleged that he told defendant of a buyer who would pay $40,000 for the house, but that the defendant held out, thinking it was worth more, until the buyer bought another house. The house was subsequently sold for a lesser amount, all of which went to the defendant. Plaintiff brought this action claiming that if defendant had accepted the first offer, there would have been an excess over the amount due the defendant, and thus the plaintiff suffered a loss as he had expended money on the lot and certain appliances. Plaintiff's suit was based on the defendant's duty to minimize the damages. In affirming a nonsuit the Court said that the equitable doctrine of mitigation of damages is a *defense* to an action in which the plaintiff seeks damages for defendant's breach of duty and does not constitute an independent cause of action.[5] The Court further said that

[2] See Highway Comm'r v. Black, 239 N.C. 198, 79 S.E.2d 778 (1954); Proctor v. Highway Comm'n, 230 N.C. 687, 55 S.E.2d 479 (1949).

[3] See Annot., 75 A.L.R. 855 (1931).

[4] 247 N.C. 67, 100 S.E.2d 238 (1957).

[5] See 1 Southerland, Damages § 149 (4th ed. 1916), where it is said: "Mitigation of damages is what the expression imports, a reduction of their amount, not by proof of facts which are a bar to part of plaintiff's cause of action, or a justification, nor of facts which constitute a cause of action in favor of the defendant, but rather of facts which show that the plaintiff's cause of action does not entitle him to so large an amount as the showing on his side would otherwise entitle him." See also 26 C.J.S., *Damages* § 142 (1941), which states that facts in mitigation may be pleaded in partial, but not full defense.

when the plaintiff breached the contract the defendant had the right to dispose of the property as he saw fit, and that there was no evidence of a contract requiring defendant to accept the highest net offer.

INTEREST

The case of *Jackson v. Gastonia*[6] involved a judgment upon *quantum meruit* in which the parties stipulated the value of the water and sewage system taken over by the city to be $9,522.46. The case was first tried in the December 1956 term of superior court, and a judgment of nonsuit was entered. On appeal the Supreme Court reversed the judgment of nonsuit, and sent the case back for judgment in accordance with the stipulations of the parties.[7] In the retrial by the superior court judgment was entered for the stipulated amount bearing interest from the date of filing the complaint, October 22, 1952. The Supreme Court held this to be error since the parties had stipulated the amount of the reasonable value involved.[8] The Court said that the stipulation fixed the amount of recovery and the judge was without discretion to superadd an allowance for interest as additional damages or compensation. However, if the case had been decided correctly in favor of the plaintiffs when it was nonsuited at the December 1956 term, the judgment would have drawn interest from the date of the first trial in superior court. Thereupon the Court modified the judgment so that it would bear interest from that date.[9]

DOMESTIC RELATIONS

CUSTODY

In two decisions the Court reversed custody awards because the judge interviewed the child in private without consent of the parties.[1] The Court held that this violated the constitutional right of the litigants to hear all the evidence and have an opportunity to refute it.[2] These decisions are consistent with the logic of *In re Gupton*,[3] where in a

[6] 247 N.C. 88, 100 S.E.2d 241 (1957).
[7] 246 N.C. 404, 98 S.E.2d 444 (1956).
[8] See Annot., 100 A.L.R. 775, 776 (1936), which states the general rule to be that a stipulation distinctly and formally made can be introduced in evidence and is available as proof of the facts admitted upon a subsequent trial of the same action, unless it is limited to a particular occasion or temporary object, or unless the court permits its withdrawal upon proper application therefor.
[9] See Kneeland v. American Loan and Trust Co., 138 U.S. 509 (1891); 15 AM. JUR., *Damages* § 168 (1938).

[1] Raper v. Berrier, 246 N.C. 193, 97 S.E.2d 782 (1957); *In re* Gibbons, 245 N.C. 24, 95 S.E.2d 85 (1956).
[2] See N.C. CONST. art. I, § 35.
[3] 238 N.C. 303, 77 S.E.2d 716 (1953).

custody contest between separated parents the judge ordered "an officer of the law" to make an independent investigation of the parties without their knowledge and based an award to the mother largely upon secret information contained in the officer's report. The Court on appeal held that the fact that the father had been deprived of his right to hear, test, and explain or rebut all the evidence vitiated the decree. This line of decisions would appear to cast some doubt upon the constitutionality of G.S. § 7-103(i),[4] which sets up a procedure whereby the domestic relations court may conduct investigations concerning the custody of children affected by divorce actions in the superior court and make recommendations to the superior court judge.

In re Gibbons[5] appears to indicate that the Court has abandoned the position taken in the case of *In re Cranford*[6] to the effect that in a contest between a parent and non-parent, the legal right of the parent to custody will prevail unless the non-parent establishes the unsuitability of the parent. A trend away from this holding has been noted in prior *Case Surveys*.[7] The *Gibbons* decision is discussed in a case note in this issue of the *Law Review*.[8]

In *Holmes v. Sanders*,[9] a per curiam opinion, the Court held that residence of a child in North Carolina was sufficient to give the state's courts jurisdiction to make a custody award, although the domicile of the child might be elsewhere.[10] Seeking modification of a prior judgment[11] awarding custody to the deceased mother's parents, who were residents of North Carolina, the non-resident father contended that the trial court lacked jurisdiction to make a custody award because the child's domicile followed that of his parent. In rejecting the father's argument the Court quoted with approval a statement by Justice Cardozo in *Finlay v. Finlay*:[12] "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the

[4] "In an action for divorce where the pleadings show that there are minor children; if the pleadings also show that the custody of said children is controverted; or if any judge of the superior court having jurisdiction to try said action so direct, it shall be the duty of the clerk of the superior court to refer the case for investigation as to the child, or children, to the domestic relations court, and the judge of the domestic relations court shall make his recommendations to the judge of the superior court as to the disposition of the child, or children, for the consideration of the judge of the superior court in disposing of the custody of the said child or children." N.C. GEN. STAT. § 7-103(i) (Supp. 1957).

[5] 247 N.C. 273, 101 S.E.2d 17 (1957).

[6] 231 N.C. 91, 56 S.E.2d 35 (1949), 28 N.C.L. REV. 323 (1950).

[7] See *Fourth Annual Survey of North Carolina Case Law*, 35 N.C.L. REV. 177, 225 (1957); *Second Annual Survey of North Carolina Case Law*, 33 N.C.L. REV. 157, 194 (1955).

[8] See Note, 36 N.C.L. REV. 491 (1958).

[9] 246 N.C. 200, 97 S.E.2d 683 (1957).

[10] See Note, 35 N.C.L. REV. 83 (1956), for a discussion of the domicile problem in custody proceedings.

[11] See Holmes v. Sanders, 243 N.C. 171, 90 S.E.2d 382 (1955).

[12] 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925).

domicile of the parents. It has its origin in the protection of the incompetent or helpless . . . . For this, the residence of the child suffices, though the domicile be elsewhere." The Court pointed out that the child had resided with the maternal grandparents since 1954 and that the father had come into North Carolina and invoked the jurisdiction of the courts. The result of the *Holmes* litigation was rested upon the prior case of *Richter v. Harmon*,[13] although the Court in an earlier case[14] had asserted that residence was not sufficient and that a child must be domiciled in the state to give the courts jurisdiction to award custody.

Divorce and Alimony

A consent judgment entered into by the parties in an action for divorce from bed and board, which provides for monthly support of the wife but does not decree that the payments by the husband be made, constitutes nothing more than a contract between the parties, the Court held in *Holden v. Holden*.[15] Consequently, without the consent of the parties, it may not be modified nor may it be enforced by contempt unless the decree itself so provides. While not inconsistent with prior North Carolina decisions, the *Holden* case re-emphasizes the importance of careful drafting of consent judgments in order to preserve further rights to have the court modify or enforce a decree by contempt.

However, as the *Holden* decision intimates and later cases[16] hold, the fact that the consent judgment is enforceable only as a contract between the parties does not withdraw the children of the marriage from the court's protection. Hence, the court may modify provisions of the consent judgment concerning support of the children when warranted by a change of circumstances.

In *Beeson v. Beeson*[17] the Court held that a 1955 amendment to G.S. § 50-16[18] authorizing the wife to plead an action for alimony without divorce as a cross action in her husband's suit for divorce was not a mandatory method of procedure. Consequently, the wife's right to seek alimony without divorce in an independent suit was not disturbed[19] and a pending action for divorce would not abate a subsequent independent

[13] 243 N.C. 373, 90 S.E.2d 744 (1955). And see Note, 35 N.C.L. Rev. 83, 87 (1956).
[14] Allman v. Register, 233 N.C. 531, 64 S.E.2d 861 (1951).
[15] 245 N.C. 1, 95 S.E.2d 118 (1956), 35 N.C.L. Rev. 405 (1957).
[16] Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957); Bishop v. Bishop, 245 N.C. 573, 96 S.E.2d 721 (1957).
[17] 246 N.C. 330, 98 S.E.2d 17 (1957).
[18] N.C. Gen. Stat. § 50-16 (Supp. 1957).
[19] Prior to the amendment the alimony without divorce action could only be prosecuted as an independent suit. See Silver v. Silver, 220 N.C. 191, 16 S.E.2d 834 (1941).

action for alimony without divorce. The *Beeson* decision may prevent application of the abatement tests formulated in the prior case of *Cameron v. Cameron*[20] and has been criticized in an earlier issue of the *Law Review*.[21]

A point of first impression in North Carolina was decided in *Harmon v. Harmon*.[22] Here, the husband, after obtaining a decree of absolute divorce, remarried. The divorce decree was subsequently set aside because of the failure of the clerk to mail a copy of the order of service by publication to the first wife as required by statute.[23] The husband ceased to cohabit with the second wife upon the court's intimating that it would set aside the decree. Although the decree was subsequently set aside, the court retained the action which the husband had originally brought against his first wife on the ground of two years' separation. After being properly served, the first wife alleged that the cohabitation of the husband with the second wife was adulterous and a bar to the divorce. This argument was rejected by the Court. The evidence indicated that the husband had done everything legally required to obtain a valid divorce and that he had acted in good faith. Consequently, the Court held that his cohabitation with the second wife up to the time when he learned that the decree would be set aside did not constitute adultery and bar his right of action for divorce.

Prior law to the effect that a criminal abandonment was necessary to defeat a divorce sought on the ground of two years' separation under G.S. § 50-6[24] appears to have been changed by the Court's decision in *Pruett v. Pruett*.[25] A discussion of the holding appears elsewhere in this issue.[26]

EVIDENCE

Admissibility of Offer to Pay Medical Expenses

In *Hughes v. Anchor Enterprises, Inc.*,[1] the plaintiff, on leaving defendant's restaurant, slipped and fell on the floor, which was allegedly wet from mopping. On direct examination the plaintiff's husband was permitted to testify that the assistant manager of defendant's restaurant had stated to him: "I have told the boy not to mop the floor like this." The Court held this testimony was properly admitted for the purpose of

[20] 235 N.C. 82, 68 S.E.2d 796 (1952).
[21] Note, 36 N.C.L. Rev. 203 (1958).
[22] 245 N.C. 83, 95 S.E.2d 355 (1956), 35 N.C.L. Rev. 409 (1957).
[23] N.C. Gen. Stat. § 1-99.2(c) (Supp. 1957).
[24] N.C. Gen. Stat. § 50-6 (1950).
[25] 247 N.C. 13, 100 S.E.2d 296 (1957).
[26] See Note, 36 N.C.L. Rev. 495 (1958).

[1] 245 N.C. 131, 95 S.E.2d 577 (1956).

impeaching the prior testimony of the assistant manager that the floor was dry and that it had not been mopped. However, on cross examination of the assistant manager and on direct examination of plaintiff's husband, plaintiff elicited testimony that the assistant manager, after reaching the hospital, offered to be responsible for medical expenses. The Court held that such testimony should not have been admitted over defendant's objection, and stated: "[I]n accord with the weight of authority elsewhere, the rule in this jurisdiction is that, in the absence of other relevant statements or circumstances, evidence of an offer or promise made by the defendant to pay the hospital and medical expenses of the injured person is not competent as an admission of liability."[2]

The court distinguished *Gibson v. Whitton*[3] on the ground that there the testimony went beyond an offer to compromise, and tended to show an admission of liability on the part of the defendant. In that case the trial court admitted testimony that the defendant had told the plaintiff at the hospital the day after the accident that if the plaintiff would wait until he got out of the hospital he would take care of everything.

The Court also distinguished *Brown v. Wood*,[4] where the defendant had stated that he would "see that everything was all right." The Court said that these facts justified the jury in finding that defendant had gone beyond the mere assumption of hospital care and treatment for the plaintiff. However, the language in the *Brown* case supports the rule set out in the principal case. In *Brown*, the Court said that the Good Samaritan's caring for an injured man and paying his charges at the inn has never been said to be an admission of liability on the part of the Good Samaritan.

If the statement goes beyond the giving of first aid or medical care as an act of mercy, it then becomes an admission of liability. The question seems to be one of degree. In the principal case, plaintiff's proof was that defendant's assistant manager had told her husband to "go ahead and put [the plaintiff] in a private room and get the best medical care available and they would take care of it." If this language is construed as being merely an offer to see that plaintiff received first aid treatment, then the Court is clearly correct in holding it inadmissible. On the other hand, if it is construed as an offer to take care of all medical expenses that might arise, then it would appear to approach an admission of liability which should be competent evidence.

[2] 245 N.C. at 136, 95 S.E.2d at 582. See also Biddix v. Rex Mills, 237 N.C. 660, 75 S.E.2d 777 (1953); Patrick v. Bryan, 202 N.C. 62, 162 S.E. 207 (1932) (giving first aid and medical care to the injured person is not an admission of negligence).

[3] 239 N.C. 11, 79 S.E.2d 196 (1953).

[4] 201 N.C. 309, 160 S.E. 281 (1931).

CONTRADICTION OF HEARSAY TESTIMONY WITHOUT LOSING EXCEPTION

In an action to recover for damage to an automobile, the trial judge in *Jones v. Bailey*[5] allowed the plaintiff to testify that after the accident he heard a conversation between the defendant and an officer at the hospital and that the defendant asked the officer if she had the right of way and the officer said she did not. The defendant's objection and motion to strike were overruled. The defendant then took the stand and denied that she made any such inquiry of the officer. She then called the officer and he testified that he had no recollection of having said anything to the defendant at the hospital. On appeal the Court said that the testimony of the plaintiff was clearly hearsay and should not have been admitted. The plaintiff-appellee urged that it was competent for the purpose of contradicting or impeaching the testimony of the defendant and the officer who testified in behalf of the defendant on the ground, that when the defendant offered evidence to contradict plaintiff's incompetent testimony, she lost the benefit of her exception to the admission of such evidence. Plaintiff relied on *Hopkins v. Colonial Stores,*[6] in which the plaintiff testified that the driver of the defendant's truck had said that he must have been about half asleep. The Court held that the testimony of the plaintiff was competent to contradict and impeach the testimony of defendant's driver. The Court in the principal case refused to concur in this view. The Court said: "Moreover, any statement in the opinion of *Hopkins v. Colonial Stores, supra,* that may be inferred to be in conflict with this opinion, on this particular point, is disapproved. It is the well established rule with us that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but . . . 'the rule does not mean that an adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence, upon the peril of losing the benefit of his exception.' "[7]

PRESUMPTION AS TO OWNER'S DRIVING CAR AT TIME OF ACCIDENT

The issue in *Parker v. Wilson*[8] was which of two deceased persons was driving the automobile at the time of the fatal crash. There was evidence that after the accident plaintiff's intestate was found lying on the steering column with her head on the switch, and that defendant's testate, the owner of the automobile, was found on the right side of the

[5] 246 N.C. 599, 99 S.E.2d 768 (1957). [6] 224 N.C. 137, 29 S.E.2d 455 (1944).
[7] 246 N.C. at 602, 99 S.E.2d at 771, quoting from Shelton v. Southern Ry., 193 N.C. 670, 675, 139 S.E. 232, 235 (1927). *Accord,* State v. Godwin, 224 N.C. 846, 32 S.E.2d 609 (1944). The rule was cited with approval in State v. Tew, 234 N.C. 612, 68 S.E.2d 291 (1951).
[8] 247 N.C. 47, 100 S.E.2d 258 (1957).

front seat. Plaintiff alleged in his complaint that defendant's testate was driving, relying on the rule that "an owner present in his automobile at the time of a collision is presumed to be in control of his automobile by himself or through some other person, and, if there be no direct proof as to the driver of the automobile, the owner will be presumed to have been driving."[9] The Court recognized that there had been considerable legal controversy over the extent to which such a presumption may follow proof of ownership.[10] However, the North Carolina statute[11] on registration evidence of ownership does not provide that proof of ownership of an automobile, or proof of the registration of an automobile in the name of any person, shall be prima facie evidence that the owner of the automobile, or the person in whose name it was registered, was the *driver* of the automobile at the time of the accident.[12] The Court refused to recognize the presumption as to driving, stating that it was up to the General Assembly as to whether such a rule should be adopted in North Carolina.

FUTURE INTERESTS

Sale With Contingent Remainders

In *Barnes v. Dortch*[1] testator devised land to his brothers, sisters, and nephew "for their lives and then to their children." In a special proceeding brought subsequent to the testator's death in 1913, the land was partitioned into equal lots between the six life tenants without joinder of the remaindermen. After partition the life tenants entered into possession of their respective shares. In 1945 the two living life tenants and the remaindermen conveyed their respective interests in lot six to *W*, who, being joined by her husband, the life tenant of lot

[9] Rodney v. Staman, 371 Pa. 1, 89 A.2d 313 (1952).

[10] See 5A Am. Jur., *Automobiles* § 919 (1956), which states the rule and cites only Rodney v. Staman, *supra* note 10, as authority. See also Annot., 32 A.L.R.2d 988, 990 (1953), which states that Iowa, Michigan, Ohio, and South Dakota have recognized the doctrine. However, the Iowa and Ohio cases relied on were cases in which the presumption arose from the fact that the owner had been seen driving shortly before the accident. Claussen v. Johnson's Estate, 224 Iowa 990, 278 N.W. 297 (1938); Renner v. Pennsylvania R.R., 61 Ohio L. Abs. 298, 103 N.E.2d 832 (1951). In the Michigan case the issue was whether the deceased person was riding in the car, and the presumption arose from the fact that he had been seen riding in the car prior to the accident. Koob v. Lansing, 321 Mich. 150, 32 N.W.2d 373 (1948). In the South Dakota case, the court recognized the rule but said that the circumstances were equally consistent with an inference that the guest was driving. Lund v. Dwyer, 74 S.D. 559, 56 N.W.2d 772 (1953).

[11] N.C. Gen. Stat. § 20-71.1 (1953).

[12] See Pa. Stat. Ann. tit. 75, § 739 (1953), which provides that the registration plate displayed on such vehicle shall be prima facie evidence that the owner of such vehicle was then operating the same.

[1] 245 N.C. 369, 95 S.E.2d 872 (1957).

six, conveyed the lot to the petitioners. In 1949 a special proceeding was brought to adjudicate the title to lot one, which had also been allotted in the 1913 proceeding. It was held that all of the testator's heirs had "acquiesced in and ratified, approved and accepted" the partition and therefore were bound thereby.

After the death of *W*'s husband without children, petitioners instituted this *ex parte* proceeding under G.S. § 41-11 for authorization to sell lot six subject to the contingent interests involved. A guardian *ad litem* was appointed to represent the unknown and unborn heirs of testator, but neither the surviving life tenant nor the remaindermen were joined. The Court held that G.S. § 41-11 requires joinder of "all persons now *in esse* who might have an interest in the land"[2] notwithstanding the former partition, conveyance, and prior adjudication. This is not to say that upon joinder of the aforementioned parties the 1949 adjudication would not be deemed res judicata. Clearly it would.[3] But the provisions of G.S. § 41-11 must be met.

If one of the remaindermen who joined in the 1945 conveyance should predecease his life tenant, and the life tenant should die without issue, the heir of such remainderman would take directly from the testator and not as an heir of the remainderman. Therefore, this heir would not be bound by the deed of his ancestor. The Court did not say whether or not the heir would be bound by the former partition. Apparently he would not.[4]

Executory Limitations Over in Personal Property

The general rule is that both real and personal property can be made objects of executory limitations providing no rule of law (*e.g.*, the Rule against Perpetuities) will be violated. *Barton v. Campbell*[5] is a further application of this rule. In that case testatrix left all of her real and personal property to her son *D*, but "if he should never have any bodily heirs at his death the property above described shall then go back to my estate." *D* adopted two children. He then sought a declaratory judgment to determine whether or not he had satisfied the condition in testatrix's will. The Court, giving effect to the executory limitation over with respect to personalty as well as to the realty, held that the property would revert unless *D* subsequently became a natural father. Although considered "children" of the adopting parent, adopted children cannot qualify as "bodily heirs" under the terms of the will. This result is consistent with prior North Carolina law.[6]

[2] *Id.* at 373, 95 S.E.2d at 875.
[3] Worthington v. Wooten, 242 N.C. 88, 86 S.E.2d 767 (1955).
[4] Whitesides v. Cooper, 115 N.C. 570, 20 S.E. 295 (1894).
[5] 245 N.C. 395, 95 S.E.2d 914 (1957).
[6] Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953).

INSURANCE

Death by "Accidental Means"

In *Scarborough v. World Ins. Co.*,[1] an action to recover for death by accidental means, the facts disclosed that *A*, the insured, was the aggressor in an assault on *B*. *A* advanced up the steps of *B*'s home, using violent language and with upraised arms. *B*, in order to protect himself, pushed *A*, causing him to fall backward. He struck his head on a water meter protruding from the ground and death resulted therefrom. Considering this evidence, the Court held that the defendant's motion for nonsuit should have been allowed and judgment for the plaintiff was reversed.

The general rule seems to be that where the insured voluntarily provokes or is the aggressor in an encounter, and knows or should know, under the circumstances, that death or great bodily harm would be the natural and probable consequence of his act, his death is not caused by accidental means.[2] However, even though he is the aggressor, if death was not a natural and probable consequence of his acts, the insurer may be liable.[3]

Granting that one normally assumes the ordinary risks of an encounter which he provokes, it seems questionable as to whether, under these facts, the insured voluntarily assumed the risk of death. Whether death was a natural and probable consequence of the type of combat here invited would appear to be a question about which reasonable men would differ. Nonetheless, the decision is clearly proper when considered in light of the distinction which exists between *accidental death* and *death by accidental means*.[4]

Thus, if the death, although unforeseen or unexpected, results directly from insured's voluntary act, unaccompanied by anything unusual, unexpected, or unforeseen, it is *not* death by accidental means, although the result may be such as to constitute an accidental death.[5]

[1] 244 N.C. 502, 94 S.E.2d 558 (1956).

[2] Clay v. State Ins. Co., 174 N.C. 642, 94 S.E. 289 (1917).

[3] Podesta v. Metropolitan Life Ins. Co., 150 S.W.2d 596 (Mo. App. 1941) (dictum). See also Clay v. State Ins. Co., 174 N.C. 642, 94 S.E. 289 (1917); 45 C.J.S., *Insurance* § 788 n. 93 (1946).

[4] "'Accidental' means that which happens by chance or fortuitously, without intent or design and which is unexpected, unusual and unforeseen . . . . 'Accidental means' refers to the occurrence or happening which produces the result and not to the result. That is, 'accidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation." Fletcher v. Security Life and Trust Co., 220 N.C. 148, 150, 16 S.E.2d 687, 688 (1941).

[5] Mehaffey v. Provident Life & Acc. Ins. Co., 205 N.C. 701, 172 S.E. 331 (1934).

This latter rule was applied in *Allred v. Prudential Ins. Co.*,[6] an action to recover under a policy providing for recovery for death by accidental means. Judgment of nonsuit was affirmed where the facts showed that the deceased was struck and killed by an automobile after he had voluntarily lain prone in the center of a highway.

The Court places this case in the same category with a "Russian roulette" case[7] and a case of "William Tell" import,[8] stating that the death of the insured was "the natural and probable consequence of an ordinary act in which he voluntarily engaged."[9] Therefore, the death was not caused by accidental means.

In *Fallins v. Durham Life Ins. Co.*[10] the deceased was struck and killed by a bullet fired by a third party who shot in his direction in order to stop a fight in which the deceased was engaged. There was no evidence that the deceased was the aggressor in the fight, and the evidence showed that the third party did not intend to injure either participant. The Court, affirming the judgment for the plaintiff, held the evidence sufficient to go to the jury on death by accidental means. A prima facie case having been established, the burden was on the defendant company[11] to show a violation of conditions avoiding the policy under the exclusion clause.[12]

[6] 247 N.C. 105, 100 S.E.2d 226 (1957), Johnson and Bobbit, J.J., dissenting without opinion.

[7] Thompson v. Prudential Ins. Co., 84 Ga. App. 214, 66 S.E.2d 119 (1951).

[8] Baker v. National Life & Acc. Ins. Co., 298 S.W.2d 715 (Tenn. 1957).

[9] 247 N.C. at 111, 100 S.E.2d at 231.

[10] 247 N.C. 72, 100 S.E.2d 214 (1957).

[11] MacClure v. Accident & Cas. Co., 229 N.C. 305, 49 S.E.2d 742 (1948); Collins v. United States Cas. Co., 172 N.C. 543, 90 S.E. 585 (1916). However, in Warren v. Pilot Life Ins. Co., 215 N.C. 402, 404, 2 S.E.2d 17, 18 (1939), the Court stated: "There is a distinction, with respect to the burden of proof, between the rule applicable to actions upon ordinary life insurance policies containing exceptions, where proof of policy and death of insured imposes upon the insurer the burden of sustaining the pleaded exception, and the rule applicable where the insurance is against death by accident or accidental means. In the lattter case... where unexplained death by violence is shown, the defendant who seeks to avoid liability on the ground that the death resulted from bodily injuries inflicted intentionally by another person, has the burden of going forward with evidence—that is that evidence of death by external violence is sufficient to take the case to the jury—but that the burden of the issue of death by accidental means still remains upon the plaintiff." No North Carolina case has been found where this distinction has been followed, although apparently it is recognized and followed in a number of other jurisdictions. See Jefferson Standard Life Ins. Co. v. Clemmer, 79 F.2d 724 (4th Cir. 1935).

[12] The exclusion clause provided: "Insurance under this policy shall be null and void if the insured's death resulted directly or indirectly from any of the following causes: . . . (d) participating in or attempting to commit an assault or felony, (e) violence intentionally inflicted by another person." Fallins v. Durham Life Ins. Co., 247 N.C. 72, 73, 100 S.E.2d 214, 216 (1957). As to subsection (e), the Court distinguished Epps v. Gate City Life Ins. Co., 201 N.C. 695, 161 S.E. 211 (1931) (officer intentionally shot insured: recovery denied), stating that in the present case the insured was unintentionally shot, and that the intention of the person inflicting the injury is controlling.

ONE "ACTIVELY AT WORK" WHILE ON TERMINAL LEAVE

Gaulden v. Pilot Life Ins. Co.,[13] a case of first impression, presented an interesting problem of interpretation of a group life insurance policy. The insured, while on terminal leave[14] immediately preceding his retirement, made application for additional insurance coverage under a new group policy. While still on such leave, insured died without having been actively at work on any date subsequent to the commencement of leave. The policy expressly provided that the additional coverage should not become effective until the first date on which the insured was both actively at work and enrolled for insurance under the new policy; until such time, the insured was to remain covered for the amount under the old policy. It was further provided that "cessation of active work shall be deemed to constitute termination of employment except . . . [that] if any person is absent from active work on account of leave of absence or temporary lay-off, his employment may be deemed to continue, for purposes of insurance hereunder . . . ."[15] This was an action seeking to recover the full amount under the new policy.

Judgment for the defendant was reversed, the Court stating: "The leave of absence granted to the insured . . . is the identical type of 'leave of absence or temporary lay-off' which was not to be deemed 'cessation of active work,' so as to affect the status of the insurance held under the policy . . . ."[16]

Granting (1) that the insured was eligible for the increased coverage, and (2) that the terminal leave of the insured did not terminate the employment for purposes of insurance, nonetheless the soundness of the decision seems open to question. The requirement that the insured be enrolled for insurance and *actively at work* seems clearly to be a condition precedent to the taking effect of the additional coverage which had not been met.[17] Further, this would seem to be the exact type of situation in which the condition was to be applicable. *Quaere:* Would the result have been the same if the insured, while on temporary leave of absence, had been injured in an accident and while on the verge of death filed the application for additional coverage?

WINDSTORM INSURANCE

In *Wood v. Michigan Millers Mut. Fire Ins. Co.*[18] a windstorm

[13] 246 N.C. 378, 98 S.E.2d 355 (1957).
[14] Terminal leave was defined as leave of absence, prior to retirement, with regular salary for the number of days equal to the unused annual leave and sick leave.
[15] 246 N.C. at 382-83, 98 S.E.2d at 358-59.
[16] 246 N.C. at 384, 98 S.E.2d at 359.
[17] See Rayburn v. Pennsylvania Cas. Co., 138 N.C. 379, 50 S.E. 762 (1905).
[18] 245 N.C. 383, 96 S.E.2d 28 (1957).

policy provided that the insurer should not be liable for loss caused directly or indirectly by "high water . . . whether driven by wind or not." Insured's property was damaged during hurricane Hazel in October 1954.

The plaintiff contended that the loss was caused solely by winds of hurricane velocity and that heavy rains occurring on that day came after the loss had been sustained. The defendant contended that the damage was caused by high water resulting from the rains. Defendant appealed from an adverse judgment, assigning error to the court's refusal to instruct that if water was a contributing cause of the loss, the plaintiff could not recover. The Court upheld the lower court, holding that the policy did not expressly exclude rains, no matter how heavy, and it was only high water which would *excuse* defendant.

The general rule in this type of situation is that if the wind—or other peril insured against—is the proximate cause of the loss, it need not be the sole cause; and it is usually sufficient to authorize recovery that the cause designated in the policy was the efficient cause of the loss, although other causes contributed thereto.[19] This would be true even though the contributing cause was expressly excepted.[20] However, in *Miller v. Farmers Mut. Life Ins. Ass'n*[21] there is dictum to the effect that the insurer would not be liable if the contributing cause was expressly excluded by the terms of the policy. The present decision apparently strengthens this stand in North Carolina. There is no decision in this jurisdiction holding squarely on that point.

MUNICIPAL CORPORATIONS

ZONING

The constitutionality of extra-territorial zoning ordinances enacted pursuant to legislative authorization was upheld in *Raleigh v. Morand.*[1] The municipality had been granted power to extend its zoning jurisdiction one-mile beyond the corporate limits[2] and sought to enforce provisions of the ordinance excluding trailer camps. This was a point of first impression[3] and the Court, with a minimum of discussion, applied

[19] 45 C.J.S., *Insurance* § 888 (1946).
[20] Phenix Ins. Co. v. Charlestown Bridge Co., 65 Fed. 628 (4th Cir. 1895). See also Note, 33 N.C.L. REV. 288, 293 (1955).
[21] 198 N.C. 572, 152 S.E. 684 (1930).

[1] 247 N.C. 363, 100 S.E.2d 870 (1957).
[2] N.C. Sess. Laws 1949 c. 540.
[3] In State v. Owen, 242 N.C. 525, 88 S.E.2d 832 (1955), the Court held invalid an extra-territorial zoning ordinance which had been adopted without legislative authority. However, the Court's language permitted the inference that such an ordinance, if adopted after a legislative grant of power, would be valid.

the general rule that the legislature may grant police power jurisdiction to municipalities over a reasonable area outside the corporate limits.[4] Zoning, the Court held, was an exercise of the police power. Hence, an extra-territorial ordinance supported by enabling legislation was valid.

The decision is of major importance to cities and towns faced with the problem of haphazard development on their fringes, particularly to the nineteen North Carolina municipalities which already have been granted power to zone areas of from one to five miles beyond their corporate limits.[5]

The *Morand* case also holds that through zoning ordinances municipalities may exclude trailer camps from residential districts. Contentions that this provision of the Raleigh ordinance constituted "arbitrary, unreasonable, and discriminatory restrictions"[6] upon the defendant's property were rejected on the ground that the ordinance applied alike to all property within the territory. It was held that the defendant had failed to overcome the presumption of validity in favor of municipal ordinances and that the ordinance was enforceable by injunctive relief.[7]

Government Immunity

Evidence that a municipality received substantial revenue from the operation of a city park was held sufficient to repell a motion for nonsuit based upon the governmental immunity doctrine in *Glenn v. Raleigh.*[8] The Court's application of the "pecuniary advantage test" and its failure to decide whether maintenance of a city park is a governmental or proprietary function has been criticized in a previous issue of this *Law Review.*[9]

Governmental immunity was upheld, however, in *Denning v. Goldsboro Gas Co.*[10] Here the Court ruled that a municipality would not be liable for injuries or death caused by a gas explosion even though its governing officials had "carelessly and negligently," as alleged, granted a franchise to a public utility whose pipe lines and equipment were defective. Granting of the franchise was a discretionary decision in the governmental field made by the town officials under legislative authority and subjected neither them nor the municipality to liability for an erroneous decision. Although, as the Court pointed out, city officials

[4] See 62 C.J.S., *Municipal Corporations* § 141 (1949); 37 Am. Jur., *Municipal Corporations* §§ 122, 284 (1941).

[5] See Green, *Supreme Court Upholds Extra-Territorial Zoning,* Popular Government, Mar. 1958, p. 6.

[6] 247 N.C. at 367, 100 S.E.2d at 873.

[7] N.C. Gen. Stat. § 160-179 (1952) authorizes the use of the injunctive powers of the court to enjoin violations of zoning ordinances.

[8] 246 N.C. 469, 98 S.E.2d 913 (1957).

[9] Note, 36 N.C.L. Rev. 97 (1957).

[10] 246 N.C. 541, 98 S.E.2d 910 (1957).

may be subject to individual liability when they act corruptly or oppressively in exercising a governmental function,[11] any stricter liability, especially in the area of discretionary or legislative decisions, would make responsible persons reluctant to serve on town boards.

MUNICIPAL UTILITIES

Validity of Contract Exempting City from Liability for Negligence

The validity of a city ordinance relieving the municipality from a negligent failure to provide nonresidents with services contracted for was upheld in *Smith v. Winston-Salem.*[12] Although it is ordinarily against public policy for a public service corporation to exempt itself from liability and the city in providing nonresidents with services acts in a proprietary capacity, the legislature had here determined public policy by providing that municipalities might base charges for services furnished nonresidents on non-liability for breach of contractual obligations.[13] Hence, the ordinance was valid and became part of plaintiffs' contract with the city when they voluntarily connected their homes with the municipal sewage system. Accordingly they could not recover for damages arising out of or related to defendant's contractual obligation to provide services and had no cause of action for injury to their homes caused by sewage which backed up in their pipes and overflowed fixtures as a result of the city's improper maintenance and operation of the sewage system.

Rates

Nonresident consumers of municipal utilities were also involved in *Chandler v. Asheville,*[14] where the Court held that the power to fix rates for utilities was a legislative or governmental act as to which a municipal corporation was under the absolute control of the legislature. Hence, although the power to fix utility rates has been delegated to municipalities by general statutes,[15] the General Assembly by a local act[16] could prohibit Asheville from charging nonresident consumers in sanitary districts adjoining the city a higher rate than was charged resident consumers.

Public Convenience and Necessity

In *North Carolina Utilities Comm'n v. Casey*[17] the Court declined to

[11] *Id.* at 544, 98 S.E.2d at 912.
[12] 247 N.C. 349, 100 S.E.2d 835 (1957).
[13] N.C. GEN. STAT. § 160-249 (1952). See also N.C. GEN. STAT. § 160-255 (1952), which provides that as to nonresident water and electric consumers the municipality shall "in no case be liable for damages for a failure to furnish a sufficient supply of either water or light."
[14] 247 N.C. 398, 101 S.E.2d 470 (1958).
[15] N.C. GEN. STAT. §§ 160-255 to -256 (1952).
[16] N.C. Public-Local Laws 1933, c. 399.
[17] 245 N.C. 297, 96 S.E.2d 8 (1957).

determine whether electricity should be furnished residents by the municipality or by a power company. This was a question of "public convenience and necessity" to be determined by the State Utilities Commission and not subject to judicial inquiry.

Compensation for Annexation of Water and Sewer Systems

As a means of decreasing the cost of developing utilities, municipalities frequently enact ordinances providing that water and sewer systems installed by developers in subdivisions within a specified area outside the corporate limits and connected with the municipal system will become the city's property whenever the subdivision is annexed. In 1952 such an ordinance was involved in *Spaugh v. Winston-Salem,*[18] where the Court ruled that the developer was not entitled to compensation from the city for the water and sewer lines. In connecting his lines with the city's system, the developer was presumed to have had knowledge of the ordinance and to have made it a part of his contract with the city. After the annexation the city merely continued to furnish water and sewer service to subdivision residents in the same manner as during the preceding twenty years. Further, the city had never agreed to compensate the developer for the facilities. Although several earlier cases were distinguished,[19] the Court did not cite *Farr v. Asheville,*[20] where in a similar situation the same result had been reached without an ordinance of the Winston-Salem type being involved. In the *Farr* case the Court had concluded that a mere annexation of the development did not of itself amount to a taking or appropriation of the water and sewer lines which plaintiff had installed for his own convenience and profit in order to increase the value of his lots.

The problem arose again in *Jackson v. Gastonia.*[21] Here also there was no ordinance providing that the water and sewer lines would become the city's property upon annexation. The subdivider installed the pipes to increase the salability of his lots and connected with the city mains. After inspecting the lines to protect against water leakage, the city began supplying water to and collecting from individual consumers. Lot purchasers were not required to connect their homes with the de-

[18] 234 N.C. 708, 68 S.E.2d 838 (1952).

[19] Charlotte Consol. Constr. Co. v. Charlotte, 208 N.C. 308, 180 S.E. 573 (1935) (upheld recovery upon evidence that city took lines constructed inside city by plaintiff through exercise of its eminent domain powers); Stephens Co. v. Charlotte, 201 N.C. 258, 159 S.E. 414 (1931) (city held liable for reasonable value of sewer and water lines in subdivision after annexing the territory and taking over the lines); Abbot Realty Co. v. Charlotte, 198 N.C. 564, 152 S.E. 686 (1930) (subdivider installed sewage facilities on unimproved land within the city to enhance the value of the property and in reliance upon an unenforceable contract by the city to reimburse him. City upon taking over the lines and incorporating them into the municipal system was held liable for their reasonable value).

[20] 205 N.C. 82, 170 S.E. 125 (1933).

[21] 246 N.C. 404, 98 S.E.2d 444 (1957).

veloper's system, and connections were made at the expense of the lot owners. The developer maintained the lines without reimbursement from the property owners. Although no written contract to compensate him for the lines was made, the municipality did have the system appraised prior to its annexation of the area. After the decision in the *Spaugh* case, however, the city declined to pay for the water and sewer lines. In an action to recover their value the parties stipulated that since annexation the city had "taken over, used and controlled" the water and sewer lines to the same extent as if they had been originally installed by the city.

Distinguishing the *Spaugh* and *Farr* cases, the Court allowed a recovery. Unlike *Spaugh,* there was here no applicable city ordinance. The case differed from *Farr* because the city had "taken over, used and controlled" the system as if it had originally belonged to the city. Further, the transactions between the developer and the lot purchasers did not amount to a public dedication because they were not for the benefit of the public at large. This being so, and there being no written contract with the city for purchase of the lines, plaintiff was held entitled to a *quantum meruit* recovery.

Although the decision may be just, the basis on which the Court reached this result is not made explicit. The Court points to the absence of an ordinance providing that the mains would become the property of the city upon annexation. But this would not seem to be a determinative factor. The city may provide in an ordinance that upon the happening of a particular event the title to the property shall vest in the municipality, and such ordinance may be construed to be part of an implied contract made with the municipality when the developer voluntarily connects his lines with the city's system; nevertheless, the city would seem to be still under an obligation to pay compensation for the property taken. Otherwise, the municipality would be appropriating private property by legislative fiat without paying just compensation.[22]

On the other hand, where the developer has assessed the cost of building the system against the price of the lots he sells, an element of "unjust enrichment" enters the picture and it seems equally unreasonable for him to be reimbursed both by the lot purchasers and by the municipality as well.

However, absent an ordinance similar to that in the *Spaugh* case, an extension of the municipal limits alone would not seem to amount to a taking or appropriation of the water and sewer system by the city, especially where the city merely continues to supply water and sewer services to consumers as it had been doing in the past. Yet where the

[22] See Spaugh v. Winston-Salem, 234 N.C. 708, 715, 68 S.E.2d 838, 843 (1952) (concurring opinion).

developer has himself operated and maintained the water and sewer system, perhaps by purchasing water in bulk from the municipality and retailing this to his consumers; he would seem clearly to have reserved his rights. He should then be entitled to compensation, even though he has connected to the city's mains pursuant to an ordinance providing for the vesting of title in the city upon annexation.

No comprehensive rule seems to emerge from an examination of the cases. Instead, as the Court itself pointed out in both the *Spaugh* and *Jackson* decisions, "this case and others of like nature must be considered and determined in the light of the pertinent facts presented by the record in each case."[23]

EMINENT DOMAIN

As a general rule, property already devoted to a public use may not be taken for an inconsistent public use by the exercise of general eminent domain powers.[24] A specific legislative authorization or one of unmistakable intent is considered necessary for the taking. The Court has, however, recognized exceptions to the rule. Hence, in *Goldsboro v. Atlantic Coast Line R.R.*[25] the Court upheld the exercise of a municipality's general powers to condemn a portion of a railroad right-of-way, consisting of an unused strip of land and track, for use as a traffic circle. The trial court had found that the property showed no evidence of use in recent years and was not necessary to the railroad in the operation of its business. Affirming the condemnation, the Court stated that "when the property is not in actual public use and not necessary or vital to the operation of the business of the owner" the "land may be taken under general" powers of eminent domain "as freely as from a private individual."[26]

The Court has also intimated that the rule may be more flexible where the property sought to be condemned belongs to a public service corporation than where the property belongs to a governmental unit or instrumentality.[27]

A different application of this doctrine was involved in *Southern*

[23] *Id.* at 714, 68 S.E.2d at 824; Jackson v. Gastonia, 246 N.C. 404, 408, 98 S.E.2d 444, 447 (1957).

[24] See Yadkin County v. High Point, 217 N.C. 462, 8 S.E.2d 470 (1940) (enjoining city from construction of dam and reservoir which if built as designed would have flooded various highways in neighboring county and portion of county-home site); Fayetteville Street R.R. v. Railroad, 142 N.C. 423, 55 S.E. 345 (1906) (enjoining defendant from prosecuting condemnation proceedings under general eminent domain powers to acquire abandoned road-bed for which plaintiff had obtained prior right to use as its right-of-way).

[25] 246 N.C. 101, 97 S.E.2d 486 (1957).

[26] *Id.* at 108, 97 S.E.2d at 491.

[27] Yadkin County v. High Point, 217 N.C. 462, 466, 8 S.E.2d 470, 473 (1940).

Ry. v. Greensboro.[28] Pursuant to a street improvement plan involving the elimination of a traffic "bottleneck" and relocation of an interstate highway, the city had commenced construction of six grade crossings over the railroad's main-line right-of-way within a distance of 1,670 feet. This was being done without specific legislative authorization and in the face of objections by the railroad. Alleging that the unauthorized construction made use of its tracks dangerous, constituted a trespass, and would retard the future development of railroad service and unreasonably interfere with its business, the railroad sought and obtained a temporary restraining order against further construction work by the city. At a further hearing, however, the injunction was dissolved. The Supreme Court granted supersedeas pending appeal, and on appeal held that the temporary injunction should have been continued until the final hearing.

The Court indicated that the city would be taking the railroad's property to the extent that the construction interfered with the railroad's operations over its right-of-way. This was property already devoted to a public use, and the Court pointed out that the city admittedly did not have a specific legislative grant of authority to take it for an inconsistent public use. The Court also noted that if the railroad's allegations of trespass were established the city might be required to restore the property, as nearly as possible, to its former condition.

Municipalities ordinarily may extend streets across railroad tracks in a manner which does not interfere with the use of the tracks,[29] and through the exercise of their police powers may require railroad companies to construct overhead crossings or viaducts at their own expense when traffic conditions warrant.[30] However, in the instant case the plaintiff's allegations of trespass, a wrongful taking of its property, and interference with its business were deemed sufficient to require the halting of the construction work so that the status quo might be maintained until the rights of the parties were determined at the final hearing.

PERSONAL PROPERTY

Artisan's Lien

G.S. § 44-2 codifies the common law possessory lien arising by implication of law for repairs made by an artisan on personal property. This lien under some circumstances enjoys priority over previously

[28] 247 N.C. 321, 101 S.E.2d 347 (1957).

[29] See Southern Ry. v. Greensboro, 247 N.C. 321, 330, 101 S.E.2d 347, 356, citing with approval Ft. Wayne v. Lake Shore & M.S.R.R., 132 Ind. 558, 32 N.E. 215 (1892).

[30] See Durham v. Southern Ry., 185 N.C. 240, 117 S.E. 17 (1923).

acquired chattel mortgages as long as possession is continued by the lien holder.[1] However, once possession is voluntarily surrendered the lien terminates and becomes incapable of future revival.[2]

A recent illustration of the characteristics of this lien is *Barbre-Askew Finance, Inc. v. Thompson*,[3] where the defendant-mechanic surrendered possession of a partially repaired automobile to the "owner or legal possessor" under an oral agreement that the automobile would be returned for final repairs. The defendant alleged that under G.S. § 44-2 his lien had priority over plaintiff's previously recorded chattel mortgage. The Court held that even though possession was thereafter re-acquired and maintained, the defendant had lost his lien as to the initial repair work done prior to the car's surrender. Although defendant acquired a contractual lien upon surrender of possession as between himself and the car owner by virtue of the oral agreement, it was inferior to plaintiff's previously recorded chattel mortgage.

As to the repair work done subsequent to the return of the car, the defendant had a valid lien under G.S. § 44-2. Technically, liens arising under this statute are common law possessory liens, not to be confused with the statutory mechanic's lien.[4]

REAL PROPERTY

Adverse Possession

In *Burns v. Crump*[1] the defendant asserted title to land through adverse possession. In order to satisfy the statutory period he attempted to tack periods in which the property had been held adversely by his predecessors. The evidence indicated that *G* originally held the land adversely, but without color of title. He conveyed the adjoining forty-five acres to *S* by deed, the description therein failing to include the land in question. This deed further provided that "the above J. P. Gragg is to have a home on and full possession of said land as long as he lives." Thereafter *S*, with *G* joining in the deed, conveyed the forty-five acres to the defendant. Here again the description included only the forty-five acre tract. However, at the time of conveyance *G* went on the land with the defendant and pointed out corners and boundaries which did in fact include the disputed area.

[1] Johnson v. Yates, 183 N.C. 24, 110 S.E. 603 (1922).
[2] 53 C.J.S., *Liens* § 17d(3) (1948). *Contra,* Gardner v. LeFevre, 180 Mich. 219, 146 N.W. 653 (1914).
[3] 247 N.C. 143, 100 S.E.2d 381 (1957), 36 N.C.L. Rev. 512 (1958).
[4] N.C. Gen. Stat. § 44-1 (1950). See also 36 Am. Jur., *Mechanics' Liens* §§ 1-3 (1941); note 2 *supra.*

[1] 245 N.C. 360, 95 S.E.2d 906 (1957).

It is generally conceded that in order to tack successive adverse possessions there must be privity between the several occupants.[2] Further, a deed will not create privity as to land not described therein.[3] After stating these principles the Court concluded that no privity could exist as between the defendant and *G*. The deed given by *G* to *S*, said the Court, conveyed a fee simple title and the attempt to reserve a life estate, being repugnant to the estate granted, was ineffective. Therefore, *G*'s joinder in the defendant's deed was mere surplusage. The pointing out by a third party of land not embraced within a given deed does not create the required privity between grantor and grantee. As to *S* no evidence appeared that she had ever intended to assert title to the land in question, adversely or otherwise.

An interesting question still undecided in this state is whether privity will arise if the grantor personally, or by means of his duly authorized agent, goes on the land conveyed and in the process of pointing out to the grantee the land to be conveyed includes other adjoining lands held adversely by him which are not embraced within the boundaries of the deed delivered. Some authorities indicate that such action on the grantor's part would create the necessary privity.[4]

In *Scott v. Lewis*[5] the plaintiffs alleged ownership through adverse possession. Due to a previous adjudication against them in favor of the defendant-owner in 1907, the Court held that even though the plaintiffs continued in possession thereafter, their possession could not be considered adverse without further notice of their intent to hold adversely.

Dedication

In *Todd v. White*[6] the owners sold lots with reference to a recorded map which indicated that a certain area had been set aside as a "Park" (later changed to "Park-Subject to Revision"). Each deed conveying a lot provided that the owners "shall have the right to change, alter or close up any street or avenue shown upon said map or plat not adjacent to the lot above described and not necessary to the full enjoyment by the [grantee] . . . of the above described property *and shall retain the right and title to, and the control and disposition of all parks,* streets, avenues . . . as shown on said map or plat, subject only to the rights of the party of the second part for the purposes of egress and ingress necessary to the full enjoyment of the above described property."

[2] 1 Am. Jur., *Adverse Possession* § 152 (1936).
[3] 1 *id.* § 156.
[4] Gregory v. Thorrez, 27 Mich. 197, 269 N.W. 142 (1936); 1 Am. Jur., *Adverse Possession* § 157 (1936); see Note, 31 N.C.L. Rev. 478 (1953).
[5] 246 N.C. 298, 98 S.E.2d 294 (1957).
[6] 246 N.C. 59, 97 S.E.2d 439 (1957).

It is the general rule that when the grantor has his land subdivided into lots, streets, alleys, courts, and parks according to a map or plat and thereafter sells or conveys the lots with reference to such map or plat, nothing else appearing, he thereby dedicates such streets, alleys, courts, and parks to the use of the lot purchasers and those claiming under them.[7] However, the Court held that the language in the deed retaining title and control of the park area in the owners was effective to take the case out of the foregoing rule. Therefore, the owners could convey the park area free of any easement for park purposes regardless of whether or not the area had been used as a park by the various grantees or an effective withdrawal under G.S. § 136-96 had been accomplished. The record indicates that the city in which the land was located had not accepted the park area.

DEEDS

Delivery on Death

If a grantor attempts to postpone the effectiveness of an executed deed until his death he must risk one of two possible hazards. If he records the deed there is a rebuttable presumption of delivery, placing him under a considerable disadvantage if his grantee gains possession of the deed before the grantor's death.[8] If on the other hand he places his deed of gift in escrow without recordation he runs the risk presented by G.S. § 47-24, which requires all deeds of gift to be recorded within two years measured from the time of execution. If not so recorded such deeds will be deemed void *ab initio*.

In *Harris v. Briley*[9] the grantor and his wife executed their deed of gift in escrow, delivery to be made upon the deaths of the grantors. This deed was not recorded until its surrender to the grantee, which occurred some three years after the date of execution. The Court held, per curiam, that the deed was void for noncompliance with G.S. § 47-24. This case is consistent with prior North Carolina law.[10]

Limitations

The term *so long as* is said to create an estate on special limitation or, as the case may be, a determinable fee. No right of reversion need be reserved in order for the limitation to become effective. Upon the happening of the contingency the title reverts back to the grantor automatically by operation of law. On the other hand, the term *upon condition* is said to create an estate on condition, but in order for the limita-

[7] Home Real Estate Loan and Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940).
[8] Burton v. Peace, 206 N.C. 99, 173 S.E. 4 (1934).
[9] 244 N.C. 526, 94 S.E.2d 476 (1956).
[10] Allen v. Allen, 209 N.C. 744, 184 S.E. 485 (1936).

tion to be effective in North Carolina the power of termination must be expressly reserved.[11]

The case of *The Washington City Bd. of Educ. v. Edgerton*[12] presents an interesting problem in that land was conveyed to the plaintiff by deed *"upon condition* that the same shall be held and possessed by the party of the second part only *so long as* the said property shall be used for school purposes."[13] (Emphasis added.) The issue arose as to whether the plaintiff received under this deed a fee simple absolute or an estate subject to a condition subsequent. No consideration was given to the third possibility, that of a determinable fee. The Court construed the language as merely denoting the grantor's motive or purpose in conveying the land with the result that the grantee took a fee simple absolute title. The deed did not create a fee on condition subsequent since no right of re-entry was reserved.

ACKNOWLEDGMENT

In *Stokes v. Smith*[14] the plaintiff brought an action to recover land held by the defendant. The following facts were stipulated. In 1909 *W* conveyed land to *H,* her husband, without complying with G.S. § 52-12.[15] This deed was therefore void. On October 4, 1912, *W* and *H* conveyed *W*'s land to *D* in consideration of $100. On the following day *D* and wife reconveyed the land to *H* for $100. The land was subsequently sold by court order in payment of *H*'s personal debts. The Court held that since the parties failed to stipulate the absence of good faith, the mere fact that the land was reconveyed on the following day for the identical consideration was not sufficient to indicate conclusively that *D* was used solely to avoid compliance with G.S. § 52-12. The opinion contains a worthwhile review of the history of the North Carolina homestead laws.

EASEMENTS

Two recent cases concerning easements are worthy of mention. The first is *Cooke v. Wake Elec. Membership Corp.*,[16] where an owner of land granted an easement to a power company allowing it to run

[11] See McCall, *Estates on Condition and on Special Limitations in North Carolina,* 19 N.C.L. REV. 335 (1941).
[12] 244 N.C. 576, 94 S.E.2d 661 (1956).
[13] *Id.* at 577, 94 S.E.2d at 662.
[14] 246 N.C. 694, 100 S.E.2d 85 (1957).
[15] In all conveyances of real property by a wife to her husband for a period in excess of three years, the wife must undergo a privy examination and the person taking the wife's acknowledgment must further certify, as a matter of fact, that the wife's conveyance was not unreasonable or injurious to her, before such conveyance will be deemed valid. N.C. GEN. STAT. § 52-12 (1957).
[16] 245 N.C. 453, 96 S.E.2d 351 (1957).

its lines over his land with the right to re-locate its electric poles. It subsequently became necessary to relocate the poles because of the construction of a dual highway. It was held that the power company was under a duty to relocate the poles so that they would be substantially the same distance from the new highway as they were from the old unless the owner consented to another location or unless dangerous hazards were present. Further, although the grantor desired the poles to be placed at a greater distance from the new road, the power company was under no legal obligation to oblige him, notwithstanding the owner's offer to pay the additional expenses.

The second case is *Grimes v. Virginia Elec. and Power Co.*[17] Here the plaintiff and his wife granted to the defendant company, "its successors and assigns, the perpetual easement to construct, operate, and maintain one or more pole or tower lines, as the company may from time to time deem expedient or advisable . . . ." Thereafter the defendant company assigned to the city of Washington a license to attach wires to its poles. The plaintiff was allowed to recover for the additional burden placed upon his land. Although the power company was allowed to make maximum use of its poles for its own use, to allow the assignment without additional compensation to the owner would be imposing two easements over the owner's land rather than the single easement for which the parties bargained.

EMINENT DOMAIN

Hedrick v. Graham[18] upholds the power of the State Highway and Public Works Commission to condemn a land owner's right of access to and from highways on which his land abuts. This right of access, however, is in the nature of an easement which is considered property and thus cannot be taken without just compensation. The Court held that the condemnation of the right to ingress and egress by eminent domain was authorized by G.S. § 136-9 and G.S. § 136-18(b).[19]

In *Gatling v. State Highway and Public Works Comm'n*[20] the Court held that unless notice of the final meeting of the appraisers in a condemnation proceeding is given in accordance with G.S. § 40-17 to interested parties, G.S. § 40-19, which requires exceptions to be filed within twenty days from the filing of the commissioner's report, does not bar exceptions filed after the twenty day period.

[17] 245 N.C. 583, 96 S.E.2d 713 (1957).
[18] 245 N.C. 249, 96 S.E.2d 129 (1957), 36 N.C.L. REV. 87 (1957).
[19] See Note, 34 N.C.L. REV. 130 (1956).
[20] 245 N.C. 66, 95 S.E.2d 131 (1956).

Estate by the Entirety

In *McLamb v. Weaver*[21] commissioners partitioned certain lands. At the request of one of the parties, who had been a tenant in common in the partitioned property, they deeded her share to her and her husband as an estate by the entirety. The Court held that no such estate was created. The only purpose of a partitioning proceeding is to sever the unity of possession, and not to create a new estate or title. Therefore, the commissioners had no power to convey the respective shares to the several tenants after severance.

In *Shimer v. Traub*[22] the Court held that where two persons, believing themselves to be husband and wife when in fact they are not, purchase land jointly, they will be deemed tenants in common and not tenants by the entirety.

A split of authority exists as to whether a conveyance from one spouse to himself and the other spouse creates a tenancy in common or an estate by the entirety.[23] In *Woolard v. Smith*[24] the North Carolina Court declared for the first time that such a conveyance would create an estate by the entirety. This practical result obviates the useless formality of conveying to a straw man, who, in turn, conveys the property back to the spouses.

Fixtures

Where a tenant attaches fixtures to the freehold he has the right to remove them at the end of the term upon a showing that they were annexed for the purposes of trade or manufacture. Fixtures so attached do not become a part of the realty. But when the owner of land attaches fixtures thereto, his motive is deemed to be the enhancement of the freehold.[25] Accordingly, the Court concluded in *Stephens v. Carter*[26] that when the owner sells the land, the fixtures are deemed to be a part of the freehold. Therefore, a sale of such fixtures must be evidenced by a paper writing in accordance with the Statute of Frauds and the sale of fixtures by parol prior to the sale of the land is ineffective.

Landlord and Tenant

Assignment

Where the lessor subsequent to the lessee's breach of a covenant or

[21] 244 N.C. 432, 94 S.E.2d 331 (1956).
[22] 244 N.C. 463, 94 S.E.2d 363 (1956).
[23] 26 Am. Jur., *Husband and Wife* § 72 (1940).
[24] 244 N.C. 489, 94 S.E.2d 466 (1956); now confirmed by N.C. Gen. Stat. § 39-13.3 (Supp. 1957), discussed in *Comments on North Carolina 1957 Session Laws*, 36 N.C.L. Rev. 41, 47 (1957).
[25] Springs v. The Atlantic Refining Co., 205 N.C. 444, 171 S.E. 635 (1933).
[26] 246 N.C. 318, 98 S.E.2d 311 (1957).

condition accepts rent from his tenant with full knowledge of the broken covenant or condition, the lessor cannot thereafter assert his right of forfeiture given by the lease, notwithstanding an express denial of waiver upon acceptance of the rent.[27] *Fairchild Realty Co. v. Spiegel, Inc.*[28] clearly illustrates this rule and the danger it entails for landlords. The plaintiff leased his premises to the defendant at a minimum monthly rate "plus three percent of all sales in excess of $500,000 made from the demised property." The three percent additional rental netted the plaintiff some $20,000 a year. The lease provided that no assignment could be made without the lessor's consent. It also reserved to the lessor the right to declare a forfeiture of the lease upon default or breach of this condition. The defendant thereafter, without the plaintiff's consent, assigned the lease to another corporation which took possession of the premises. The assignee's sales never equaled those of the assignor and apparently never exceeded $500,000. Because the lessor continued to accept rent from the original lessee after full knowledge of the broken condition, he waived his right to terminate the lease. The dissent questions whether the rule should have been applied under these circumstances. However, the Court's decision, though harsh, seems to be in accord with prior law. In another case the Court followed the general rule that even though the lessor consents to the lessee's assignment, the lessee, absent any stipulation to the contrary, remains personally liable for the rents due.[29]

Liens

The statutory lien, arising under G.S. § 44-1 in favor of a tenant for services rendered, cannot exist in the absence of a debtor-creditor relationship. Thus where a landlord contracts to farm on halves with his tenant and agrees that the tenant may sub-contract the growing of part of the crops to other tenants, but stipulates that the tenant and sub-tenants are to account to each other, the sub-tenants obtain no lien for services rendered as against the landlord, since there is no contract or debt between them. Further, the landlord's lien arising under G.S. § 42-15 for advances made enjoys priority over any claims which the sub-tenants might possess against the original tenant.[30]

Duty to Repair

In *Richman Mfg. Co. v. Gable*[31] the defendant leased the second and third floors of his building to the plaintiff "to have and to hold the same, with the privileges and *appurtenances* thereunto in anywise appertaining

[27] Winder v. Martin, 183 N.C. 410, 111 S.E. 708 (1922).
[28] 246 N.C. 458, 98 S.E.2d 871 (1957).
[29] Fidelity Bank v. Bloomfield, 246 N.C. 492, 98 S.E.2d 865 (1957).
[30] Eason v. Dew, 244 N.C. 571, 94 S.E.2d 603 (1956).
[31] 246 N.C. 1, 97 S.E.2d 672 (1957).

. . . upon the following terms and conditions . . . . 3. It is further understood and agreed that the [plaintiff] . . . shall be responsible for two-thirds[32] of the maintenance and upkeep of the heating plant and equipment in said building . . . ." (Emphasis added.) When the furnace, which was located in the basement, later exploded, the plaintiff brought an action to recover damages from his landlord. The evidence indicated that the explosion resulted from lack of maintenance in that the furnace had not been properly cleaned or adjusted. The defendant's motion for nonsuit was sustained, apparently for two reasons. First, the Court stated that the furnace was an appurtenance within the meaning of the contract since it was necessary to the present enjoyment of the premises. Secondly, the Court construed the lease to the effect that the tenant had expressly agreed and consented to repair and maintain the furnace. Of course, where the tenant agrees to assume the responsibility of repairs, there is no question concerning his responsibility to make them.[33] However, the Court's determination that the furnace was an appurtenance may in fact be misleading. Absent any express undertaking, the duty to repair does not appear to depend upon whether or not the object to be repaired is an appurtenance, but rather upon the type of repair and other circumstances involved.[34] For example, had the explosion resulted from defects caused by some broken or worn out mechanism, the tenant would have been under no obligation to repair it unless he agreed to do so, for he is only bound to make ordinary repairs and not those of a substantial or permanent nature.[35] On the contrary, the obligation in such a case would probably fall upon the landlord if he had partially leased his building to several tenants and the heating plant were located in an unleased portion of the building.[36]

Restrictive Covenants

It is the general rule in North Carolina that no notice, however full and formal, can take the place of registration.[37] In respect to recordation the usual theory advanced seems to be that if a proper search of the public records would have revealed that sought to be charged, sufficient notice will have been given. Generally the definition of *proper search* has been confined to the chain of title.[38]

Reed v. Elmore[39] presents a case of first impression in this state.

[32] Plaintiff's co-tenant was responsible for the remainder of the upkeep and maintenance.
[33] 32 Am. Jur., *Landlord and Tenant* § 788 (1941).
[34] 32 *id.* § 780.
[35] Tiffany, Real Property § 83 (1940).
[36] 32 Am. Jur., *Landlord and Tenant* § 746 (1941).
[37] Austin v. Staten, 126 N.C. 783, 36 S.E. 338 (1900).
[38] Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197 (1942).
[39] 246 N.C. 221, 98 S.E.2d 360 (1957), 36 N.C.L. Rev. 233 (1958).

An owner subdivided land into seven lots. Lot three was sold to the plaintiff subject to a condition "that no structure shall be erected by the grantee within 550 feet of the Pineville-Matthews Road, it being understood and agreed that the 100 foot strip leading to said tract of land from the Pineville-Matthews Road shall not be used for purpose of constructing any building thereon, and this restriction shall likewise apply to Lot No. 4, retained by the grantor, said Lot No. 4 being adjacent to lands hereby conveyed."[40] Thereafter the owner conveyed lot four by deed with no mention of the previous restriction thereon. Through mesne conveyances the defendant subsequently became the owner of lot four. All the deeds were duly recorded. The Court held that plaintiff's deed imposed a mutual restrictive covenant on lots three and four in the nature of a negative easement running with the land. Even though plaintiff's deed was clearly off defendant's chain of title, this restrictive covenant was held to be binding on the defendant-grantee.[41]

SALES

Bulk Sales

In *Kramer Bros., Inc. v. McPherson*[1] the evidence tended to show that defendant had purchased a portion of the stock of merchandise of a hobby shop, paying between $845.00 and $865.00 for the goods. The seller did not notify his creditors of the proposed sale or otherwise comply with the bulk sales statute.[2] In an action by a creditor of the seller against the defendant-purchaser to set aside the sale and obtain a personal judgment for any of the merchandise the defendant had sold or otherwise disposed of, the Court held the evidence sufficient to go to the jury.

Transfer of Title

In *Putnam v. Triangle Publications, Inc.*[3] the Court held that when

[40] *Id.* at 223, 98 S.E.2d at 361.

[41] See Waldrop v. Town of Brevard, 233 N.C. 26, 62 S.E.2d 512 (1950), where the plaintiff argued that no deed in his chain of title referred to the easement sought to be charged. The Court, after holding that his land was nevertheless subject to the easement, said: "This position might be well taken if we were dealing with restrictive covenants instead of an easement and waiver and release of any and all claims . . . ." *Id.* at 30, 62 S.E.2d at 514.

[1] 245 N.C. 354, 95 S.E.2d 889 (1956).

[2] N.C. Gen. Stat. § 39-23 (1950). The statute provides in part: "The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless . . ." the seller makes an inventory showing the quantity, etc. of the articles to be sold and notifies the creditors of the proposed sale at least seven days in advance of the sale.

[3] 245 N.C. 432, 96 S.E.2d 445 (1957).

a foreign corporation sold magazines containing libelous matter to North Carolina wholesalers and delivered them to a common carrier outside North Carolina, the corporation was not guilty of tortious conduct in this state, since title passed upon delivery to the carrier. This is in accord with the general rule that, nothing to the contrary appearing, delivery of goods to a common carrier for shipment passes title to the buyer.[4]

In *Peed v. Burleson's, Inc.*[5] plaintiff contracted to sell potatoes and to deliver them to the buyer but the buyer was to pay the freight. Upon shipment by motor vehicle carrier, the truck driver wrongfully sold the potatoes to a defendant. The Court held that plaintiff still had title at the time of the conversion. The Court recognized the general rule that in a sale f.o.b. point of shipment, in the absence of an intent to the contrary, title passes upon delivery of the goods to the carrier for shipment, but held that this case falls within an exception to the general rule, because the seller by his contract undertook to make delivery himself at the point of destination. This exception is also recognized by the Uniform Sales Act.[6]

Implied Warranties

In *Driver v. Snow*[7] the plaintiff bought a second-hand stove from the defendant. The stove was equipped with a water jacket to be used for heating water but the plaintiff made it known that he was going to use it only for heating the kitchen and not for heating water. Defendant gave plaintiff plugs to cover holes left on removal of pipes attached to the water jacket. Plaintiff removed the pipes, put the plugs in the holes, and started a fire in the stove. Unknown to either party the jacket contained water. The steam, being unable to escape, caused an explosion which injured the plaintiff. Plaintiff contended that there was an implied warranty that the stove was safe for the purpose for which it was bought. The Court held that in the sale of a second-hand article there is no such implied warranty where the buyer and seller have equal opportunity to inspect for defects. The Court found that the plaintiff had a better opportunity to discover the defect under these circumstances. The Court distinguished cases involving latent defects not discoverable on ordinary examination.[8]

TAXATION

Property Tax

In *Ramsey v. Board of Comm'rs*[1] the Court held that a statute giving

[4] Vold, Sales § 76 (1931).
[5] 244 N.C. 437, 94 S.E.2d 351 (1956).
[6] Uniform Sales Act § 19, rule 5.
[7] 245 N.C. 223, 95 S.E.2d 519 (1956).
[8] For a general discussion of implied warranties, see Note, 32 N.C.L. Rev. 351 (1954).

[1] 246 N.C. 647, 100 S.E.2d 55 (1957).

a county power to issue bonds for a water and sewage system was constitutional. The Court stated that a county may levy taxes only for a public purpose and, taking judicial notice of the urbanization of the counties of the state, found that the projects were in the public interest. The Court has long held that municipalities may issue bonds for the construction of water and sewage systems.[2] This case was the first test of the same authority given to the counties.[3] The holding is in accord with the majority of American jurisdictions.[4]

Another recent case involving the powers of a county to tax was *Bragg Investment Co. v. Cumberland County*.[5] The Court there sustained a county tax on buildings, on stoves and refrigerators in the buildings, and on the value of the leasehold interest of the plaintiff. Plaintiff had leased from the federal government land on a military reservation and had built apartments thereon for the use of military personnel. By sustaining an ad valorem tax on the value of the leasehold the Court in effect ruled that the state intangibles tax had not eliminated all intangibles from county taxation.[6]

Income Tax

Goodwill Distributors, Inc. v. Shaw[7] was a case of first impression in North Carolina. There *A* and *B* corporations merged with and into *C* corporation pursuant to G.S. §§ 55-165 to -173. In the following fiscal year *C*, the surviving corporation, sued the Commissioner of Revenue for a refund on taxes paid, claiming a deduction for a net-operating-loss carry-over based on the pre-merger losses of *B*. The Court reversed the lower court's judgment for plaintiff on the pleadings, stating that it did not appear from the complaint that *C* corporation was substantially the same taxpayer as the corporation sustaining the loss within the meaning of G.S. § 105-147(6)(d) and thus entitled to deduct the pre-merger loss.

This holding is in accord with a recent United States Supreme Court case on the same point.[8] There the Court disallowed a carry-over loss for federal income tax purposes because there was not a "continuity of business enterprise," *i.e.*, the surviving business was not sufficiently

[2] McKinney v. High Point, 237 N.C. 66, 74 S.E.2d 440 (1952); Rhodes v. Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949); Fawcett v. Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903).

[3] N.C. Gen. Stat. 153-77(p) (Supp. 1957).

[4] 20 C.J.S., *Counties* § 261 (1940).

[5] 245 N.C. 492, 96 S.E.2d 341 (1956).

[6] The effects of this case have been thoroughly discussed in Lewis, *Taxing Private Interest on Public Land*, Popular Government, Nov. 1956, pp. 13-17; *Local Taxation of Intangible Personal Property*, Popular Government, March 1957, p. 8.

[7] 247 N.C. 157, 100 S.E.2d 334 (1957).

[8] Lisbon Shops, Inc. v. Koehler, 353 U.S. 382 (1957).

similar to the merged loss corporation to allow the deduction. This test is a departure from the previous doctrine of "continuity of corporate form," which allowed a deduction if the survivor corporation was existing under the same state charter as the loss corporation.[9] Although the Court did not directly discard the corporate form test, the inference is that it would not now be followed. This new doctrine is meritorious, since tax consequences are not made to depend upon the technicalities of state corporation laws.[10]

The North Carolina Court indicated some of the criteria to be used in determining whether the survivor may take advantage of the loss: the types of business of the corporations before the merger; whether they were in the same field of endeavor; whether they were in the same territory; whether the same business was continued after the merger; whether the net worth is relatively the same; whether the income of the survivor corporation sought to be deducted was earned prior to or after the merger. The Court held that it was error for the trial judge to grant judgment for the plaintiff on the pleadings without determining whether the survivor corporation met the tests prescribed.

TORTS

Abuse of Process

Abuse of process is the tort action which provides a remedy in cases where legal procedure has been set in motion in proper form but has been perverted to accomplish an ulterior purpose for which it was not designed.[1] The essential elements have been stated to be:[2] (1) an ulterior purpose,[3] and (2) a willful act in the use of process not proper in the regular conduct of the proceeding.[4] The mere use of the process to accomplish a purpose other than the proper one is not abuse of process;[5]

[9] Standard Paving Co., 190 F.2d 330 (10th Cir. 1951); California Casket Co., 19 T.C. 32 (1952).

[10] See *The Supreme Court, 1956 Term*, 72 HARV. L. REV. 83, 190 (1957); Note, 41 MINN. L. REV. 136 (1957).

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[1] PROSSER, TORTS, § 100, at 667 (2d ed. 1955). The tort is said to be the misuse or the misapplication of process justified in itself for an end other than that which it was designed to accomplish. Abernathy v. Burns, 210 N.C. 636, 188 S.E. 97 (1936).

[2] Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937), 16 N.C.L. REV. 277; Railroad Co. v. Hardware Co., 143 N.C. 54, 55 S.E. 422 (1906).

[3] Where there was no allegation of an ulterior motive, a demurrer was sustained. Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

[4] A distinct act not authorized by the process or an objective not legitimate in the use of the process is required. Usually the process is used as a threat or a club for purposes of extortion. Ludwick v. Penny, 158 N.C. 104, 73 S.E. 228 (1911).

[5] Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276 (1945).

but where it is used in the course of negotiations, as a threat, to accomplish that purpose, there is abuse.[6]

In *Bailey v. McGill*[7] the plaintiff alleged that he was suffering from an incurable disease and had been under the care of the defendant; that defendant, solely through malice and ill will toward him and to rid himself of the plaintiff-patient, advised and influenced plaintiff's parents to institute lunacy proceedings; that plaintiff was committed and held for observation for thirty days and thereafter was released and declared to be not mentally disordered. Plaintiff's counsel stated in open court that they were not relying upon a cause of action for malicious prosecution or for abuse of process, or for false imprisonment.[8] The trial court sustained the defendant's demurrer *ore tenus* which was made on the ground that aside from a cause of action for malicious prosecution no cause of action was stated in the complaint. Reversing, the Supreme Court held that plaintiff had stated a cause of action for abuse of process and that since there was no showing that he had expressly authorized his counsel to state that he was not relying on that cause of action, counsel's statement to that effect was not binding.

Although the Court makes no effort to spell out the two elements of the cause of action, it would appear that the first element, ulterior purpose, is clear and distinct, while the second element, a willful act, is not so clear and not distinct. It would seem that the willful act required is some act or threat, in using the process after it has issued and during the course of negotiations to accomplish the ulterior motive.[9] The defendant is charged with *influencing* and *advising* plaintiff's parents to execute and file the affidavit with the clerk of superior court.[10] This act, however, occurred *before* the process was issued. The defendant is also charged with influencing the examining doctors to execute their affidavits without proper examination of the plaintiff. This act could have taken place after the process issued, but it does not seem to be in the nature of the act required heretofore for abuse of process.[11]

FRAUD

The grantor, knowing that a third person claimed superior title to land, represented, through his agent, that he had a fee simple title to that land. He executed a conveyance with full covenants of seisin,

[6] Carpenter, Baggott & Co. v. Hanes, 167 N.C. 551, 83 S.E. 577 (1914).
[7] 247 N.C. 286, 100 S.E.2d 860 (1957).
[8] The effect of this statement is considered under TRIAL PRACTICE.
[9] See note 4 *supra*.
[10] In the usual case the defendant has instituted the proceedings himself. Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937); Abernathy v. Burns, 210 N.C. 636, 188 S.E. 97 (1936).
[11] See note 4 *supra*.

general warranty, and against encumbrances. The Court held that the grantee did not have a cause of action for fraudulent misrepresentation.[12] Moreover, the Court stated that his action would be for breach of warranty, which could not occur until he is evicted or ousted by one claiming under superior title.

LIBEL AND SLANDER

When a physician makes affidavits before the clerk of court in a lunacy proceeding, he is said to be acting in the role of a witness in a judicial proceeding which gives the affidavits the cloak of absolute privilege when they are pertinent to the proceeding.[13]

In *Bell v. Simmons*[14] the plaintiff was secretary-treasurer of a Farm Bureau local. The defendant made statements to newspaper reporters charging that certain records of the local were missing. These statements subsequently appeared in a newspaper article. In the trial court, plaintiff offered evidence tending to prove that no records belonging to the local were missing. The Supreme Court reversed a nonsuit and said that the statements were capable of a defamatory meaning in that they charged the plaintiff with conduct from which unfitness for her occupation could be implied and that there was ample evidence that the statements were intended for publication.[15]

TRESPASS

In *McBride v. Coggins-McIntosh Lumber Co.*[16] the plaintiff sued for trespass, alleging that the defendant cut and removed trees belonging to the plaintiff. The defendant alleged that he had purchased timber rights from the owners of adjoining land and that they had pointed out the trees included in the sale. Therefore, he requested that they be made parties defendant.[17] The Court held that the vendors, even though they did not physically participate in the cutting and removing of the timber, could be joint tort-feasors with defendant.

[12] Shinier v. Traub, 244 N.C. 466, 94 S.E.2d 363 (1957). "[W]here the vendor . . . executes a conveyance to the purchaser with a warranty of title . . . his previous representations as to the validity of his title . . . are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty . . . which determined the extent of his liability." Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 648 (1889).

[13] Bailey v. McGill, 247 N.C. 286, 100 S.E.2d 860 (1957). For a discussion of this problem, see Note 36 N.C.L. REV. 552 (1958).

[14] 247 N.C. 488, 101 S.E.2d 383 (1958).

[15] *Id.* at 494, 101 S.E.2d at 387.

[16] 246 N.C. 415, 98 S.E.2d 663 (1957).

[17] For a discussion of the third party practice, see CIVIL PROCEDURE (PLEADING AND PARTIES).

An unavoidable accident was held to be a defense in an action for trespass in *Smith v. Pate*.[18]

PHYSICIANS AND SURGEONS

In the earlier case of *Powers v. Planters Nat'l Bank & Trust Co.*[19] the defendant leased a house to plaintiff without revealing that the prior occupant had died one month before with tuberculosis and that the house was probably infected. Eighteen months after becoming exposed to the germs, plaintiff manifested symptoms of tuberculosis and was hospitalized. Approximately two and one-half years after discovery of the symptoms plaintiff instituted a suit for damages for negligent breach of duty to disclose. The Court followed the general rule that the cause of action for negligence accrues at the time of the original breach of duty and held that the action was barred by the three-year statute of limitation.[20] In *Shearin v. Lloyd*[21] the evidence was clear enough to support the assertion that upon the completion of an appendectomy the defendant had negligently left a foreign object in the plaintiff's body. The question involved was whether the plaintiff had commenced his action for malpractice within the prescribed period of three years[22] from the time the cause of action accrued. The operation was performed on July 20, 1951, and the physician-patient relationship was terminated after the twelve-month checkup—presumably in July 1952. On November 17, 1952, the doctor discovered and disclosed to the plaintiff the facts constituting the negligence. Plaintiff commenced this suit on November 14, 1955.[23] This case, presenting three different dates—time of breach, termination of relationship, date of discovery—all of which have been adopted by one jurisdiction or another[24] as the date on which the cause of action for malpractice accrues, gave the Court an opportunity to depart from its adherence to the general rule. Yet, citing cases,[25] the Court said,[26] "Our decisions

[18] 246 N.C. 63, 97 S.E.2d 457 (1957). The case is discussed in Note, 36 N.C.L. REV. 251 (1958).

[19] 219 N.C. 254, 13 S.E.2d 431 (1941), 19 N.C.L. REV. 599.

[20] N.C. GEN. STAT. §§ 1-15, 1-46, 1-52(5) (1953).

[21] 246 N.C. 363, 98 S.E.2d 508 (1957).

[22] See note 20 *supra*.

[23] In the fall of 1953, after two subsequent operations and intervening clinical treatment, plaintiff was advised by defendant that a third operation would be necessary. Plaintiff refused to accede to this advice and terminated his relations with defendant.

[24] Cappuci v. Barone, 266 Mass. 578, 165 N.E. 653 (1919) (time of breach, majority view); Huysman v. Kirsch, 6 Cal. App. 2d 302, 57 P.2d 908 (1936) (termination of the relationship); Mo. ANN. STAT. § 516.100 (Vernon 1952) (the date damages are capable of ascertainment).

[25] Connor v. Schenck, 240 N.C. 794, 84 S.E.2d 175 (1954); Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Powers v. Planters Nat'l Bank & Trust Co., 219 N.C. 254, 13 S.E.2d 431 (1941); Mast v. Sapp, 140 N.C. 533, 53 S.E. 350 (1906).

[26] 246 N.C. at 370, 98 S.E.2d at 513.

impel the conclusion that plaintiff's cause of action accrued 20 July, 1951, immediately upon the closing of the incision." That date was more than three years prior to the commencement of the action.[27] Accordingly, though not without some implication of regret,[28] the Court adhered to the general rule to reach a result as harsh as that in the *Powers* case.

NEGLIGENCE

Bailments

The duty of a bailor to reveal any latent defects in a chattel which he delivers to a bailee was involved in *Ashley v. Jones*.[29] In that case the chattel was a gasoline truck containing propane gas held in liquid form by pressure. The defect, known to the bailor, was a leaking pipe. Without warning from the bailor about the defect, the bailee accepted the chattel to make repairs. Lacking sufficient parts to make the repairs, the bailee stored the truck overnight in his closed garage. Sometime during the night an employee of the bailee opened the garage door, giving the gas access to a flame which immediately ignited the gas and precipitated an explosion causing the destruction of the garage and equipment. The Court held that such evidence was sufficient to withstand the bailor's motion of nonsuit and carry the case to the jury on the bailee's counterclaim for damage to the garage.[30]

In *Neece v. Richmond Greyhound Lines, Inc.*[31] a bus carrier accepted as "baggage" a package exceeding the dimensions given in the tariff filed by it with the Interstate Commerce Commission.[32] The Court reasoned that since the package exceeded the tariff specifications of "baggage" the carrier was under no duty to accept it. Therefore, when it did accept it, it did so as a gratuitous bailee and became liable for the full value of the package upon loss occasioned by its gross negligence. Moreover the Court said that the admission of the defendant that it re-

[27] According to the Court, even if it had been willing to adopt either of the other two views, the only date which could have saved plaintiff's cause of action was the date of discovery. It would seem, however, that there is reason enough for contending that the termination of the doctor-patient relationship was not until the fall of 1953. All subsequent operations and treatment were made necessary, at least indirectly, by the appendectomy, and the twelve-month checkup was only technically the termination of their relationship. If this contention be justified and if the Court had adopted this view, then this date would also save the cause of action.

[28] "It is not for us to justify the limitation period . . . . [T]his is a matter within the province of the General Assembly." 246 N.C. at 370, 98 S.E.2d at 514.

[29] 246 N.C. 442, 98 S.E.2d 667 (1957).

[30] This action was instigated by the bailor, who asked for damages for the loss of his truck. The bailee, denying negligence on his part, counterclaimed for the loss of his garage and equipment.

[31] 246 N.C. 547, 99 S.E.2d 756 (1957).

[32] This case is also discussed under CONTRACTS.

ceived the plaintiff's bag and failed to return it on demand was sufficient to take the case to the jury, citing *Perry v. Seaboard Air Line Ry.*[33]

In the *Perry* case the trial judge was held to have committed error for assuming in his charge to the jury that the plaintiff had established the fact that the loss occurred while the suitcase was in the defendant's possession. But in view of the new trial, the Court felt constrained to deal with the defendant's contention that there was no presumption of negligence on proof of loss by a gratuitous bailee. In concluding that there was a presumption of negligence sufficient for the consideration of the jury, the Court recognized that a gratuitous bailee is liable only for loss occasioned by its gross negligence—its failure to exercise slight diligence. Quoting from *Hanes v. Shapiro*,[34] the Court explained,[35] "[T]he terms 'slight negligence,' 'gross negligence,' and 'ordinary negligence' are convenient terms to indicate the degree of care required; but in the last analysis, the care required by the law is that of the man of ordinary prudence. This is the safest and best rule and rids us of the technical and useless distinctions in regard to the subject." Applying this rule to ascertain the liability of the gratuitous bailee, the Court said,[36] "[F]ailure to exercise the care of a person of ordinary prudence undertaking to carry the goods of another without compensation" is gross negligence. Thus it would appear that the test for gross negligence is the same as that for ordinary negligence and that the gratuitous bailment is merely to be considered as one of the circumstances.[37]

Furthermore, in answering the posed question of what the plaintiff must prove, the Court said, "[P]roof of delivery to the carrier and its failure to deliver is evidence of negligence sufficient to carry the case to the jury and to support a verdict . . . ."[38] Apparently fully aware that some of the cases relied upon were cases of bailment for hire[39] involving ordinary negligence as the standard of liability, the Court said that the rule "prevails in every bailment."[40]

Gas and Electric Companies

The highly explosive nature of liquefied petroleum gas imposes upon

[33] 171 N.C. 158, 88 S.E. 156 (1916).
[34] 168 N.C. 24, 30, 84 S.E. 33, 36 (1915).
[35] 171 N.C. at 163, 88 S.E. at 159.
[36] *Ibid.*
[37] "Ordinary care, being that kind of care which should be used in the particular circumstances, is the correct standard in all cases. It may be high or low in degree, according to circumstances, but is, at least, that which is adapted to the situation." Hanes v. Shapiro, 168 N.C. 24, 30, 84 S.E. 33, 36 (1915).
[38] 171 N.C. at 163, 88 S.E. at 159. The theory is that this evidence raises a prima facie case, making it incumbent upon the defendant to accept the burden of going forward to absolve itself.
[39] Hackney v. Perry, 152 Ala. 626, 44 So. 1029 (1907); Yazoo & M.V.R.R. v. Hughes, 94 Miss. 242, 47 So. 662 (1908).
[40] 171 N.C. at 164, 88 S.E. at 160.

the distributors of such gas the duty of preventing its escape and minimizing its danger.[41] Thus, where an agent of a gas company was filling the tank of a customer and evidence would support the inference that he was using defective equipment or making improper use of his equipment resulting in the escape of gas and consequent explosion, the Court reversed a nonsuit below.[42]

In *Frazier v. Suburban Rulane Gas Co.*[43] the evidence indicated that the defendant had agreed to conduct periodic inspections of the gas fixtures which it had installed in the plaintiff's chicken house. There was also evidence to the effect that defendant had negligently failed to inspect the equipment and that the fire was caused by an accumulation of soot in the burners or defects in the pipes, either of which could have been discovered by an adequate inspection. The Court held that the evidence on the issue of negligence was sufficient to go to the jury.

The maintenance of high tension power lines also imposes upon power companies the duty of utmost care to avoid injury.[44] That duty, however, does not require the power company to cut and remove a sound tree, located on or near the boundary line of its right-of-way, solely because the tree is of sufficient height to strike the power line if felled in that direction.[45]

The duty of insulating high tension wires and of placing warning signs is limited to those places where the power company could, in the exercise of ordinary prevision, anticipate that someone might, in the course of his legitimate activities, come in contact with the wires.[46]

Owners and Occupiers of Land

An invitee who slips and falls on a waxed floor may maintain an action against the owner or occupier only when he presents evidence that the floors were improperly waxed or polished.[47] In *Copeland v. Phthisic*[48] the plaintiff, a business invitee, presented evidence that at the point where she slipped there was a large patch of accumulated wax sufficient to reveal her shoe heel print imbedded therein. The Court held that it was not error to submit the case to the jury.

[41] Great Am. Ins. Co. v. Modern Gas Co., 247 N.C. 471, 101 S.E.2d 389 (1958).
[42] *Ibid.*
[43] 247 N.C. 256, 100 S.E.2d 501 (1957).
[44] Lea v. Carolina Power & Light Co., 246 N.C. 287, 98 S.E.2d 9 (1957).
[45] *Ibid.* A power company is not required to anticipate negligence on the part of others.
[46] Philyan v. Kinston, 246 N.C. 534, 98 S.E.2d 791 (1957).
[47] Barnes v. Hotel O. Henry Corp., 229 N.C. 730, 51 S.E.2d 180 (1949).
[48] 245 N.C. 580, 96 S.E.2d 697 (1957). Where no evidence of improper waxing was presented, a licensee who slipped on a throw rug placed over a recently waxed floor was nonsuited. Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717 (1957).

Contributory Negligence

As a matter of law, a child three years old is incapable of negligence or contributory negligence.[49]

In *Harris v. Bingham*[50] the plaintiff alleged that the defendant, a real estate broker, in drafting a contract to sell plaintiff's land to a third person, negligently failed to indicate that the land was subject to a right-of-way for a highway. The Court held that a person is presumed to know the contents of what he signs and that when plaintiff signed the contract he was charged with knowledge of the omission and of defendant's breach of duty. Thus, he had a duty to be vigilant in attempting to avoid injury to himself. A demurrer to the complaint was sustained.

Proximate Cause and Last Clear Chance

The failure to remove the switch key from a parked car does not render the owner of an automobile liable for the negligent operation of the car by a thief who steals it.[51] "To allow recovery would do violence to the rule of proximate cause as understood and applied in this jurisdiction."[52]

In *Burr v. Everhart*[53] the plaintiff insisted that a scaffold was necessary before he could begin to tear off a roof in safety and that the failure of defendant to supply a scaffold was a breach of her duty to provide a safe place to work. He alleged that the accident occurred when a plate at the eave of the roof crumbled[54] as he stepped from the roof to a ladder. The Court held that there was no showing that the presence of the scaffold, rather than the ladder, would have prevented his fall and, therefore, the breach of duty was not the proximate cause of the injury.

When the judge charges the jury seriatim on the issues of (1) defendant's negligence, (2) the plaintiff's contributory negligence, and (3) the doctrine of last clear chance, he need not submit the doctrine of last clear chance to the jury on the first issue.[55]

AUTOMOBILES

The decisions involving motor vehicles since the last *Case Survey* may be grouped into the following categories: five concerned collisions

[49] Arnette v. Yeago, 247 N.C. 356, 100 S.E.2d 855 (1957).
[50] 246 N.C. 77, 97 S.E.2d 453 (1957).
[51] Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957).
[52] *Id.* at 264, 100 S.E.2d at 513.
[53] 246 N.C. 327, 98 S.E.2d 327 (1957).
[54] Defendant was found to be under no duty to anticipate the rotten condition of the plate.
[55] Hennis Freight Lines, Inc. v. Burlington Mills Corp., 246 N.C. 143, 97 S.E.2d 850 (1957). The application of this doctrine is considered in Barnes v. Horney, 247 N.C. 495, 101 S.E.2d 315 (1958), 36 N.C.L. REV. 545.

between vehicles at intersections;[56] five arose when vehicles struck pedestrians or children on the road;[57] three involved train-motor vehicle collisions;[58] four concerned vehicles moving in the same direction when they collided;[59] five were concerned with stopped or parked cars;[60] eight involved vehicles traveling in the opposite direction;[61] two cases considered the question of which of the deceased occupants was driving the car at the time of the accident;[62] and three cases considered the problem of the guest passenger.[63]

TRIAL AND APPELLATE PRACTICE

Process

In 1955 the North Carolina legislature enacted G.S. § 55-38.1 (recently designated as G.S. § 55-145), by which it is sought to subject foreign corporations to the jurisdiction of our courts to a far greater extent than was visualized in the "doing business" concept of old G.S. § 55-38. Paragraph (3) of the statute, which purported to make a foreign corporation subject to the jurisdiction of our courts if it manufactured or distributed goods with the reasonable expectation that such goods would be used or consumed in North Carolina and such goods

[56] Jackson v. McCoury, 247 N.C. 502, 101 S.E.2d 377 (1958); Edens v. Carolina Freight Carriers Corp., 247 N.C. 391, 100 S.E.2d 878 (1957); Price v. Gray, 246 N.C. 162, 97 S.E.2d 844 (1957); Mallette v. Ideal Laundry & Dry Cleaners, Inc., 245 N.C. 652, 97 S.E.2d 245 (1957); Taylor v. Brake, 245 N.C. 553, 96 S.E.2d 686 (1957).

[57] Barnes v. Horney, 247 N.C. 495, 101 S.E.2d 315 (1958); Barbee v. Perry, 246 N.C. 538, 98 S.E.2d 794 (1957); Lane v. Bryan, 246 N.C. 108, 97 S.E.2d 411 (1957); Bridgers v. Wiggs, 245 N.C. 663, 97 S.E.2d 119 (1957); Fleming v. Twiggs, 244 N.C. 666, 94 S.E.2d 821 (1956).

[58] Bumgarner v. Southern Ry., 247 N.C. 374, 100 S.E.2d 830 (1957); Faircloth v. Atlantic Coast Line R.R., 247 N.C. 190, 100 S.E.2d 328 (1957); Irby v. Southern Ry., 246 N.C. 384, 98 S.E.2d 349 (1957).

[59] Simmons v. Rogers, 247 N.C. 340, 100 S.E.2d 849 (1957); Queen City Coach Co. v. Fultz, 246 N.C. 523, 98 S.E.2d 860 (1957); Crotts v. Overnite Transp. Co., 246 N.C. 420, 98 S.E.2d 502 (1957); Sloan v. Glenn, 245 N.C. 55, 95 S.E.2d 81 (1956).

[60] Wilson v. Webster, 247 N.C. 393, 100 S.E.2d 829 (1957); Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); Basnight v. Wilson, 245 N.C. 548, 96 S.E.2d 699 (1957); Clark v. Emerson, 245 N.C. 387, 95 S.E.2d 880 (1957); Weavil v. C. W. Myers Trading Post, Inc., 245 N.C. 106, 95 S.E.2d 533 (1956).

[61] Wise v. Lodge, 247 N.C. 250, 100 S.E.2d 677 (1957); Durham v. McLean Trucking Co., 247 N.C. 204, 100 S.E.2d 348 (1957); Robbins v. Crawford, 246 N.C. 622, 99 S.E.2d 852 (1957); Kirkman v. Baucom, 246 N.C. 510, 98 S.E.2d 922 (1957); Morgan v. Bell Bakeries, Inc., 246 N.C. 429, 98 S.E.2d 464 (1957); Hennis Freight Lines, Inc. v. Burlington Mills Corp., 246 N.C. 143, 97 S.E.2d 850 (1957); Lookabill v. Regan, 245 N.C. 500, 96 S.E.2d 421 (1957); White v. Lacey, 245 N.C. 364, 96 S.E.2d 1 (1957).

[62] Parker v. Wilson, 247 N.C. 47, 100 S.E.2d 258 (1957); Bridges v. Graham, 246 N.C. 371, 98 S.E.2d 492 (1957). These cases are considered in Evidence.

[63] Bell v. Maxwell, 246 N.C. 257, 98 S.E.2d 33 (1957); Tatem v. Tatem, 245 N.C. 587, 96 S.E.2d 725 (1957); Basnight v. Wilson, 245 N.C. 548, 96 S.E.2d 699 (1957).

were so used or consumed, was held unconstitutional as applied to the facts presented in *Putnam v. Triangle Publications, Inc.*[1] Paragraph (4) of the statute, which purported to make a foreign corporation subject to the jurisdiction of our courts for any tortious conduct it committed in North Carolina, was held valid and applied in *Painter v. Home Finance Co.*[2]

It is well established that a non-resident who comes into this state to testify is exempt from the service of civil process while he is at court or coming to or going from it. This exemption is not bottomed on statute but was well established at common law.[3] In 1937 North Carolina adopted the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings.[4] Under this statute, a state having the act may request another state to summon a resident of that state to appear as a witness in a criminal or grand jury proceeding in the demanding state. Such summons will be issued by the state receiving the request if it appears that no undue hardship will be caused and that the witness will be free from the service of either civil or criminal process while he is in the demanding state or going to or from it.

In *Thrush v. Thrush*[5] a non-resident party litigant while in North Carolina to attend a civil action was served in the civil action just named. The Court properly held that the non-resident was exempt from the service of civil process, cited the common law authority of *Winder v. Penniman,*[6] but then also cited as authority for its holding the fifth section of the above mentioned uniform act which was entirely inapplicable. In so doing the Court repeated the same sort of error that was committed in *Bangle v. Webb,*[7] also cited in the opinion.

NONSUIT

In *Cox v. Cox*[8] the Court held that a wife who has filed suit for divorce cannot take a voluntary nonsuit if the defendant husband has appeared in the action and filed a petition for custody of the child of the marriage. It is familiar law that a plaintiff will not be permitted to take a voluntary nonsuit when the defendant has filed a counterclaim arising out of the transaction set forth in the complaint.[9] The custody petition

[1] 245 N.C. 432, 96 S.E.2d 445 (1957).
[2] 245 N.C. 576, 96 S.E.2d 731 (1957). These cases and the general question of jurisdiction over foreign corporations are considered in Note, 35 N.C.L. REV. 546 (1957).
[3] Winder v. Penniman, 181 N.C. 7, 105 S.E. 884 (1921).
[4] N.C. GEN. STAT. §§ 8-65 to -70 (1953).
[5] 246 N.C. 114, 97 S.E.2d 472 (1957).
[6] 181 N.C. 7, 105 S.E. 884 (1921).
[7] 220 N.C. 423, 17 S.E.2d 613 (1941).
[8] 246 N.C. 528, 98 S.E.2d 879 (1957).
[9] Samuel H. Shearer & Son v. Herring, 189 N.C. 460, 127 S.E. 519 (1925); McLean v. McDonald, 173 N.C. 429, 92 S.E. 148 (1917).

was an effort on the part of the husband to obtain affirmative relief and the Court applied the counterclaim analogy to that petition in denying the wife the right to take a voluntary nonsuit.

In the *Cox* case, the clerk on motion of the wife entered a judgment of voluntary nonsuit. The superior court reversed and the wife appealed. The Supreme Court not only held that the clerk's action was erroneous but also held that the reversal of the nonsuit by the superior court and the retention of the case was not such a final order as would sanction an immediate appeal.[10]

Reference

It is familiar law that an order of compulsory reference should not be made in the face of an undisposed of plea in bar. It has been held that the statute of limitations is a plea in bar which must be disposed of prior to the making of a compulsory reference.[11] The theory of the Court has been that if the determination of the plea will defeat the action of the plaintiff in its entirety the reference should be held up until the merits of the plea are determined. Only if the defendant should fail in establishing the plea would it then be necessary for the trial court to consider the matters as to which compulsory reference is sought.

However, in *Solon Lodge v. Ionic Lodge*[12] the Court held that a plea of the statute of limitations would not bar a compulsory reference under the particular circumstances of the case. The action was to establish a trust in real property and so was one type of action in which a compulsory reference could be ordered under G.S. § 1-189(5). It appeared that no accounting was sought, but a specific sum was involved. To establish the trust and to defeat the plea of the statute of limitations it was necessary to rely on substantially the same evidence. Since one trial on substantially the same evidence would answer both the issue of the existence of the trust and the validity of the plea of the statute of limitations, there would be no purpose in having separate trials. In fact the reason of the rule—that the plea in bar must be first disposed of before the reference—would be defeated.

Jury-Polling

The necessity of having the record clearly indicate the answers of jurymen on a poll is illustrated in *State v. Dow*.[13] Following a verdict

[10] See Veazey v. Durham, 231 N.C. 354, 57 S.E.2d 375 (1950), for a discussion of nonappealability of interlocutory orders.

[11] Oldham v. Rieger, 145 N.C. 254, 58 S.E. 1091 (1907). See also Murchison Nat'l Bank v. Evans, 191 N.C. 535, 132 S.E. 563 (1926).

[12] 245 N.C. 281, 95 S.E.2d 921 (1957).

[13] 246 N.C. 644, 99 S.E.2d 860 (1957).

of guilty, defense counsel requested that the jury be polled. The transcript of the record shows that the court addressed the various jurors in an effort to determine if they concurred in the verdict. Answers of some of the jurors appear while the record fails to show a response or an indication of their position by other jurors. Possibly the jurors nodded in the affirmative but the record, while showing such indication as to certain jurors, is silent as to others. In granting a new trial the Court said, "[T]he record must affirmatively establish that each juror assented to the verdict entered . . . . The verdict now challenged does not, on the record, meet the test."[14]

In *North Carolina State Highway and Public Works Comm'n v. Privett*,[15] the trial court properly polled the jury. Counsel then wished to ask the jurors if they were aware of the amount of the commissioners' award when they returned their verdict. This question was held to be manifestly improper as it would tend to impeach the jurors' verdict by seeking to ascertain the grounds upon which they agreed on their verdict. It was properly ruled out by the trial court.

JUDGMENTS

Vacation of Judgments

A novel situation involving the vacation of a divorce decree after the death of the wife who obtained the decree was presented in *Patrick v. Patrick*.[16] It appeared that Mrs. Patrick filed suit for divorce on the ground of five years' separation and desertion in 1929 when Patrick was temporarily out of the state employed in Pennsylvania. Publication was had, but no actual notice of the suit was given Patrick. After obtaining the divorce Mrs. Patrick joined her "husband" in Pennsylvania. The parties then returned to North Carolina and apparently lived happily as man and wife until Mrs. Patrick's death in 1956. The first knowledge Patrick had of the divorce was when letters of administration which had been granted him on Mrs. Patrick's estate were revoked.

Within twenty-five days after learning of the divorce, Mr. Patrick made a motion in the divorce action to have the decree vacated. The trial judge granted the relief and his action was affirmed. The fact that the wife was now deceased was held immaterial. There had been a fraudulent concealment of the divorce action on the part of the wife. The method of service, instead of being designed to inform the husband, was designed to keep him in ignorance. The wife's action was a fraud both on her husband and the court. The significant statement of the Court is, "When the method of service is not intended to give notice,

[14] *Id.* at 646, 99 S.E.2d at 862.
[15] 246 N.C. 501, 99 S.E.2d 61 (1957).
[16] 245 N.C. 195, 95 S.E.2d 585 (1956).

but to conceal it, jurisdiction of the defendant is not acquired."[17] And although the Court found the statutory requisites had been met as to service by publication, "[J]urisdiction was not obtained by the method of service employed. Lack of notice denied the defendant the opportunity to appear and to defend."[18]

Res Judicata

A most significant case in the field of res judicata is *Thompson v. Lassiter*.[19] A minor son was driving his father's car with his father's permission when he became involved in a three-car accident. A passenger in one of the other cars sued the driver of the third and that driver brought in as defendants the son and the driver of the other car under the contribution statute, G.S. § 1-240. The father appeared in the litigation as guardian ad litem for his son. A jury verdict found all three drivers negligent and awarded damages to the plaintiff.

Subsequently the father sued the original defendant and sought to recover for the damages occasioned to his own car and for the medical expenses and loss of earnings of his son. The Court held that the judgment rendered in the action by the passenger was res judicata as to the right of the father to sue the driver of one of the other cars. The theory of the Court was that although the father was not individually a party to the original action, he appeared in the case as guardian ad litem, had control of the litigation, and could cross examine the various parties; therefore, he should be held bound by the result of the first suit.

In reaching this conclusion the Court was called upon to distinguish *Rabil v. Farris*,[20] in which the Court held that when a father acts as next friend in bringing an action for his child he is not estopped by an adverse judgment in the child's suit from suing individually for expenses incurred and loss of services of the child. The fact that a next friend is appointed to prosecute an action for the infant while a guardian ad litem is appointed to defend is a distinction which the Court finds substantial. But chief emphasis is placed on the fact that the father, as guardian ad litem, was in control of the defense of the cross action and "took every action he could have taken if he had been a defendant himself."[21]

Of course, the father when prosecuting his son's action as next friend would also take every action he might take in attempting to establish liability later on in his own action for expenses incurred in treating his son, etc. It is significant that in the *Rabil* case three of the justices dissented and one of them, Justice Barnhill, asked, "Why then

[17] *Id.* at 199, 95 S.E.2d at 588.
[18] *Id.* at 200, 95 S.E.2d at 588-89.
[19] 246 N.C. 34, 97 S.E.2d 492 (1957).
[20] 213 N.C. 414, 196 S.E. 321 (1938).
[21] 246 N.C. at 39, 97 S.E.2d at 497.

permit two actions contested on their merits, with respect to the same facts, merely because the damages are to be divided between the father and the infant? Under the doctrine of res judicata the father should be bound as to the determination of facts in the prior case in which he participated."[22]

It seems that greater consistency would be achieved if the Court in the *Thompson* case, instead of attempting to distinguish the *Rabil* case, had adopted the philosophy of the dissenting opinion in *Rabil* and applied the res judicata principle to both next friend and guardian at litem cases.

CONTEMPT—EFFECT OF APPEAL

In *Lawson v. Lawson*[23] the plaintiff wife obtained an order from the superior court that the defendant husband pay fees to her counsel and alimony to her pendente lite. The husband promptly appealed that order. Thereafter, while the appeal was pending, the superior court adjudged the husband in contempt for failure to comply with the order and sentenced him to imprisonment until he complied. The husband thereupon petitioned the Supreme Court for a writ of supersedeas which that Court granted. Held: the appeal divested the superior court of jurisdiction; its contempt adjudication and order of imprisonment were void and accordingly were vacated. To similar effect is *Holden v. Holden*.[24]

APPEALS—PARTY AGGRIEVED

"Any party aggrieved may appeal . . . ." This provision which is now G.S. § 1-271 has been in our statutes since 1868 and a multitude of cases have interpreted and applied the section. In *In re Application for Reassignment*[25] the Court held that an order of the Greensboro City Board of Education assigning certain negro children, on applications made by their parents, to previously all white schools could not be made the subject of appeal by parents of white children attending those schools. Neither could these white parents obtain an injunction restraining the Board of Education from enrolling and permitting the Negro children to attend the schools to which they had been assigned.

After reviewing the history of the Assignment and Enrollment of Pupils Law,[26] the Court concluded that the only party who can be aggrieved by action of a board of education in making an assignment under the statute is the child assigned or some one acting in his be-

[22] 213 N.C. at 419, 196 S.E. at 324. [23] 244 N.C. 689, 94 S.E.2d 826 (1956).
[24] 245 N.C. 1, 95 S.E.2d 118 (1956), 35 N.C.L. REV. 405 (1957).
[25] 247 N.C. 413, 101 S.E.2d 359 (1957).
[26] N.C. GEN. STAT. 115-176 to -179 (Supp. 1957). See Wettach, *North Carolina School Legislation*, 35 N.C.L. REV. 1 (1956).

half. Therefore, those parents of white children who have not themselves been denied a requested assignment are not "aggrieved parties" and hence have no right of appeal. The Court reiterated its position in *Joyner v. The McDowell County Bd. of Educ.*[27] to the effect that under the assignment law class suits are not in order but that all applications for assignment must be made individually and an appeal by an aggrieved party must also be made on an individual basis.

Attorney and Client

The case of *Bailey v. McGill*[28] points up the necessity of having the record show that the client has given express authority to his attorney to withdraw a cause of action stated in the complaint. In the absence of showing such authority, or actual consent on the part of the client, the action of the attorney in announcing at the trial that the plaintiff does not rely on a cause of action stated in the complaint will be nugatory.

While an attorney has certain implied authority, such authority is usually limited to matters of procedure. The implied authority arising out of the relationship does not confer upon the attorney the right to surrender a substantial right of his client. To announce the withdrawal or the nonreliance on a valid cause of action set up in the complaint is, as was declared by the Court, a surrender of a substantial right of the client.[29]

TRUSTS

While there were no decisions of major importance in the trusts area, the Court did establish significant precedents on several minor points.

Failure to File Bond

A successor trustee's failure to file the bond required by statute[1] does not make his appointment void, the Court held on a point of first impression in *State Trust Co. v. Toms.*[2] Applying the rule generally applicable to the original appointment of other fiduciaries from whom a bond is required,[3] the Court concluded that this was a mere irregularity

[27] 244 N.C. 164, 92 S.E.2d 795 (1956).
[28] 247 N.C. 286, 100 S.E.2d 860 (1957).
[29] See for other cases applying the rule declared in the *Bailey* case, State v. Bailey, 240 N.C. 253, 81 S.E.2d 772 (1954); Bath v. Norman, 226 N.C. 502, 39 S.E.2d 363 (1946); Bank of Glade Spring v. McEwen, 160 N.C. 414, 76 S.E. 222 (1912).

[1] N.C. Gen. Stat. § 36-17 (Supp. 1957).
[2] 244 N.C. 645, 94 S.E.2d 806 (1956).
[3] See, *e.g.*, N.C. Gen. Stat. § 28-35(1) (1950) (foreign executors), Batchelor v. Overton, 158 N.C. 395, 74 S.E. 20 (1912); N.C. Gen. Stat. § 28-34 (1950) (ad-

relating to the qualification of the trustee. Hence the original trustee's resignation and settlement with its successor,[4] made in conformity with an order of the court having jurisdiction, were valid and liability could not be imposed on the original trustee for the successor's embezzlements.

Trusts for Married Women

A trust for a married woman, created to protect her property from her husband, will terminate upon the death or divorce of the husband. This is because the trust is extinguished by the accomplishment of its object.[5] North Carolina precedent to this effect was established by *Wachovia Bank & Trust Co. v. Taliaferro.*[6] Here a testamentary trust was to continue "for that period after the death of my wife . . . during which my daughter . . . shall be married." When the will was executed the daughter had separated from her husband and was awaiting a final divorce under the five-year separation statute then in force. The Court concluded that the testator had intended to insure by this provision that the trust would not terminate before the daughter's marriage was dissolved. The final divorce was obtained prior to the death of the testator's wife; and in an action brought some years later, the Court reinforced the language of the will with the rule above stated and held that the trust should have terminated upon the wife's death.[7]

Purchase Money Resulting Trust

In an action brought to establish a purchase money resulting trust where the husband paid the purchase price and the deed named his wife as sole grantee, the Court held that evidence of his having paid taxes on the property from the time of its purchase was competent as "tending to rebut the presumption of a gift" to the wife.[8] This appears to have been a point of first impression in North Carolina. Where one pays the purchase price of property and title is put in another, nothing else appearing, equity presumes an intention to create a trust with the payor as its beneficiary.[9] However, when title is put in a close relative or the

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ministrators and collectors), *In re* Estate of Pitchi, 231 N.C. 485, 57 S.E.2d 649 (1950); N.C. Gen. Stat. § 33-12 (1950) (guardian for minor or incompetent), Howerton v. Sexton, 104 N.C. 75, 10 S.E. 148 (1889).

[4] See N.C. Gen. Stat. §§ 36-9 to -18 (1950).

[5] See 4 Bogert, Trusts and Trustees § 997 (1948); 3 Scott, Trusts § 337.5 (2d ed. 1956).

[6] 246 N.C. 121, 97 S.E.2d 776 (1957).

[7] Married women's trusts were also involved in Pilkington v. West, 246 N.C. 575, 99 S.E.2d 798 (1957), where the Court, overruling earlier decisions, held that a passive trust for the sole and separate use of a married woman will be executed by the Statute of Uses. See Note, 36 N.C.L. Rev. 255 (1958).

[8] Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957).

[9] See Van Hecke and Edwards, *Purchase Money Resulting Trusts in North Carolina,* 9 N.C.L. Rev. 177 (1930).

purchaser's wife, this presumption ordinarily changes from one of trust to gift.[10] To rebut this in the instant case the husband also showed that title had been placed in the wife by mistake, that the error was not discovered for some eighteen years, and that the wife at this time attempted to deed the property to him but her conveyance was void because of a defect in its execution.[11] Evidence of a husband's conduct after the purchase of the property would not seem to be conclusive in rebutting the presumption of gift.[12] His payment of taxes might be considered consistent with a gift. Yet, such evidence would seem to be relevant when considered with the other circumstances of the case.[13] In the instant case the husband's evidence that he paid the taxes, along with the other circumstances, was held sufficiently clear, cogent, and convincing to rebut the presumption of gift and to establish the trust.

INTENT TO CREATE TRUST

A thirty word holographic will leaving all of the testator's property "to my wife . . . to provide for my son . . . and herself" was deemed sufficient to show an intention to create a trust in *Morris v. Morris*.[14] The Court stated that in construing a will of such brevity, every expression used by the testator should be given effect, if possible. Here, testator's dominant purpose was found to be, as he stated, to provide for his wife and twelve-year-old son. From this the Court concluded that the testator had intended for his wife to be under an enforceable duty, as trustee, to deal with the property both for the benefit of the son and for herself. Accordingly, the lower court's decision that the language was merely precatory[15] and that the wife took an estate in fee simple was reversed. The Court has said that "no particular language is required to create a trust relationship if the intent to do so is evident."[16] Although the *Morris* case finds the trust intent to have been expressed in fewer words than had been used in previous holdings[17] in this area, the decision would seem to be correct.

[10] See 2A BOGERT, TRUSTS AND TRUSTEES § 459 (1948).

[11] It did not comply with the provisions of N.C. GEN. STAT. § 52-12 (1950), governing conveyances from a wife to her husband.

[12] See Parks v. Parks, 207 Ark. 720, 182 S.W.2d 470 (1944); 2A BOGERT, TRUSTS AND TRUSTEES 487 (1948).

[13] As to the types of evidence which may tend to rebut the presumption of gift, see 2A BOGERT, TRUSTS AND TRUSTEES 481-88 (1948).

[14] 246 N.C. 314, 98 S.E.2d 298 (1957).

[15] See 1 SCOTT, TRUSTS 189-202 (2d ed. 1956); 1 BOGERT, TRUSTS AND TRUSTEES § 48 (1948).

[16] Stephens v. Clark, 211 N.C. 84, 88, 189 S.E. 191, 194 (1937).

[17] See *e.g.*, Jarrell v. Dyer, 170 N.C. 177, 86 S.E. 1031 (1915) (where testatrix devised all of her property "to my mother . . . that she may administer it to the use of my children," the mother was held to be trustee for the children); Crudup v. Holding, 118 N.C. 222, 24 S.E. 7 (1896) (devise of testator's property to his wife "to keep and to hold together for her use and the use of my children" made

RULE AGAINST EXCESSIVE DURATION OF PRIVATE TRUSTS

Language used by the Court in *Finch v. Honeycutt*[18] may reopen the possibility that a private trust, even though all interests are presently vested, might be held invalid because full enjoyment of the trust property in fee is postponed for an excessive period of time. This would be accomplished, if at all, through the application of the disputed "rule against excessive duration of private trusts,"[19] a doctrine of American origin closely related to the Rule Against Perpetuities. Stated generally, the rule against excessive duration provides that a private trust may not be limited to continue beyond a period which might exceed a life or lives in being and twenty-one years thereafter.[20] In the *Finch* case the Court held valid a trust for testator's three children (ages seven, three, and one-and-one-half at the time of his death) in which he had provided for distribution of specified portions of his estate to them free from the trust in 1980 and 1992 and the balance in 2005. The Court held that such a trust did not violate the Rule Against Perpetuities as the interests of the children were presently vested; only the full enjoyment was postponed. The Rule is concerned wholly with the vesting of estates, not with their enjoyment or possession. But, the Court then added:

> Even though the postponements here ultimately invade the Twenty-first Century, reference to the ages of the children indicates that the postponements are within the life or lives of the beneficiaries in being and twenty-one years and ten lunar months thereafter, the limitation of the Rule against Perpetuities.[21]

The significance of this language is not clear. However, it would seem to imply that under a different factual situation the Court might strike down an otherwise valid trust because full enjoyment of the fee is postponed for a period which might exceed that of the Rule Against Perpetuities. The Court seems to be saying that because of the youth of the children it has concluded that the distributions will probably be made within their normal life spans and twenty-one years thereafter. Unanswered is the question of what the Court would have

wife trustee for herself and the children); Young v. Young, 68 N.C. 309 (1873) (devise of estate to wife "to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them, in the manner she may think best for their good and for their own happiness" made wife trustee for herself and children).

[18] 246 N.C. 91, 97 S.E.2d 478 (1957).

[19] See 1 SCOTT, TRUSTS § 62.10 (2d. ed. 1956); 1A BOGERT, TRUSTS AND TRUSTEES § 218 (1948); 3 SIMES AND SMITH, FUTURE INTERESTS § 1391 (1956); Note, 27 N.C.L. REV. 158 (1948).

[20] 3 SIMES AND SMITH, FUTURE INTERESTS 240 (1956) (the authors describe the rule as a "doctrine toward which the courts are tending"). In 1A BOGERT, TRUSTS AND TRUSTEES 409 (1948), it is said, "If there is such a rule, it is a rule that a grantor may not postpone direct enjoyment of property for too long a time."

[21] 246 N.C. at 100, 97 S.E.2d at 485.

said and done had the beneficiaries been so much older that it appeared unlikely that the distributions would be made within their lives and twenty-one years.

The Court has in two earlier cases[22] indicated that the Rule Against Perpetuities limits the duration of private trusts. However, these assertions were repudiated in *McQueen v. Branch Banking & Trust Co.*,[23] where the Court stated that the Rule was only concerned with the vesting of estates and not with the duration of the vested private trust. The distribution in fee in that case was to be made to the income beneficiaries in twenty-five years.

WILLS

ADMINISTRATION

Parties

G.S. § 28-6(*b*) provides that upon renouncement of the right to qualify as administrator the renouncing party may nominate in writing some other qualified person to be named administrator without losing his priority under G.S. § 28-6(*a*). Since G.S. § 28-6(*b*) leaves the qualification of the nominee within the discretion of the clerk, upon rejection the nominee ordinarily lacks sufficient interest in the estate to challenge the issuance of letters of administration to another. It was so held in *In re Cogdill*.[1] Unless the nominee can show as a matter of law that the clerk abused his discretion, only those persons who are allowed the privilege of nominating under G.S. § 28-6(*a*) have sufficient interest to challenge the appointment of another by proceeding under G.S. § 28-32.

Upon death, title to personal property vests in the decedent's executor, or administrator for purposes of administration. It is generally true that upon proper distribution personal property ceases to belong to the decedent's estate. Absent any trust proviso imposing duties upon the executor, he loses all control over the property and becomes *functus officio* in regard thereto.[2]

In *Darden v. Boyette*[3] *T* devised all his personal property to his wife "for and during her natural life . . . with full power to dispose of the same by deed or will in fee simple" and upon her death "if there

[22] Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949), 48 MICH. L. REV. 235 (1949); American Trust Co. v. Williamson, 228 N.C. 458, 46 S.E.2d 104 (1948), 27 N.C.L. REV. 158 (1948).
[23] 234 N.C. 737, 68 S.E.2d 831 (1952).

[1] 246 N.C. 602, 99 S.E.2d 785 (1957).
[2] McKay v. Guirkin, 102 N.C. 21, 8 S.E. 776 (1889).
[3] 247 N.C. 26, 100 S.E.2d 359 (1957).

shall be any of said property . . . left undisposed of by my said wife during her lifetime, the same shall . . . be divided among my then heirs at law, *per stirpes* and not *per capita.*" *T*'s wife, having been appointed executrix, distributed all such property to herself as life tenant pursuant to *T*'s will and after payment of all debts and funeral expenses terminated the administration by filing her final account with the proper authorities. Thereafter she died without having disposed of the property. The plaintiff, subsequently appointed administrator *c.t.a.* of *T*'s estate, sought to recover possession of it.

The Court held that, since *T*'s will had not imposed any trust proviso on his estate, upon distribution of the property to the life tenant the property inured to the benefit of the remaindermen. Therefore, since the property was not subject to further administration, the plaintiff could not qualify under G.S. § 1-57 as the real party in interest. This leaves the remaindermen responsible for their own interests. This seems to be in accord with prior North Carolina law.[4]

Construction

In *Wachovia Bank and Trust Co. v. Wolf*[5] *T*'s will, after providing for certain bequests to specified charities, stated: "To my sister Mrs. Camille H. Wolfe, I leave my furniture, household effects and personal property. The balance of my estate I leave to the National Red Cross society of America." The will failed to mention some $21,827.20 in cash and securities to which both *T*'s sister and the Red Cross asserted claims. The Court in view of the particular circumstances involved concluded that *T* intended "personal property" to include only such property as "tangible articles of household and personal use." Therefore the cash and securities passed under the terms of the will to the National Red Cross.

In *Finch v. Honeycutt*[6] the Court after stating there was a presumption against intestacy applied the doctrine of devise by implication in construing testator's will.

In *Matheson v. American Trust Co.*[7] *T* established a testamentary trust with income to be paid to a brother and wife (not specifically naming the brother's wife) in equal shares and "should either of them die before the termination of this trust, said trustees shall pay the whole of said income to the survivor of them during the lifetime of such

[4] See McKay v. Guirkin, 102 N.C. 21, 8 S.E. 776 (1889).

[5] 245 N.C. 535, 96 S.E.2d 690 (1957). This case was previously reported in 243 N.C. 469, 91 S.E.2d 246 (1956), and discussed in 35 N.C.L. Rev. 167, and *Fourth Annual Survey of North Carolina Case Law,* 35 N.C.L. Rev. 177, 268 (1957).

[6] 246 N.C. 91, 97 S.E.2d 498 (1957), 36 N.C.L. Rev. 365 (1958).

[7] 246 N.C. 710, 100 S.E.2d 77 (1957).

survivor." The brother remarried after *T*'s death and was survived by his second wife, his first wife having previously died. The Court held that the brother's second wife was not entitled to receive any part of the trust income under the class gift theory since wives do not generally constitute a class.

WIDOW'S DISSENT

G.S. § 30-1 allows a widow six months after probate in which to dissent from her husband's will. In *Whitted v. Wade*[8] the wife was adjudged mentally incompetent before her husband's death, the condition later proving to be permanent. A guardian *ad litem* was not appointed for the widow until after the expiration of the six month period. After his appointment the guardian promptly filed the widow's dissent. G.S. § 30-1 was again held to be a statute of limitations and not an enabling act.[9] Consequently G.S. § 1-17 which tolls the statutes of limitations until the disability is removed and for three years thereafter, was deemed to be applicable. Therefore, the widow's dissent was filed within due time.

DESCENT AND DISTRIBUTION

G.S. § 33-32 states in part:

> "[I]n all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and *shall descend and be distributed, as by law the property sold might and would have been had it not been sold,* until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper." (Emphasis added.)

Brown v. Cowper[10] is a case of first impression in North Carolina. The Court was twice presented with the issue of "breaking the descent" in ancestral property.[11] G.S. § 33-32 does not explicitly cover situations where realty is exchanged for realty. However, the Court held

[8] *247* N.C. 81, 100 S.E.2d 263 (1957). See Note, 35 N.C.L. REV. 520 (1957).
[9] Hinton v. Hinton, 61 N.C. 410 (1868).
[10] *247* N.C. 1, 100 S.E.2d 305 (1957).
[11] North Carolina distinguishes ancestral and nonancestral property. If an intestate owns land which has been obtained from his ancestor by gift, devise, descent, or settlement and he dies without leaving lineal descendants, the land descends to his collateral heirs who are of the ancestor's blood; N.C. GEN. STAT. § 29-1(4) (1950); McCall and Langston, *A New Intestate Succession Statute for North Carolina,* 11 N.C.L. REV. 266, 279 (1933); Comment, 42 YALE L.J. 101 (1933). But if the intestate purchased the land for a valuable consideration from his ancestor, the land will descend as nonancestral property to his collateral heirs in general. This is called breaking the descent. See Jones v. Jones, 227 N.C. 424, 42 S.E.2d 620 (1947); *Ex parte* Barefoot, 201 N.C. 393, 160 S.E. 365 (1931).

that where real property of an incompetent was exchanged for other realty, the land received by the incompetent was subject to the ancestral characteristics of the land exchanged therefor, since such was within the "purpose and intent" of G.S. § 33-32. The case also presented the issue of whether or not a sale and repurchase by the incompetent would break the line of descent. The incompetent's land was sold under court order. The purchaser executed notes secured by a deed of trust. Upon default the land was re-purchased for the incompetent. Once again the Court held that there was no "breaking of the descent" since this situation also fell within the purport of the statute.

PROBATE

G.S. § 31-19 provides that a "record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal." In *Morris v. Morris*[12] the Court construed this statute to the effect that an order of probate is to be considered conclusive only when it is regular on its face. Therefore, in a proceeding under the Declaratory Judgment Act for the construction of a holographic will where the order of probate indicated that only two persons proved the execution thereof instead of the three required by G.S. § 31-18.2, the order was held to be fatally defective.

[12] 245 N.C. 30, 95 S.E.2d 110 (1956).