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A SURVEY OF THE DECISIONS OF THE NORTH CAROLINA SUPREME COURT FOR THE SPRING AND FALL TERMS OF 1953*

In response to requests from members of the practicing Bar, the *North Carolina Law Review* has undertaken for the first time a survey of the opinions of the North Carolina Supreme Court over the past year. The survey is designed to discuss all of the cases regarded as being of significance and interest to those concerned with the work of the Court and to highlight those decisions which reflect substantial changes and matters of first impression in the law of North Carolina. Appropriate references will appear to those cases which have already been the subject of comment in articles or student notes in this *Law Review*.

Most of the research and writing of this project was accomplished by the student editors and selected student members of the *Law Review* staff working under the supervision of the faculty of the Law School of the University of North Carolina. Some sections, however, represent the individual work of a faculty member.

Student members of the *Law Review* staff and the sections for which they are responsible are:

Joseph P. Hennessee (Damages, Evidence and Trial Practice), John V. Hunter, III (Courts, Equity and Trusts), Durward S. Jones (Civil Procedure), Peter G. Kalogridis (Torts), Frances Jeanne Owen (Administrative Law, Credits and Sales), Lucius W. Pullen (Future Interests, Real Property and Wills and Administration), Thomas W. Steed, Jr. (Conflict of Laws, Constitutional Law and Taxation), Thomas L. Young (Agency and Workmen's Compensation, Contracts and Insurance).

Throughout this article the North Carolina Supreme Court will be referred to as the "Court" unless it appears in its full title. The United States Supreme Court will be designated only by its full name.

ADMINISTRATIVE LAW

ADMINISTRATIVE REGULATIONS

In a number of cases administrative regulations were held to be invalid because they were in violation of the terms of the statute involved.

* The period covered embraces those decisions of the North Carolina Supreme Court as reported in 237 N. C. 159 through 239 N. C. 435.

In *Bryant v. Barber*¹ the plaintiff brought an action to restrain defendants from operating buses to Camp Lejeune in violation of the Bus Act of 1949.² Under this act only the holder of a certificate or permit from the Utilities Commission may legally engage in transportation of intrastate passengers unless such party is exempt from regulation by the express terms of the act. The act exempts "transportation of passengers for or under the control of the United States Government, . . ." An administrative ruling of the Utilities Commission interpreted this as exempting persons engaged in transporting civilian employees to and from the marine base at Camp Lejeune. The plaintiff was operating as a contract carrier under a permit issued by the Utilities Commission authorizing him to transport passengers from designated points to and from Camp Lejeune. Defendants, after the administrative ruling, began the operation of buses along the same route under a certificate of exemption from the Utilities Commission. The Supreme Court in affirming a temporary restraining order by the lower court against the defendants held that the administrative ruling was based on an erroneous interpretation of the statutory exemption above quoted and that the defendants therefore were not authorized to carry passengers. The Court construed the quoted provision to authorize the exemption only of carriers procured by the United States government to carry passengers for it or the transportation of passengers by vehicles under the control of the United States.

In *State ex rel. Utilities Commission v. Fox*,³ Fox prior to the North Carolina Truck Act of 1947⁴ had operated as an irregular route common carrier and had interchanged interstate but not intrastate freight with interstate carriers. After the passage of the Truck Act Fox received a certificate from the Utilities Commission under the "grandfather" clause of the act which provided that those carriers operating as bona fide common carriers prior to the act should be issued a certificate to continue operations in which they were then engaged without requiring proof of public convenience and necessity. He also received from the Interstate Commerce Commission a certificate authorizing him to interchange freight with common carriers in interstate commerce subject to the approval of the North Carolina Utilities Commission. After this the Utilities Commission adopted a rule which prohibited the interchanging of freight between an intrastate regular route common carrier and an intrastate irregular route common carrier except after approval of the Commission. The Interstate Com-

¹ 237 N. C. 480, 75 S. E. 2d 410 (1953).

² N. C. GEN. STAT. §§ 62-121.43 through 62-121.79 (1950).

³ 239 N. C. 253, 79 S. E. 2d 391 (1954).

⁴ N. C. GEN. STAT. §§ 62-121.5 through 62-121.42 (1950).

merce Commission notified Fox that he could conduct operations in interstate commerce only to the extent permitted in intrastate commerce by his state certificate. The Utilities Commission denied him permission to interchange intrastate traffic with other carriers because he had never interchanged such traffic and did not now intend to. The effect was to deny him the right to interchange interstate commerce as he had done prior to 1947. The North Carolina Supreme Court held that Fox was entitled as a matter of right to the certificate under the "grandfather" clause and the Utilities Commission had no power to promulgate a rule which had the effect of denying the exercise of rights which the Legislature in clear and express terms preserved to carriers operating prior to 1947. The Court said that if Fox must have permission of the Commission to interchange freight with other intrastate carriers, whether he intends to exercise such right or not, in order to retain his right to interchange freight with interstate carriers, he is entitled to such permission.

In the case of *In re Blue Bird Taxi Co.*⁵ the owner of taxicabs attacked as excessive certain rates for liability insurance established by an experience rating plan promulgated by the North Carolina Automobile Rate Administrative Office and approved by the Commissioner of Insurance. The Administrative Office is empowered by statute⁶ "to encourage safety on the highways and streets of the State, by offering reduced premium rates under a uniform system of experience rating as may be approved by the Commissioner of Insurance." The Administrative Office established an experience rating plan for a class of taxicabs under which owners having a bad experience were charged more than the basic rate. Under this plan the petitioner, which had proved to be a worse than average risk, was charged fifty-two per cent more than the basic rates. The Court invalidated this extra charge on the ground that when the statute granted authority to encourage safety by offering *reduced* premium rates, this impliedly excluded encouraging safety by increasing premium rates. This statute was amended after this decision to permit increases as well as decreases and to validate experience rating plans in use prior to the effective date of the amendment.⁷

MANDAMUS

In *Baker v. Varser*⁸ an applicant after hearing before the Board of Law Examiners had been denied permission by the Board to take the bar examination on the ground that he not been a resident of North

⁵ 237 N. C. 373, 75 S. E. 2d 156 (1953).

⁶ N. C. GEN. STAT. §§ 58-246(b) (1950).

⁷ N. C. GEN. STAT. §§ 58-246(b) and 58-248.7 (1953 Supp.).

⁸ 239 N. C. 180, 79 S. E. 2d 757 (1954).

Carolina for one year. The applicant then petitioned for mandamus and obtained an order issued by a judge of the superior court that the Board permit the applicant to take the examination. The Supreme Court indicated that the applicant had a right to be heard on the question of whether the Board properly interpreted the meaning of the term "residence" but held that the proper method of review was by writ of certiorari and not by mandamus. The action was not dismissed but remanded to the superior court for further consideration, the complaint to be considered as an application to the superior court for a writ of certiorari.

In *St. George v. Hanson*,⁹ the applicant after being denied a pilot's license by the Board of Commissioners of Navigation and Pilotage for the Cape Fear River and Bar had applied to the superior court for a writ of mandamus ordering the Board to issue such a license. The superior court found that the license had been denied as a matter of the Board's discretion and refused to issue a writ. The Supreme Court affirmed, holding that mandamus could not be invoked to control the exercise of discretion of an administrative board when the act complained of was judicial or quasi-judicial unless it clearly appeared that there has been an abuse of discretion.

EVIDENCE TO SUPPORT FINDINGS

Several cases reaffirmed the well-established rule that if the administrative agency's findings of fact are supported by competent evidence, such findings are conclusive on appeal.¹⁰

A somewhat different question as to evidence arose in *Winesett v. Scheidt*¹¹ in which the Court held that the Department of Motor Vehicles had exceeded the authority granted it by statute to revoke a motor vehicle operator's license when it revoked a license upon evidence of a plea of *nolo contendere* in the superior court on a charge of drunken driving, since such a plea is not "satisfactory evidence" of the commission of the offense as required by the statute under which the Department suspended the license.¹²

⁹ 239 N. C. 259, 79 S. E. 2d 885 (1954).

¹⁰ *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. 2d 220 (1953); *State ex rel. Employment Security Commission v. Coe*, 239 N. C. 84, 79 S. E. 2d 177 (1953) (also held that the findings of fact by the Commission supported its conclusions of law); *State ex rel. Utilities Commission v. Atlantic Coast Line R. R.*, 238 N. C. 701, 78 S. E. 2d 780 (1953).

¹¹ 239 N. C. 190, 79 S. E. 2d 501 (1954), 32 N. C. L. REV. 549 (1954).

¹² N. C. GEN. STAT. § 20-16 (1953).

AGENCY AND WORKMEN'S COMPENSATION¹

AGENCY

Proof of Agency under Nonresident Motorist Statute

The Nonresident Motorist Statute² provides for constructive service of process on nonresident motorists in actions growing out of accidents and collisions on North Carolina Highways by service on the Commissioner of Motor Vehicles. In an early decision³ involving this statute the Supreme Court held there must be sufficient evidence to support a finding that the vehicle was operated by the nonresident defendant or under his "control or direction, express or implied."

This proposition was reaffirmed in *Winbourne v. Stokes*,⁴ but the Court was careful to point out that the trial court's finding that a vehicle was operated under the control and direction of the nonresident defendant⁵ in order to determine the preliminary question of service of process "does not preclude the defendants on the hearing from alleging as a defense . . . that Wm. C. Dail who was driving the defendants' automobile at the time of the fatal collision was not acting within the scope of his agency or employment. . . ."⁶

Statutory Presumption of Agency

The probative force of the statutory presumptions created by G. S. § 20-71.1⁷ was considered in three cases. That section of the Motor

¹ Several cases which otherwise would be discussed in this study have been treated elsewhere in this publication and consequently will not be repeated. *Hawkins v. M & J Finance Corp.*, 238 N. C. 174, 77 S. E. 2d 669 (1953), 32 N. C. L. Rev. 545 (1953-54) (Where the owner of a motor vehicle delivered the same to a dealer for sale along with certificates of title executed blank as to assignee, and the dealer representing himself to be the owner by exhibiting the title certificates mortgaged the vehicle instead of selling it, it was held that an agent authorized to sell property has no implied authority to mortgage the property.); *Williams v. Randolph Hospital, Inc.*, 237 N. C. 387, 75 S. E. 2d 303 (1953), 32 N. C. L. Rev. 129 (1953-54) (Where a charitably maintained hospital was held not liable for the negligence of its servants provided it used due care in selection, even to a paying patient.); *Hinkle v. City of Lexington*, 239 N. C. 105 (1953), 79 S. E. 2d 220 (1953); 32 N. C. L. Rev. 373 (1953-54). (Involving the question of whether an injury arose out of and in the course of employment as to be compensable)

² N. C. GEN. STAT. § 1-105 (1953).

³ *Smith v. Haughton*, 206 N. C. 587, 174 S. E. 506 (1934).

⁴ 238 N. C. 414, 78 S. E. 2d 171 (1953).

⁵ The trial court found as facts on the basis of affidavits: that the driver of defendants' car was hired as a traveling salesman with a territory in Virginia; that the accident occurred on an ordinary business day on a public highway route between the driver's territory in Virginia and the home office of defendants in South Carolina; that the driver was not authorized to be traveling in North Carolina at the time of the accident; that the driver's mother was expecting him for dinner the evening of the accident at her home in North Carolina south of where the accident occurred and on the route to the home office; that at the time of the accident the car contained a substantial quantity of goods and selling supplies used by the driver in his activities as salesman.

⁶ *Winbourne v. Stokes*, 238 N. C. 414, 418, 78 S. E. 2d 171, 174 (1953).

⁷ N. C. GEN. STAT. § 20-71.1 (1953).

Vehicle Act provides that in all actions to recover damages arising out of a motor vehicle accident proof of ownership of the vehicle involved shall be prima facie evidence that it was being operated at the time of the accident with the authority, consent and knowledge of the owner and that proof of registration of a motor vehicle is prima facie evidence of ownership and that the vehicle was being operated by or under the control of a person for whose conduct the owner was legally responsible.

In *Travis v. Duckworth*⁸ the Court held that the presumption raised by proof of ownership of a vehicle is sufficient to carry a case to the jury on the question of respondeat superior even though there is not only a complete lack of evidence establishing that the driver was acting in the scope of his employment, but evidence clearly indicating a deviation from such employment. Therefore, the defendant's motion for nonsuit was correctly denied but he was entitled to have the court instruct the jury that if they believed the evidence on the question of agency they should find for the defendant.⁹

In two other cases, however, the Court emphasized that it is still necessary for the party aggrieved to plead and prove both negligence and agency to recover in those cases where the statutory presumption is relied upon to carry the question of agency to the jury.¹⁰ The act only establishes a rule of evidence intended to facilitate proof of ownership and agency in motor vehicle collision cases and is not designed to render proof unnecessary. Furthermore, the presumption is directed solely to the question of agency; it does not make out a prima facie case or support a finding on the issue of negligence.

⁸ 237 N. C. 471, 75 S. E. 2d 309 (1953).

⁹ The evidence disclosed that the driver of the vehicle involved in the accident, a tractor-trailer combination, parked his trailer in Charlotte and started out on a seventy-five mile side trip to his home in Morganton. It was en route to Morganton that the accident out of which this cause of action arose occurred. The Court said: "The evidence seems clearly to indicate such a deviation from the scope of the driver's employment . . . as should relieve the latter (employer) from liability for a tort committed by the employee while on this errand. . . . There was no evidence competent against Bowman (employer) to show that Bowman had given permission or knew of Duckworth's driving the tractor. . . ." (Parenthesis added.) *Travis v. Duckworth*, 237 N. C. 471, 474, 75 S. E. 2d 309, 311 (1953).

¹⁰ *Parker v. Underwood*, 239 N. C. 308, 79 S. E. 2d 765 (1954); *Hartley v. Smith*, 239 N. C. 170, 79 S. E. 2d 767 (1954). In the *Parker* case the complaint contained allegations that the defendant's truck was being driven by his son "with the express consent, knowledge and authority of the defendant." The Court upheld a demurrer to the complaint in that there was no "allegation that connects the driver of the motor vehicle in question at the time of the collision in question with said Thomas Hugh Underwood (defendant) as servant, agent or employee acting within the scope of his employment." The Court said that "the appellee contends, and properly so, that the provisions of this statute (G. S. § 20-71.1) are a rule of evidence, *S. v. Scoggin*, 236 N. C. 19, 72 S. E. 2d 54, and do not relieve the plaintiff of alleging the ultimate facts on which to base a cause of actionable negligence."

Liability Imposed by Public Policy

In *Newsome v. Surratt*¹¹ liability was imposed on an interstate franchise carrier for the negligent operation of a leased truck which was being driven at the time of the accident by an employee of the lessor. Despite the fact that the lessee motor line did not participate in the negligent act, the Court held that the duty to protect the public is legally nondelegable and that public policy demands that franchise holders be "responsible for those who are permitted to act under such franchise, even though such persons are independent contractors."¹² However, the Court did allow the motor line indemnity from the lessor and driver.¹³

WORKMEN'S COMPENSATION

"Arising out of" and "In the Course" of Employment

The North Carolina Court has repeatedly held the phrases "arising out of" and "in the course of" as used in Section 97-2(f) of the Workmen's Compensation Act¹⁴ are not synonymous but involved two ideas and impose a double condition on recovery under the Act.¹⁵ The same proposition was reiterated twice during the past term of court.¹⁶

*Sweatt v. Rutherford County Board of Education*¹⁷ was a proceeding under the Act, as applied to employees paid from state school funds by the School Machinery Act,¹⁸ to recover compensation for the death of an employee by his widow. The decedent was employed both by the defendant Board as principal of a public high school and by a private orphanage as superintendent. Decedent's entire salary was paid by the State Board of Education for his services as principal of the school. On the evening of his death, the decedent had reprimanded an inmate of the orphanage, who was also a student in the high school, for violation of an orphanage regulation. Thereafter, while the decedent was in his office at the school performing duties as principal, the inmate, highly angered by the reprimand, shot and killed him.

The Industrial Commission awarded compensation under the Act

¹¹ 237 N. C. 297, 74 S. E. 2d 732 (1953).

¹² *Newsome v. Surratt*, Porter and Jocie Motor Lines, Inc., 237 N. C. 297, 301, 74 S. E. 2d 732, 735 (1953). *Accord*, Brown v. L. H. Bottoms Truck Lines, Inc., 227 N. C. 299, 42 S. E. 2d 71 (1947).

¹³ *Newsome v. Surratt*, Porter and Jocie Motor Lines, Inc., 237 N. C. 297, 302, 74 S. E. 2d 732, 736 (1953).

¹⁴ N. C. GEN. STAT. §§ 97-1 *et seq.* (1950).

¹⁵ For a comprehensive collection of cases so holding, see the annotations to N. C. GEN. STAT. § 97-2(f) (1950) and the N. C. WORKMEN'S COMPENSATION ACT ANNOTATED § 97-2(f) (1952).

¹⁶ *Hinkle v. City of Lexington*, 239 N. C. 105, 79 S. E. 2d 220 (1953); *Sweatt v. Rutherford County Board of Education*, 237 N. C. 653, 75 S. E. 2d 738 (1953). For discussion of the *Hinkle* case see p. 373 *supra*.

¹⁷ 237 N. C. 653 (1953).

¹⁸ N. C. GEN. STAT. § 115-370 (1952).

and the superior court affirmed. On appeal, however, the Supreme Court reversed, holding that the Commission erred in finding that the injury "arose out of" the employee's duties as principal of the high school.

The Court pointed out that "arising out of" refers to the cause or origin of the accident while "in the course of" relates to the time, place and circumstances under which the injury occurs. Therefore, the Commission was correct in finding that the injury was "in the course of" the decedent's duties as principal of the school, since it occurred in his office while he was performing his duties as principal, but it was not justified in finding the injury to be one "arising out of" the employment, inasmuch as the shooting grew out of and was caused by the reprimand of the inmate of the orphanage for an orphanage offense, an administrative duty of the decedent as an employee of the orphanage.¹⁹

Limitation on the Right to File Claims

Although G. S. § 97-24 allows injured employees only one year from the time of an accident in which to file claims for compensation with the Industrial Commission, the plaintiff-employee in *Biddix v. Rex Mills, Inc.*²⁰ gave two reasons for contending that his claim was not barred when filed one year and three months after he was injured. The plaintiff argued that since his employer had paid his hospital and medical bills for five months following the accident that the provision in G. S. § 97-47²¹ which gives the right to file for review of any award within one year from the date of the last payment of medical bills was applicable and that, in any event, his employer's payment of the hospital and medical bills and failure to deny liability constituted a waiver of the one year limitation in which to file claims.

These arguments were accepted by both the full Commission and the superior court but the Supreme Court held that the claim was filed too late. G. S. § 97-47 pertains only to the filing of petitions for review of awards already granted, explained the Court, and has no application to the limitation on the time to file original claims prescribed by G. S. § 97-24. And while the Court expressly declined to hold that the provision relating to filing of claims could not be waived,²² it held that the contention of waiver was untenable in this case.

¹⁹ Cf., *Gowens v. Alamance County*, 214 N. C. 18, 197 S. E. 538 (1938).

²⁰ 237 N. C. 660, 75 S. E. 2d 777 (1953).

²¹ N. C. GEN. STAT. § 97-47 (1950) gives the right to any party in interest to file for review of any award within one year from the date of the last payment of the award or the last payment of medical or other treatment bills under an award, on the grounds of a change in condition.

²² Cf., *Wilson v. E. H. Clement Co.*, 207 N. C. 541, 177 S. E. 797 (1934), where the Court declined to decide whether the provisions of G. S. § 97-24 constituted a statute of limitations which could be waived or a condition precedent to bringing of claim for compensation. For a collection of cases construing

"Widow" and "Dependents" within Meaning of Act

In a decision soon after the enactment of the Workmen's Compensation Act, the Court considered an appeal which in the trial court stage involved the right to compensation of a woman who had been living with the deceased employee as his common law wife.²³ The Commission denied her compensation, holding that she was not a widow of the decedent since common law marriages are not valid in North Carolina.²⁴ That portion of the Commission's decision was not appealed from and the decision of the Supreme Court involved an entirely different matter. However, the headnotes to that decision erroneously indicated that the Supreme Court had agreed with the Commission.

The Court referred to this error in a recent case.²⁵ Here again the case involved the claim of a woman who had been living with the deceased employee as his wife without the embellishments of marriage. However, the claimant did not assert any rights as widow of the employee, but attempted to qualify for compensation as a dependent under G. S. § 97-39. That section provides that widows, widowers and children shall be conclusively presumed to be wholly dependent, and that "in all other cases," questions of dependency shall be determined according to the facts of the particular case at the time of the accident. It was the contention of the claimant that she was such an "other" case as to have her dependence determined under this section.

The Court refused this contention, pointing out that by implication from the reading of G. S. § 97-2(1), (m), (n) and (o)²⁶ and G. S. § 97-40,²⁷ the intent of the Legislature must have been to provide compensation only to those persons whom the deceased employee was under a legal or moral obligation to support, which status the common law wife does not enjoy in North Carolina.

In so refusing compensation the Court stated:

Manifestly, a woman living in cohabitation with a man, to whom she is not married, is not within the purview of the term 'in all

G. S. § 97-24 see N. C. WORKMEN'S COMPENSATION ACT ANNOTATED § 97-24 (1952).

²³ Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66 (1930).

²⁴ Reeves v. Parker-Graham-Sexton, Inc., 1 I. C. 277 (1930); *aff'd*, 199 N. C. 236, 154 S. E. 66.

²⁵ Fields v. Hollowell & Hollowell, 238 N. C. 614, 78 S. E. 2d 740 (1953).

²⁶ N. C. GEN. STAT. § 97-2(1),(m),(n),(o) (1950) defines various terms denoting familial relations including those persons generally considered to be in the class known as dependents. In defining "widow" the statute refers generally to "the decedent's wife" but does not specify "legal wife." That limitation has apparently been read into the statute by numerous decisions of the Industrial Commission. See, NORTH CAROLINA WORKMEN'S COMPENSATION ACT ANNOTATED § 97-2(n) (1952).

²⁷ N. C. GEN. STAT. § 97-40 (1950) provides for payment of compensation to next of kin in the absence of dependents.

other cases' To ascribe to the General Assembly of North Carolina an intention by implication to make of that class a compensable dependency is not accordant with the sound public policy established by the North Carolina Workmen's Compensation Act.²⁸

Thus the question of whether a common law wife can ever qualify for compensation as widow has not been expressly answered by the Court. However, on the basis of the Court's strong statement on public policy and legislative intent, it seems that a recovery by a common law wife is very unlikely.

Indemnity Against Joint Tort-feasor

In another decision involving the Workmen's Compensation Act, *Hunsucker v. High Point Bending & Chair Co.*,²⁹ the question was whether a passively negligent third party tort-feasor could get indemnity over against the actively negligent employer, in the employee's suit against the third party. The Court held that he could not.

CIVIL PROCEDURE

PLEADINGS

Alleging Ultimate Facts

Only the ultimate facts upon which the plaintiff's rights depends should be alleged, and not legal conclusions, or those evidentiary facts that will be required to prove the proper allegations.¹

This principle is clear enough in its statement, but most difficult to apply. And again last year the Court was called upon several times to decide whether or not pleadings were proper in this particular. Any attempt to explain, reconcile, or distinguish the decisions would be futile and serve no useful purpose. Suffice it here to point out the situations in which the problem arose.

*Foster v. Holt*² evolved from an auto collision; defendant denied ownership of the car, and plaintiff replied alleging that defendant did own the car, that he had taken out collision and liability insurance on it. The Court affirmed the allowance of defendant's motion to strike all reference to the insurance. *Foust v. City of Durham*³ is a result of defendant's water main bursting; plaintiff alleged that de-

²⁸ *Fields v. Hollowell & Hollowell*, 238 N. C. 614, 618-620, 78 S. E. 2d 740, 743-744 (1953).

²⁹ 237 N. C. 559, 75 S. E. 2d 768 (1953). For a full discussion of this decision see Civil Procedure section of this Survey at page 401.

¹ *Parker v. White*, 237 N. C. 607, 75 S. E. 2d 615 (1953); *Guy v. Baer*, 234 N. C. 276, 67 S. E. 2d 47 (1951).

² 237 N. C. 495, 75 S. E. 2d 319 (1953).

³ 239 N. C. 306, 79 S. E. 2d 519 (1954).

defendant owned and operated the water works in its proprietary capacity; defendant contended this was a mere conclusion. The overruling of defendant's demurrer was affirmed. *Newton v. Highway Commission*⁴ involved the taking of land for public highway use without just compensation. The petitioner alleged that the cracks in their land were caused by a displacement of an embankment, which was caused by the construction of the highway, and that the resulting damage constitutes a taking of property. The Court said these were legal conclusions not admitted by the demurrer.

Alleging Negligence and Contributory Negligence

This problem of how much detail pleadings should contain in order to state a cause of action or defense is frequently troublesome in the area of negligence and contributory negligence. However, there appears to be little question, if any, that merely calling an event the result of negligence on the part of the defendant, or alleging that it was caused by the plaintiff's own negligence is insufficient.

Thus, in *Shives v. Sample*⁵ the Court found that the complaint did not state a cause of action. Here plaintiff was employed by the defendant and was engaged in hauling and unloading stone and gravel on a stock pile. The plaintiff proceeded on the theory that defendant was negligent in not furnishing a safe place to work, alleging that the stock pile caved in with him and that the defendant was negligent in that he knew or reasonably should have known that it was hollow. The Court said that negligence itself is not a fact but the legal result of certain facts, and that the matter here pleaded is a conclusion of the pleader to be disregarded. No facts were alleged to show how or when the pile became hollow.

Similarly the defendant's attempt to set up contributory negligence as a bar to plaintiff's wrongful death action in *Darden v. Leemaster*⁶ was inadequate. The plea was merely that the death of the intestate was caused solely by his own negligence and without any negligence on the part of defendant. The Court said that a sufficient plea of contributory negligence must contain facts from which negligence may be concluded.

The line drawn in the two preceding cases is neither new nor hazy. There were merely conclusions without facts. But the line blurs in many cases where facts are pleaded to raise contributory negligence and it becomes necessary, in view of the evidence, to determine whether or not they were pleaded specifically enough. The Supreme Court in

⁴ 239 N. C. 433, 79 S. E. 2d 917 (1954).

⁵ 238 N. C. 724, 79 S. E. 2d 193 (1953).

⁶ 238 N. C. 573, 78 S. E. 2d 448 (1953).

*Hunt v. Wooten*⁷ has again shown its demand for great particularity, apparently no longer feeling the liberality expressed in 1949 in *Davis v. Rhodes*.⁸ The *Hunt* case was an action by a guest in an automobile against the driver for personal injuries caused when the car struck a hydrant. Defendant pleaded contributory negligence alleging that the plaintiff was sitting facing him on the edge of the seat and was engaged in "animated conversation" which diverted his mind from driving, and that he discovered the hydrant in his path too late to prevent the accident. On trial the defendant testified that he ran off the road because he and the plaintiff were kissing each other. The Court held, with one Justice dissenting, that the defendant could not rely on the kissing, because it had not been pleaded, thus not satisfying G. S. § 1-139. The dissent felt that the kissing was the evidentiary fact to be proved and not the ultimate fact to be alleged. In view of this interpretation, it is submitted that where there is any doubt as to the completeness of the plea, the safer course is to move to amend the pleading to include the desired matter, thus precluding the error illustrated above.

Variance Between Pleadings and Proof

In marked contrast to *Hunt v. Wooten*, our amendment statute⁹ was utilized by the plaintiff in *Simrel v. Meeler*¹⁰ with quite satisfactory results. The *Simrel* case arose out of an auto collision. The plaintiff's complaint had not alleged specifically that defendant had failed to keep a reasonably careful lookout, but plaintiff's proof was that he had not. After all the evidence was in, defendant asserted that the complaint did not charge him with negligence in that respect; whereupon plaintiff moved to amend so as to allege the failure to lookout in specific terms. The motion was allowed, and the Court affirmed, taking the view that if there were a deficiency in the original complaint, it was cured by the amendment authorized by G. S. § 1-163.¹¹

It is more than interesting to note that in the other cases last year involving a variance between the pleading and proof, there appears no

⁷ 238 N. C. 42, 76 S. E. 2d 326 (1953).

⁸ 231 N. C. 71, 56 S. E. 2d 43 (1949). Plaintiff here alleges the death of his intestate and that defendant "unlawfully, wrongfully, recklessly, and negligently" drove into the motor scooter on which the intestate was riding. The Court held that this was merely a defective statement of a good cause of action and not a statement of a defective cause of action.

⁹ "The judge or court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. . . ." N. C. GEN. STAT. § 1-163 (1953).

¹⁰ 238 N. C. 668, 78 S. E. 2d 766 (1953).

¹¹ See note 8, *supra*.

attempt by the plaintiffs to avail themselves of G. S. § 1-163 and make their pleadings satisfactory by amendment. These cases involved: (1) an action for fraud, with an allegation of an oral agreement and proof of a written one to the contrary;¹² (2) an auto collision where plaintiff alleged failure to keep a proper lookout and violations of certain statutes, but the proof tended to show violation of a city ordinance;¹³ (3) a complaint for damages for a private nuisance alleging that both defendants operated the oil refinery jointly, with proof that one defendant owned the land and permitted the other to operate the refinery;¹⁴ (4) a plaintiff seeking to recover for injury to property on the theory of defendant's taking land without condemnation proceedings but proving a right of way agreement.¹⁵ In all these cases the question was, "Was there a material variance?" And the defendant prevailed. With this fact and our amendment statute in mind, the only safe course is to have the question on appeal be, "Did the trial judge abuse his discretion in allowing (or disallowing) the motion to amend the pleadings?"

The variance problem arose in an unusual way in *Bank of Wadesboro v. Caudle*.¹⁶ Verdict and judgment here were in favor of a substitute plaintiff who had filed no pleadings in the action but had proceeded on the complaint alleging a cause of action in favor of the original plaintiff. Since the proof was unsupported by allegations there was a fatal variance.

Motion to Strike

When a specific paragraph of a pleading is deemed irrelevant, it is improper to demur to this alone. The remedy lies in a motion to strike. This motion, like a demurrer, admits for the purposes of the hearing the truth of the allegations challenged thereby. The only question then is the sufficiency or propriety of those allegations, and in arriving at a solution it is not proper for the Court to hear evidence or find facts outside the record. Consequently, there was a reversal in *Stone v. Carolina Coach Co.*,¹⁷ where the trial court made certain findings of fact at the hearing concerning the judgment pleaded as a bar. Without these findings the judgment as alleged would have constituted a bar to the plaintiff's action. It was error then to sustain plaintiff's demurrer to the third further defense as a whole and the motion to strike its specific paragraphs.

¹² Wilkins v. Commercial Finance Co., Inc., 237 N. C. 396, 75 S. E. 2d 118 (1953).

¹³ Cook v. Hobbs, 237 N. C. 490, 75 S. E. 2d 322 (1953).

¹⁴ Morgan v. High Penn Oil Co., 238 N. C. 185, 77 S. E. 2d 682 (1953).

¹⁵ Sale v. Highway Commission, 238 N. C. 599, 78 S. E. 2d 724 (1953).

¹⁶ 239 N. C. 270, 79 S. E. 2d 723 (1954).

¹⁷ 238 N. C. 662, 78 S. E. 2d 605 (1953).

G. S. § 1-153 provides in part:

If irrelevant or redundant matter is inserted in a pleading it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted.

Despite the clear language of this statute, the defendants in *Purvis v. Whitaker*¹⁸ moved to strike certain allegations in the complaint after their demurrer had been overruled. The motion was denied, and the Court dismissed the appeal in a per curiam opinion.¹⁹

It was necessary for the Court to restate twice last year that it would not reverse a denial of a timely motion to strike under G. S. § 1-153²⁰ unless the record affirmatively revealed (1) that the matter is irrelevant or redundant, and (2) that its retention will cause harm or injustice to the movant.²¹

An example of irrelevant and redundant matter that is properly stricken was presented in *Neal v. Marrone*.²² In answer to an action for specific performance of a written contract the defendant alleged that the contract was partly written and partly oral—the parol elements being contradictory to the provisions of the written contract. Since there was no allegation of fraud or mistake, the matter alleged was irrelevant.

*Penn Dixie Lines, Inc. v. Grannick*²³ presented another sample of irrelevant matter that should have been stricken, and allegations that were neither sham nor irrelevant that were improperly stricken under G. S. § 1-126.²⁴ The action was for property damages arising out of an auto collision. Defendant pleaded as defenses: (1) a compromise and settlement effected by plaintiff and defendant with two passengers who were riding with the defendant at the time of the collision; and (2) that plaintiff had been paid his damages by his insurance company which was thereby subrogated to the plaintiff's rights against the defendant and was thus the real party in interest and should be made a party to the action. In determining that the first defense was properly stricken the Court was faced, for the first time, with the question of

¹⁸ 238 N. C. 262, 77 S. E. 2d 682 (1953).

¹⁹ Regarding time for making motion see Brandis and Bumgarner, *The Motion to Strike Pleadings in North Carolina*, 29 N. C. L. REV. 3, 21 (1950).

²⁰ See note 16, *supra*.

²¹ *Sowers v. Home-Made Chair Co., Inc.*, 238 N. C. 576, 78 S. E. 2d 342 (1953); *Ledford v. Marion Transportation Co.*, 237 N. C. 317, 74 S. E. 2d 653 (1953).

²² 239 N. C. 73, 79 S. E. 2d 239 (1953).

²³ 238 N. C. 552, 78 S. E. 2d 410 (1953).

²⁴ "Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may in its discretion impose." N. C. GEN. STAT. § 1-126 (1953).

whether or not a compromise made by the plaintiff and defendant with third persons in this situation could be received in evidence in this subsequent action. It was held that it could not because such compromise of the claim could not be accepted as an implied admission of liability on the plaintiff's part. The Court felt that the plaintiff was merely purchasing his peace, which action is favored by the courts. The compromise was thus rendered irrelevant, since an allegation of fact not legally receivable in evidence is irrelevant and should be stricken on motion.²⁵ The trial court found as a fact on the basis of an affidavit that the allegations regarding the insurance company's payment to the plaintiff were untrue, and ordered them stricken. The Court said the facts pleaded were undoubtedly a defense to the cause of action stated in the complaint, and the trial court erred in finding facts outside the record.

Judgment on the Pleadings

Before the plaintiff can have a judgment on the pleadings the facts entitling him to relief must be admitted, and there must be no valid defense or plea in avoidance asserted in the answer. With this exacting test it is indeed rare when such a judgment is obtained.

However in an action to recover on a contract to repair a building²⁶ the defendant admitted ownership of the property, the contract to repair, the contract price, the filing of the lien, her agreement to pay, and nonpayment. In defense the defendant alleged that she had insurance which would pay for the repairs, and that the insurance company was liable to her, and accountable to the plaintiff here. It was held that this alleged defense did not relieve the defendant from personal liability, and that defendant's admissions left no material issue for the jury. The judgment was consequently affirmed.

Affirmative Defenses

Once the label "affirmative defense" is judicially affixed, it follows that the defense must be specially pleaded and that mere denials will not permit it to be proved at the trial. However, it is not always easy to predict whether a defense so labelled may be presented by demurrer when facts showing its existence are pleaded in the complaint.

The Court has briefly, but positively reiterated its rule that, regardless of the allegations of the complaint, demurrer may not be employed to present the defense of laches²⁷ and the statute of limitations.²⁸ On

²⁵ Pemberton v. Greensboro, 203 N. C. 514, 166 S. E. 2d 396 (1953). See Brandis and Bumgarner, *The Motion to Strike Pleadings in North Carolina*, 29 N. C. L. REV. 3, 6 (1950).

²⁶ McGee v. Ledford, 238 N. C. 269, 77 S. E. 2d 638 (1953).

²⁷ Queen v. Sisk, 238 N. C. 389, 78 S. E. 2d 152 (1953).

²⁸ Batchelor v. Mitchell, 238 N. C. 351, 78 S. E. 2d 240 (1953).

the other hand, in a suit against a municipality, the Court indicated that the defense of governmental function could be presented by demurrer, though, in the particular case, the demurrer was overruled because the allegations of the complaint were construed as properly pleading proprietary function and not as showing governmental function as a matter of law.²⁹

In an action in ejectment the defendant, under a denial, may attack any link in the chain of title relied on by the plaintiff without specifically alleging its invalidity.³⁰ However, where the attack is based on irregularity in a foreclosure sale, it is said to be in the nature of an affirmative defense. Consequently, the burden of proof is on the defendant. Such was the holding in *Jones v. Percy*³¹ where one link in the plaintiff's chain of title was a foreclosure deed which the defendant attacked on the ground that the sale was not properly advertised. In holding that the defendant must prove improper advertising, the Court expressly overruled *Insurance Co. v. Boogher*³² which had held the burden of proof was on the plaintiff and was the only North Carolina case so holding out of many that had decided the point.³³

The general rule that a party seeking to avoid liability by an affirmative plea assumes the burden of proving his allegation is little questioned. However, its application to actions on certain insurance contracts has led to some confusion. In *Polansky v. Insurance Ass'n.*³⁴ the plaintiff sought to recover damages to his auto under a contract of insurance covering any direct and accidental loss. Excluded from coverage however was any damage resulting from wear and tear or mechanical breakdown. Plaintiff alleged the damage was caused by fire or explosion, and defendant alleged the cause was wear and tear and thus excluded from the policy. On appeal the defendant contended that the plaintiff should have been nonsuited since he had failed to offer evidence that his loss was not excluded from the policy. It was held that the burden was on the defendant-insurer to show the claim fell within an exception to the coverage; therefore, the case was properly submitted to the jury.

²⁹ *Foust v. City of Durham*, 239 N. C. 306, 79 S. E. 2d 519 (1954). The opinion points out that demurrer may be employed when the time limitation is a condition annexed to the cause of action, rather than an ordinary statute of limitations.

³⁰ *Ownbey v. Parkway Properties, Inc.*, 221 N. C. 27, 18 S. E. 2d 710 (1942).

³¹ 237 N. C. 239, 74 S. E. 2d 700 (1953).

³² 224 N. C. 563, 31 S. E. 2d 771 (1944).

³³ However, for the burden of proof to be placed on the defendant, "it must appear that the deed (1) is regular upon its face, (2) was duly executed, and (3) contains recitals which show compliance with the statute regulating the foreclosure of a deed of trust or mortgage." *Jones v. Percy*, 237 N. C. 239, 243, 74 S. E. 2d 700, 703 (1953).

³⁴ 238 N. C. 427, 78 S. E. 2d 213 (1953).

The *Polansky* situation thus brings about the same result regarding the burden of proof as does an action on an ordinary life insurance contract containing exceptions. In both these situations the insurer must prove the pleaded exception, if such is the case.³⁵ However, where the insurance is against death by accident, if an issue is raised as to suicide or death by intentional act of a third party, the burden of proving that the death was accidental is on the insured.³⁶ In *Polansky* the Court did not discuss or cite the accidental death cases, despite the fact that some similarity is obviously involved.

In *Laughter v. Highway Commission*³⁷ the defendant alleged release and accord and satisfaction in bar of the plaintiff's proceeding to recover compensation for land taken for highway purposes. These were good pleas in bar. But when defendant, without obtaining a ruling on them, appeared and participated in the selection of commissioners to appraise the award it was held to have waived the benefit of the pleas. The Court concluded that it was reasonable to assume that the defendant, because of its subsequent actions, had changed its mind.

Aider by Answer

The Court was presented with an interesting twist on the usual aider cases in *Dulin v. Williams and Scoggins*.³⁸ A, grantee of timber, sued B, his grantor, and C, a subsequent grantee of B, to establish his claim to the timber. Since C's deed had been recorded before A's, the latter could not prevail by merely being the first purchaser.³⁹ However, B, in a cross action against C, sought to reform the latter's deed, so as to make it subject to A's interest, on the ground that there had been an agreement before the execution of the second deed that such a recital would be included. The trial court allowed A to prevail over C on the basis of this supposed estoppel pleaded in the answer of B. This was error since the doctrine of aider by answer had no application. The Court announced that, "An affirmative allegation in the answer of one of two or more defendants of a necessary fact not alleged in the complaint or petition does not cure the omission as to the other defendants."⁴⁰

³⁵ *Warren v. Pilot Life Ins. Co.*, 215 N. C. 402, 2 S. E. 2d 17 (1939).

³⁶ *McGill v. Town of Lumberton*, 215 N. C. 752, 3 S. E. 2d 324 (1939), *second appeal*, 218 N. C. 586, 11 S. E. 2d 873 (1940) (a Workmen's Compensation case); *Warren v. Pilot Life Ins. Co.*, 215 N. C. 402, 2 S. E. 2d 17 (1939); *Jones v. Life & Casualty Co.*, 199 N. C. 772, 155 S. E. 870 (1930). Cf., *Davis v. St. Paul Mercury & Indemnity Co.*, 227 N. C. 80, 40 S. E. 2d 609 (1946) ("Mysterious disappearance" clause in a theft policy).

³⁷ 238 N. C. 512, 78 S. E. 2d 252 (1953).

³⁸ 239 N. C. 33, 79 S. E. 2d 213 (1953).

³⁹ For a complete treatment of this issue, see the section on Real Property in this survey.

⁴⁰ *Dulin v. Williams*, 239 N. C. 33, 39, 79 S. E. 2d 213, 218 (1953). It was further pointed out that even had the complaint alleged the estoppel, the plaintiff

JOINDER OF PARTIES AND CAUSES OF ACTION⁴¹*Necessary and Proper Parties*

In two cases last year statutes other than the general procedure sections were construed by the Court to determine whether or not all necessary parties were present. G. S. §§ 61-1, 2, & 3 give trustees of religious bodies the right to hold property and to sue or be sued on any matter relating to it. Thus, in an action by the trustees of a church to remove cloud on the title to church property, it was held that it was not necessary to join the members of the church.⁴² This follows the usual rule that ordinarily trustees of an active trust may sue or be sued, in actions involving the trust res, without joinder of the *cestuis*.⁴³ No doubt, under the circumstances of the principal case, joinder of the *cestuis* would not have been improper.

The other case⁴⁴ was an action by one-third of the stockholders for dissolution of the corporation under G. S. § 55-125, and it did not appear that the other shareholders had been made parties or served with process. G. S. §§ 55-131 and 55-125 require that, before a corporation may be dissolved, summons must be served by publication on stockholders, creditors and others interested; and that the court shall order all persons interested to appear and show cause why the corporation shall not be dissolved. On the basis of these statutes the Court concluded that all stockholders were necessary parties to this action. Since stockholders, other than plaintiffs, were not named as parties and since no service was had on them, the Court below was without jurisdiction to enter judgment dissolving the corporation. The judgment was quashed *ex mero motu*.

A proper party, as distinguished from a necessary party, is one whose interests may be affected by whatever decision is rendered, rather than one whose interests will be affected regardless of the decree.⁴⁵ As the designation "proper" indicates, such a party may be joined but his joinder is not necessary. And it is within the discretion of the trial judge to say whether or not a proper party, not originally named as a party, is thereafter to be brought into the action.

could not have prevailed, because the estoppel will only apply where the registered deed contains an express recital making the conveyance to the grantee subject to the outstanding interest.

⁴¹ For a study of this entire topic see Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. Rev. 1 (1946); Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules*, 25 N. C. L. Rev. 245 (1947).

⁴² *Pressly v. Walker*, 238 N. C. 732, 78 S. E. 2d 920 (1953).

⁴³ N. C. GEN. STAT. § 1-63 (1953).

⁴⁴ *Glod v. Castle Hayne Growers & Shippers, Inc.*, 239 N. C. 304, 79 S. E. 2d 396 (1954).

⁴⁵ *Gaither Corp. v. Skinner*, 238 N. C. 254, 77 S. E. 2d 659 (1953).

This, the Court held in two cases last year. In the first,⁴⁶ it was held that the insurer, who has paid plaintiff for most of the damage to his car (thus being partially subrogated to plaintiff's claim) is a proper party in plaintiff's suit against the tortfeasor and may, at the instance of either plaintiff or defendant, be brought into the action by the court in the exercise of its discretion.⁴⁷ This merely reaffirms the 1953 holding of *Burgess v. Trevathan*.⁴⁸

In the second case⁴⁹ the defendant, who had contracted to construct plaintiff's building, was being sued for damages for faulty and defective materials used in the construction of the roof. Defendant sought unsuccessfully to have the sub-contractor, who had constructed the roof, made a party, alleging, inter alia, that if defendant was liable to plaintiff, he should have judgment over against the sub-contractor. The Court held that, while the sub-contractor was a proper party, in the sense that plaintiff could have joined him as a defendant originally, it was not reversible error for the judge to refuse to require his joinder at the instance of the original defendant.

It is to be hoped that this decision will be narrowly confined, and that a judge who allows a sub-contractor to be made a party under these circumstances will also be sustained. Despite the Court's assertion that no primary-secondary liability situation is presented, there is obviously a strong argument for the position that the sub-contractor *ought* to be made a party, to the end that the contractor may have all his rights adjudicated in the same action.⁵⁰ The Court justifies the non-joinder, in part, by the argument that a plaintiff should be allowed to have his lawsuit uncluttered by the dispute between contractor and sub-contractor. However, in the principal case, the objection to joinder came from the sub-contractor and not from the plaintiff. Further, it is most doubtful that a plaintiff should automatically be conceded greater control over party selection than the defendant. At the least there should be some attempt to balance the respective conveniences of the plaintiff and the defendant. Finally, to decline to join the sub-

⁴⁶ *Jackson v. Baggett*, 237 N. C. 554, 75 S. E. 2d 532 (1953).

⁴⁷ It was thus error for the trial court to grant as a matter of law plaintiff's motion to strike all reference in defendant's answer to the insurance company. Such order could be made, however, if the insurance company were not made a party to the action.

⁴⁸ 236 N. C. 157, 72 S. E. 2d 231 (1952); commented on in 31 N. C. L. REV. 224 (1953).

⁴⁹ *Gaither Corp. v. Skinner*, 238 N. C. 254, 77 S. E. 2d 659 (1953).

⁵⁰ It may be pointed out that if plaintiff recovers judgment against the contractor, the decision that the roof is not up to the specifications is not res adjudicata as to the sub-contractor, who may relitigate the issue in the contractor's suit against him. The chance, thus presented, that the contractor may lose on both sides of the same issue, is eliminated if the sub-contractor is joined in the original action.

contractor in this circumstance is inconsistent with the whole modern trend in joinder.

Dual Misjoinder

Only once last year was a demurrer for misjoinder of causes and parties ultimately successful before the Supreme Court, which, however, was asked to pass upon three such demurrers.

The successful action was taken in *Chambers v. Dalton*⁵¹ where seven groups of owners of lots in a subdivision sued the owner of another lot in that subdivision for breach of restrictive covenants. In a per curiam opinion the Court held there was a misjoinder of causes and parties since no one cause affected all the parties to the action. This result is perhaps unavoidable in view of our statutory requirement that all causes must affect all parties.⁵² However, it is clear that the causes of all plaintiffs presented common questions of law and fact; and it is most unfortunate that North Carolina has so long delayed in adopting modern rules of joinder, which clearly (and sensibly) permit what was attempted here.

Several causes of action may be joined in the same complaint where they arise out of contract, express or implied.⁵³ *Perry v. Doub*⁵⁴ presents a good example of the utilization of this rule. The plaintiff had executed two notes to *R*, each secured by a deed of trust. Plaintiff alleged that *R* had only paid over to him a part of the sums stated in the notes. Later when plaintiff wanted to cancel the deeds of trust, he paid *R* the undisputed amount, and they agreed to deposit the disputed sum with *D* until settlement could be reached. No settlement being reached within the stipulated time, plaintiff brought this action against *R* and *D*. Five causes of action were stated: (1) and (2) for breach of contract to loan money; (3) and (4) to compel forfeiture of interest because of usurious interest charged, pursuant to G. S. § 24-2; and (5) for actual and punitive damages for crop failure resulting from plaintiff's inability to finance the operations because of *R*'s refusal to loan the full amount of the loan contracts. The trial court sustained *R*'s demurrer for misjoinder of causes and parties as to causes (3), (4), & (5). The Supreme Court reversed saying that an action to have interest stricken under G. S. § 24-2 is deemed an action on contract, and that the fifth cause of action was for special damages for breach of express contract to lend money—thus no misjoinder of causes. The agreement to deposit the settlement funds with *D* made him a proper party. This latter is, of course, an eminently

⁵¹ 238 N. C. 142, 76 S. E. 2d 162 (1953).

⁵² N. C. GEN. STAT. § 1-123 (1953).

⁵³ N. C. GEN. STAT. § 1-123.2 (1953).

⁵⁴ 238 N. C. 233, 77 S. E. 2d 711 (1953).

sensible conclusion. Rarely if ever should joinder of a stakeholder render improper an otherwise proper joinder.

The remaining case, *Casey v. Grantham*,⁵⁵ is characterized by a highly commendable approach to joinder resulting from the desire to "completely determine and settle the questions involved with all the parties before it at once." Plaintiff brought the action against his partner for an accounting of their partnership, and sought also to enjoin the foreclosure of a deed of trust on the partnership property and on plaintiff's home and farm until the accounting was had. To obtain the injunction, the partnership creditor and the trustee were made parties defendant. The defendant-creditor's demurrer on the ground of misjoinder of parties and causes of action was sustained by the trial court, but a majority of the Supreme Court reversed. Five Justices regarded the complaint as alleging only one cause of action, that being for the accounting, and that the injunction sought was merely a part of that suit. In resolving the question of parties, the majority recognized that generally creditors of a partnership are neither necessary nor proper parties in a suit between partners for a firm accounting. However, for the first time in North Carolina, it was held that under proper circumstances they may be made parties in the first instance in such a suit. And it was held that the facts of this case met this "proper circumstances" requirement.⁵⁶

A lengthy dissenting opinion expressed the view that two unrelated causes of action were alleged here and that the allegations that might warrant the joinder of the defendant-creditor were conclusions of the pleader to be disregarded. The dissent was fearful that this case could be a precedent that may obstruct the rights of lending agencies to collect their loans without undue delay. However, the peculiar facts of this case and the flexible rule under which it was decided leave ample room for avoidance of any such prejudice to lenders generally. Further, while the particular facts are novel in North Carolina, there is ample precedent in our prior cases for permitting joinder where, as here, the facts, though somewhat complex and alleged with considerable prolixity, tend to set forth a "connected story."⁵⁷

Third-Party Practice

The natural and often reasonable desire of a defendant to put some or all of his possible liability on the shoulders of another party brought quite a number of cases to the Supreme Court involving the propriety

⁵⁵ 239 N. C. 121, 79 S. E. 2d 735 (1954).

⁵⁶ The plaintiff's allegations, which were taken as admitted on this hearing, were that the partnership property was sufficient to pay off the indebtedness, and that the defendant-partner and defendant-creditor were seeking to oust plaintiff from the partnership and take over its assets and plaintiff's home and farm.

⁵⁷ See *Brandis, op. cit. supra* note 41, at 18.

of joining third parties either for contribution or for indemnity. G. S. § 1-240 permits a joint tortfeasor to be joined for contribution where the plaintiff has chosen to proceed against only one of those jointly liable to him. And one only secondarily liable for negligence may have the primarily liable party joined and ask for judgment ever against him for the full amount of plaintiff's recovery.⁵⁸

In *Hayes v. Wilmington*⁵⁹ plaintiff proceeded against the contractor who was working on street improvements and who, it was alleged, struck the gas pipe in his excavation and caused the explosion that killed the intestate. Defendant filed a cross action against the gas company alleging that the pipes were not installed properly. On motion the gas company was joined, but its later motion to strike its name as a defendant was successful and the Supreme Court affirmed. Instead of allegations in the cross-action that would make the company jointly liable, there were allegations to the effect that it was solely responsible. At best the allegations could be said to make the company secondarily liable, which did not aid defendant since one primarily liable cannot recover from one secondarily liable.

The defendant in *Taylor v. Kinston Free Press Co., Inc.*⁶⁰ was more successful however. Here plaintiff sought damages for libel, and defendant answered that it had published the article at the instance of X who had prepared the article and paid the regular advertising rates. X was made a party but demurred saying there was neither right to contribution, nor primary-secondary liability between him and the Press Co. The Court decided that X was a joint tortfeasor who could have been sued in the first instance and could thus be joined under G. S. § 1-240. Because it was decided that X was properly made a party, the Court said it was unnecessary at this stage to determine the question of primary and secondary liability between the defendants. The possibility of the application of the primary-secondary liability rule to a new situation was thus left undetermined.

In *Yandell v. National Fireproofing Corp.*⁶¹ the plaintiff attempted to state a cause of action against several defendants as joint tortfeasors. One defendant successfully demurred to the complaint, but his joy was short lived, for the other defendants filed a cross-action against him for contribution as a joint tortfeasor. He again demurred asserting the judgment sustaining his demurrer to the complaint as an estoppel to

⁵⁸ *Wright's Clothing Store, Inc. v. Ellis Stone & Co., Inc.*, 233 N. C. 126, 63 S. E. 2d 118 (1951).

⁵⁹ 239 N. C. 238, 79 S. E. 2d 792 (1954).

⁶⁰ 237 N. C. 551, 75 S. E. 2d 528 (1953).

⁶¹ 239 N. C. 1, 79 S. E. 2d 223 (1953). See the Torts section of this survey for a full discussion of this case.

the cross-action. On the basis of *Canestino v. Powell*⁶² the Supreme Court held that there was no estoppel since the former judgment did not adjudicate that all the defendants were not joint tortfeasors but only that the complaint did not state a cause of action against the one defendant as a joint tortfeasor.

The Supreme Court reaffirmed its position taken in *Lovette v. Lloyd*⁶³ by holding that the North Carolina Workmen's Compensation Act abrogates the right of a negligent third party to claim contribution from a negligent employer in equal fault, and also the right of a secondarily negligent third party to demand indemnity from a primarily negligent employer.⁶⁴ The Court, however, recognized that there are exceptions to this rule that operate where the third party, through some express contract, has an independent right to call on the employer for indemnity, or where the employer stands in some special legal relationship to the third party other than that produced by their joint wrong. But unless these exceptions come into play, where neither the employer nor his compensation insurer chooses as subrogee to sue the negligent third party and the employee proceeds against the latter under G. S. § 97-10, the defendant cannot have the employer or his insurer joined as defendants.

As a matter of public policy interstate franchise carriers are responsible for the operation of their trucks in so far as third persons are concerned. And in *Newsome v. Surratt*⁶⁵ this liability was recognized. The carrier, however, was operating the truck as a lessee, and the driver at the time of the accident was an employee of the lessor. The Court thus determined that since the lessee did not participate in the negligent act, but was liable only because of a duty imposed by law as a matter of public policy, he was only secondarily liable and could obtain indemnity from the lessor.⁶⁶ In one other case, elsewhere discussed,⁶⁷ the defendant in a contract action was unsuccessful in his effort to have his subcontractor joined to defend a cross-action.

LIMITATION OF ACTIONS

G. S. § 1-21 provides in part:

If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this State, . . . the time

⁶² 231 N. C. 190, 56 S. E. 2d 566 (1949).

⁶³ 236 N. C. 663, 73 S. E. 2d 886 (1953).

⁶⁴ *Hunsucker v. High Point Bending & Chair Co.*, 237 N. C. 559, 75 S. E. 2d 768 (1953).

⁶⁵ 237 N. C. 297, 74 S. E. 2d 732 (1953).

⁶⁶ See the Agency section of this survey for a full discussion of this case.

⁶⁷ *Gaither Corp. v. Skinner*, *supra* note 45.

of his absence shall not be a part of the time limited for the commencement; or the enforcement of the judgment.

Does this statute apply to causes of action arising out of this state between parties who were nonresidents of this state when the actions accrued? This question, previously unanswered, was resolved in the affirmative in *Merchants & Planters National Bank v. Appleyard*.⁶⁸ In reaching this result it was necessary for the Court to interpret "return of the person to this State" to include one coming into the state for the first time, and "time of his absence" as not restricted to a person who had been in the state. On first blush such interpretation would appear strained; however, the result reached is in accord with the majority of states deciding the question under similar statutes. Justice Barnhill, in a separate opinion in which he concurs only in the ultimate disposition of the case, vigorously attacks the above construction of the statute.⁶⁹

NOTICE

The Supreme Court took the opportunity in *Collins v. Highway Commission*⁷⁰ to discuss at length the law of procedural notice. The tests to be applied in determining whether such notice is necessary, how it is to be given when necessary, and how it may be waived are set out, together with the consequences that may flow from failure to give notice when it is necessary. It is not here possible even to summarize adequately the twelve numbered rules discussed in Justice Ervin's opinion. It can only be said that attorneys with questions regarding notice should be thoroughly familiar with this case.

CONFLICT OF LAWS

LIMITATION OF ACTIONS

In the absence of legislative intervention, it is a universal principle of conflict of laws that in determining whether a cause of action has been outlawed by the passage of time resort must be had to the law

⁶⁸ 238 N. C. 145, 77 S. E. 2d 783 (1953).

⁶⁹ "If we adopt the view of the majority opinion, then we open the door for serious discrimination in favor of nonresidents. It makes no difference how old a claim may be or what opportunity a nonresident claimant has had to reduce his claim to judgment, our statute is tolled in his behalf so long as the debtor remains out of this State, and it begins to run anew as soon as he removes to this State, whether the claim has been stale for one year, ten years, or twenty years under the *lex domicilii*. Thus, we open the doors of our courts for the enforcement of a claim of a nonresident which is barred by the laws of the State in which the cause of action accrued. The removal of the debtor to this State resurrects the claim and gives it new life so that it may be enforced in the courts of this State though long since dead in the State of its origin." *Id.* at 160, 77 S. E. 2d at 795 (1953). For further discussion of this case see the Conflict of Laws section of this survey.

⁷⁰ 237 N. C. 277, 74 S. E. 2d 709 (1953). See also *Chappel v. Stallings*, 237 N. C. 213, 74 S. E. 2d 624 (1953).

of the forum where the action is brought.¹ The basis of this doctrine is that statutes of limitation affect only the remedy, and remedial rights are governed by the *lex fori*. In applying this principle in the recent case of *Merchants & Planters National Bank v. Appleyard*² the Supreme Court faced a problem which had never before been decided in North Carolina.

On December 6, 1947 the defendant, then a resident of Texas, executed and delivered an unsealed promissory note payable on February 4, 1948 to the plaintiff, a Texas bank. The defendant continued to reside in that state until December, 1951, when he became a resident of North Carolina. An action on the note was instituted by the plaintiff in North Carolina on January 29, 1952—seven days prior to the expiration of the Texas four-year limitation on unsealed notes, but after the three-year period allowed on such actions by North Carolina.³

In affirming a judgment for the plaintiff on the pleadings the Court conceded that the North Carolina three-year limitation was applicable, but held that the plaintiff was entitled to the benefit of G. S. § 1-21 which suspends the operation of statutes of limitation when the defendant is out of the state when the cause of action accrues.⁴ Therefore, since the defendant had not been in this jurisdiction for three years the plaintiff's cause of action was not barred. Discussion of the Court's interpretation of the North Carolina tolling provision is found elsewhere in this survey,⁵ but it should be pointed out that the *Appleyard* case is the first time that the provision has been construed to be applicable to causes of action arising out of the state between parties who were non-residents of the state when such actions arose. It is apparent that this construction of G. S. § 1-21 will lessen the frequency with which the North Carolina limitations can be invoked as a bar to causes of actions arising out of this state.

In a lengthy concurring opinion Justice Barnhill attacked not only the majority's interpretation of the tolling provision but the application of the *lex fori* in determining whether the action was barred. He agreed

¹ RESTATEMENT, CONFLICT OF LAWS § 603 (1934); 53 C. J. S., *Limitations of Actions*, § 28, p. 972 (1948); 11 AM. JUR., *Conflict of Laws*, § 191, p. 505 (1937). North Carolina has consistently applied this doctrine: *Sayer v. Henderson*, 225 N. C. 642, 35 S. E. 2d 875 (1945); *Webb v. Webb*, 222 N. C. 551, 23 S. E. 2d 897 (1942); *Clodfelter v. Wells*, 212 N. C. 823, 195 S. E. 11 (1937); *Smith v. Gordon*, 204 N. C. 695, 169 S. E. 634 (1933).

² 238 N. C. 145, 78 S. E. 2d 783 (1953).

³ N. C. GEN. STAT. § 1-52 (1953).

⁴ N. C. GEN. STAT. § 1-21 (1953). "If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the state, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this state, . . . the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment.

⁵ See Civil Procedure.

that the plaintiff's action should not be barred in North Carolina for the reason that it was a live claim under the *lex domicilii* where the cause accrued, not because the North Carolina limitation had been tolled until the defendant's entry into this state. While recognizing that the weight of authority is to the contrary, Justice Barnhill argues that our statute of limitations is not strictly procedural but cuts off the right as well as the remedy since it imposes a limitation upon the right of a plaintiff to reduce his claim to a judgment *in personam*.

SALES OF PERSONAL PROPERTY

A bad check passed in the District of Columbia and a false pretense uttered in South Carolina brought plaintiffs from those jurisdictions into the courts of North Carolina in an effort to recover personal property brought into this state. In the resulting actions the North Carolina Supreme Court had occasion to apply the doctrine of comity in the forum by looking to the substantive law of those states in which the sale or transfer occurred in order to determine whether or not title had passed to the North Carolina defendants.⁶

Thus, in *Handley Motor Co. v. Wood*⁷ where the plaintiff received a worthless check as payment for an automobile in a cash sale taking place in the District of Columbia and the defendant later purchased the automobile in Pennsylvania from a purchaser under the original buyer and brought it to North Carolina, the Court looked to the law of both the District of Columbia and Pennsylvania in deciding that the plaintiff was entitled to possession. In the first appeal the Court held that title to the automobile remained in the plaintiff since such was the law of the District of Columbia where the original sale took place. On a second appeal the question was whether the fact that the defendant and his immediate vendee were innocent purchasers for value and without notice constituted a defense against the plaintiff's legal title. In holding that the plaintiff was entitled to recover despite such fact the Court applied the law of Pennsylvania since the transaction between the defendant and his vendor took place in that jurisdiction. In both instances the Court pointed out that the law applied was also the law of North Carolina so there was no question of its being against the public policy of this state.⁸

⁶ Price v. Goodman, 226 N. C. 223, 37 S. E. 2d 592 (1946); 11 AM. JUR., *Conflict of Laws*, § 140 (1937); RESTATEMENT, *CONFLICT OF LAWS* § 260 (1934).

⁷ 237 N. C. 318, 75 S. E. 2d 312 (1953); second appeal, 238 N. C. 468, 78 S. E. 2d 391 (1953).

⁸ See, "Worthless Checks in Cash Sales" in the section on Sales in this survey. For a discussion of the effect of the registration of chattel mortgages or conditional sales of personal property in one state when the property is removed to another state, as distinguished from cash sales, see Notes, 26 N. C. L. REV. 173 (1948), 28 N. C. L. REV. 305 (1948). See also: *Home Finance v. O'Daniel* discussed in *Credit Transactions* at p. 419.

An analogous situation arose in *Ellison v. Hunsinger*⁹ when Hunsinger by falsely representing himself to be the agent of a cotton broker with whom the plaintiff had been negotiating obtained possession of forty-three bales of cotton from the plaintiff in South Carolina and deposited them in a bonded warehouse in North Carolina. The law of South Carolina that one who has acquired possession of property by a crime such as false pretense cannot transfer a better title than he himself has, even to a bona-fide purchaser, was held to be applicable since all the transactions between Hunsinger and the plaintiff occurred in that state. Recovery was not allowed, however, against a bona-fide purchaser of the negotiable warehouse receipts from Hunsinger because the North Carolina law on warehousing of agricultural commodities in bonded warehouses provides that such negotiable receipts carry absolute title to the goods.¹⁰

CONSTITUTIONAL LAW

CONSTRUCTION OF CONSTITUTIONAL PROVISIONS

Canons of judicial construction were pointed out and applied by the Court in *Perry v. Stancil*¹ in construing the constitutional limitation on the right of a married woman to convey real property as not requiring the written assent of the husband to a deed from a wife to her husband. Admitting that the language of Article X, Section 6, clearly embraces such a conveyance, the Court replied that "greater regard is to be given to the dominant purpose than to the use of any particular words" and based its interpretation on what it considered to be the intent of the framers of the Constitution.²

In *Hyde County v. Bridgman*³ a basic rule of constitutional construction strictly adhered to by the courts was reiterated: "Absolute necessity is the moving cause for decision of a constitutional question, and the court will not decide the challenged constitutionality of an act when the appeal may be disposed of on other grounds."

DUE PROCESS

Fair Hearing

A rather salient instance of denial of a fundamental element of due process occurred in *In re Custody of Gupton*⁴ when the trial judge,

⁹ 237 N. C. 619, 75 S. E. 2d 884 (1953).

¹⁰ N. C. GEN. STAT. § 106-442 (1952). See "Title under Negotiable Warehouse Receipts" in the Sales section of this survey.

¹ 238 N. C. 303, 77 S. E. 2d 716 (1953).

² See Real Property in this survey, *infra* p. 486.

³ 238 N. C. 247, 77 S. E. 2d 628 (1953). *Accord*: *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952); *State v. Wilkes*, 233 N. C. 645, 65 S. E. 2d 129 (1951); *State v. Trantham*, 230 N. C. 641, 55 S. E. 2d 198 (1949).

⁴ 238 N. C. 303, 77 S. E. 2d 716 (1953).

in order to reach a decision in an action for custody of a minor child, instigated a secret investigation into the private and home life of the parties on his own motion and without the knowledge of the parties or their counsel. A judgment based on such information, pointed out the Supreme Court in ordering another hearing, deprives the petitioner of a fair and adequate hearing as guaranteed by Article I, Section 17, of the North Carolina Constitution.⁵ Litigants are to be informed of all the evidence before the court and given a chance to test, explain or rebut it.⁶

Notice

Another essential element of the "law of the land" under Article I, Section 17, is that notice must be given to a party whose rights are to be affected by judicial proceedings.⁷ It was emphasized in *Collins v. Highway Commissioner*,⁸ however, that notice as required by the constitution is only such notice "inherent in the original process whereby the court acquires original jurisdiction, and not notice of the time when the jurisdiction vested in the court by the service of the original process will be exercised."

Police Power

Attacks on the validity of Sunday ordinances as arbitrary, unreasonable and discriminatory exercises of police power appeared in the cases of *State v. McGee*⁹ and *State v. Towery*.¹⁰ These cases are discussed in the Note Section of this issue.¹¹

Right to Counsel

On the criminal side of due process, the Court in *State v. Cruse*¹² re-affirmed the settled rule in North Carolina that Article I, Section 11, of our Constitution in declaring the right of every man charged with crime "to have counsel for his defense" does not make it mandatory for the trial judge to assign counsel in non-capital cases, in the absence of a request by the defendant, unless circumstances are such as would

⁵ "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

⁶ *In re Edwards' Estate*, 234 N. C. 202, 66 S. E. 2d 675 (1951); *Eason v. Spence*, 232 N. C. 579, 61 S. E. 2d 717 (1950); *National Surety Corp. v. Sharpe*, 232 N. C. 98, 59 S. E. 2d 593 (1950).

⁷ *Eason v. Spence*, 232 N. C. 579, 61 S. E. 2d 717 (1950); *National Surety Corp. v. Sharpe*, 232 N. C. 98, 59 S. E. 2d 593 (1950).

⁸ 237 N. C. 277, 74 S. E. 2d 709 (1953). Of course, even after jurisdiction has been acquired procedural notice is required in many situations; see *Civil Procedure* in this survey.

⁹ 237 N. C. 633, 75 S. E. 2d 783 (1953).

¹⁰ 239 N. C. 274, 79 S. E. 2d 513 (1953).

¹¹ *Infra* p. 552.

¹² 238 N. C. 53, 76 S. E. 2d 320 (1953). The *Cruse* case is the subject of a note appearing in 32 N. C. L. Rev. 331 (1954).

seem to require it as essential to a fair trial. No such circumstances were present in this case, the Court held, since the defendant Cruse was thirty-nine years old, had attended school through the sixth grade, and had the experience of having been convicted at least twelve times before for criminal violations.

Other criminal cases involving the necessity for and the sufficiency of indictments, although based on constitutional provisions, are discussed under the more appropriate topic Criminal Law and Procedure in this survey.¹³

FREEDOM OF RELIGION

One case before the Supreme Court¹⁴ affirmed the constitutionality of a Sunday closing law as applied to the operator of a drive-in theater despite a contention that the ordinance offended the First Amendment to the United States Constitution and interfered with the "natural and inalienable right of man to worship Almighty God according to the dictates of his own conscience" as guaranteed by the North Carolina Constitution.¹⁵ Conceding that respect and consideration for churches as religious institutions influenced the governing body of the municipality in setting the hours of prohibition to coincide with those of church services, the Court held that this does not mean that the ordinance was not enacted pursuant to the legitimate exercise of the police power. Measures for the observance of Sunday as a day of rest, argued the Court, do not come from the desire to compel or deny the observance of any religious duty, but rather to "promote the public health, the general welfare, safety and morals of the people and to give them an opportunity to rest from their secular activities."

PROHIBITION AGAINST LOCAL AND PRIVATE LEGISLATION

Two of the fourteen enumerated areas in which local, private or special laws are prohibited by Section 29 of Article II of the North Carolina Constitution¹⁶ were considered by the Court in 1953.

Special acts authorizing the City of Wilmington and County of New Hanover to make provisions for the "hospitalization, medical attention, and care of the indigent sick and afflicted poor" of that city and county were adjudged unconstitutional as local acts relating to health in *Board of Managers v. Wilmington*.¹⁷ However, an act pro-

¹³ *Infra* p. 423.

¹⁴ *State v. McGee*, 237 N. C. 633, 75 S. E. 2d 783 (1953).

¹⁵ N. C. CONST., Art. I, § 26.

¹⁶ "The General Assembly shall not pass any local, private or special act or resolution relating to the establishment of courts inferior to the Superior Court; . . . relating to health, sanitation, and the abatement of nuisances. . . ."

¹⁷ 237 N. C. 179, 74 S. E. 2d 749 (1953). Both the City of Wilmington and New Hanover County are exempted from N. C. GEN. STAT. § 153-152 (1952) and N. C. GEN. STAT. § 160-229 (1952) which empower the governing bodies of

viding for the transfer of criminal cases from the Recorder's Court of Washington County to the superior court when trial by jury is demanded was deemed not to fall under the ban of the constitutional provision forbidding local acts "relating to the establishment of courts inferior to the Superior Court" since the act merely changed the jurisdiction of an inferior court already established.¹⁸

SEPARATION OF POWERS

In delegating zoning power to cities and incorporated towns¹⁹ North Carolina statutes provide that whenever the legislative body of such a municipality zones two or more corners at an intersection in a certain way, "it shall be the duty of such legislative body upon written application from the owners of other corners" to rezone such other corners in the same manner.²⁰ The plaintiff in *Marren v. Gamble*²¹ claimed that such a right in corner lot owners gives them legislative power to rezone and, thus, constitutes a delegation of legislative power to a private person in violation of Section I, Article II of the North Carolina Constitution.²² The Court disagreed, however, saying that all the General Assembly had done was to prescribe the conditions under which the zoning power delegated to municipalities is to be exercised and that the legal right in the corner lot owners was created by the Assembly in order to "enforce its own notions as to how corners at street intersections should be zoned."

STATUTORY PRESUMPTIONS

An important constitutional question was touched on in *Travis v. Duckworth*²³ in which the Court recognized the power of the legislature to declare that proof of certain related preliminary facts shall be prima facie evidence of other facts. The statute involved was the relatively new G. S. § 20-71.1 which provides that in actions to recover damages arising out of a motor vehicle accident proof of ownership

municipalities and counties to contract with a public or private hospital for medical treatment and hospitalization of the afflicted poor of the city or county.

¹⁸ *State v. Norman*, 237 N. C. 205, 74 S. E. 2d 602 (1953). *Accord*, *Queen v. Commissioners of Haywood County*, 193 N. C. 821, 138 S. E. 310 (1927), *State v. Horne*, 191 N. C. 375, 131 S. E. 753 (1926).

¹⁹ N. C. GEN. STAT. § 160-172 (1952) delegates such power to promulgate zoning regulations "for the purpose of promoting health, safety, morals, of the general welfare of the community."

²⁰ N. C. GEN. STAT. § 160-173 (1952).

²¹ 237 N. C. 680, 75 S. E. 2d 880 (1953).

²² Where the effectiveness of a zoning ordinance determining the use of property for a lawful purpose is conditioned upon the assent of private persons, a similar question of delegation is raised. See the recent comment on the status of North Carolina law on delegation to individuals in Note, 31 N. C. L. Rev. 308 (1953).

²³ 237 N. C. 471, 75 S. E. 2d 309 (1953).

of the vehicle shall be regarded as prima facie evidence that it was being operated at the time of the accident by the authority of the owner and that proof of motor vehicle registration in the name of a person shall be prima facie evidence of ownership and that the motor vehicle was being operated by one for whose conduct such person is legally responsible.²⁴ While the Court did not specifically discuss the constitutionality of this statute it is practically undisputed that such legislation violates no provision of either the Federal or State Constitutions if there is some rational connection between the fact proved and the ultimate fact to be established, and if the presumption is not made conclusive of the rights of the persons against whom it is raised.²⁵

CONTRACTS

Many contract questions are so interrelated with other areas of the law such as Insurance, Negotiable Instruments, Agency, Sales and Credit Transactions that they are more suitably discussed in those sections. However, the 1953 term produced several decisions regarding contract law which deserve separate treatment.

ACCORD AND SATISFACTION

In an illuminating dictum in *Dobias v. White*,¹ the Court went far toward clarifying the North Carolina position on accord and satisfaction as being in substantial agreement with majority views in this area of the law.² The plaintiffs sued on promissory notes given for the purchase price of certain lands, secured by a deed of trust on other lands already owned by the defendants. In defense the debtor alleged: that after the notes had fallen in arrears, the parties agreed that the defendants should convey the lands covered by the deed of trust to the plaintiffs in full settlement and satisfaction of the indebtedness and that the plaintiff should surrender the notes and cause the deed of trust to be cancelled; and that the defendants executed and tendered a deed of

²⁴ N. C. GEN. STAT. § 20-71.1 (1953); discussed in "Survey of Statutory Changes," 29 N. C. L. REV. 404 (1951). For a collection of other North Carolina legislation declaring that proof of one or a group of facts shall constitute *prima facie* evidence of another fact, see *State v. Scoggin*, 236 N. C. 19, 72 S. E. 2d 54 (1952). See also the discussion of the application of this statute in the Agency section of this survey.

²⁵ *State v. Barrett*, 138 N. C. 630, 50 S. E. 506 (1905); *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50 (1905); *Aff'd*, 203 U. S. 531 (1906) *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (1907) *State v. Griffin*, 154 N. C. 611, 70 S. E. 292 (1911); *State v. Randall*, 170 N. C. 757, 87 S. E. 227 (1915); *State v. Langley*, 209 N. C. 178, 183 S. E. 526 (1935). See also Note, 8 N. C. L. REV. 50 (1935). Federal and other state cases are collected in Notes, 51 A. L. R. 1139 (1927), 86 A. L. R. 179 (1933), 167 A. L. R. 495 (1946).

¹ 239 N. C. 409, 80 S. E. 2d 23 (1954).

² As to the law of accord and satisfaction, see generally: 6 WILLISTON ON CONTRACTS §§ 1838 *et seq.* (Rev. ed. 1938).

conveyance of the lands, but the plaintiff refused to carry out the agreement.

The lower court allowed the plaintiff's motion for a judgment on the pleadings, but the Supreme Court reversed since it regarded the agreement as an accord for the original debt.

The Court pointed out that while full performance of the accord would operate to satisfy the original claim, an unperformed accord does not constitute a defense even though the debtor has tendered performance of his part of the agreement. In refusing tender, however, the creditor becomes liable for breach of the accord and the debtor is entitled to damages for the breach or, if still practicable, specific performance of the accord. The latter remedy would act to discharge the original obligation.

Since the defendant's allegations, explained the Court, were in effect a counterclaim for specific performance of the accord, and under the circumstances such a remedy was practical, the debt evidenced by the notes was extinguished.

CONSIDERATION

Mutual Promises

In the interest of maintaining a continuing business and with a possible eye to estate tax valuation consequences many partnership agreements now contain a provision to the effect that on the death of one of the partners the survivor is to have the option to buy the share of the decedent at a stipulated price. Such a provision was involved in *Silverthorn v. Mayo*.³ In that case the provision was held to be valid and binding, subject to the rights of creditors of the deceased partner, since it was supported by valuable consideration in the mutual promises of the partners.⁴ The Court refused to hold that the agreement was testamentary in character although it directed payment of the purchase price to the widow of the decedent. Moreover, it gave effect to that provision, even though the widow had since died, by affirming a ruling of the trial court that the purchase money be paid over to the widow's executor.

BREACH OF CONTRACT

Continuing Contract; Successive Breaches

The defendant in *Towery v. Carolina Dairy, Inc.*⁵ contracted to buy all the milk produced by the plaintiffs for five years from December 15, 1944, at a specified base price, to pay the plaintiffs in addition three

³ 238 N. C. 274, 77 S. E. 2d 678 (1953).

⁴ "... the mutual promises contained therein constituted enforceable and binding rights which could not be revoked except by mutual consent. . . ." *Silverthorne v. Mayo*, 238 N. C. 274, 277, 77 S. E. 2d 678, 681 (1953).

⁵ 237 N. C. 544, 75 S. E. 2d 534 (1953).

fourths of any increase in the retail price of milk during the five years, and to pay the plaintiffs a further \$1.25 per hundred weight as compensation for the plaintiffs' discontinuing their retail milk deliveries. In May, 1947, the retail price of milk advanced, but defendant refused to increase the payments to the plaintiffs. Deliveries under the contract continued, however, and payments were made at a price excluding the agreed increase until January, 1949, when the defendant refused to continue to pay the additional \$1.25 per hundred weight and plaintiffs ceased performance. In November, 1950, plaintiffs brought this action for breach of contract, seeking damages both for the refusal of the defendant, initiated in 1947, to increase the base price, and for the refusal in 1949 to pay the additional \$1.25 per hundred weight.

The defendant contended that any action for breach of the contract was barred since more than three years had passed since the initial breach in 1947. The Supreme Court, however, ruled that the statute of limitations was no bar since the plaintiffs, in spite of the 1947 breach, had elected to continue the contract until 1949.

Plainly the action for the 1949 breach should not be barred, if the contract was then operative. As the Court said, the 1947 breach did not automatically terminate the contract. That breach might be so serious as to entitle the plaintiffs to terminate all their executory obligations under the contract; but this would be a matter for election by the plaintiffs, unless the defendant had repudiated the contract. Since the plaintiffs continued to deliver and defendant continued to accept milk under the contract it is clear that both parties regarded the contract as still operative⁶ until the refusal of the defendant in 1949 to pay the agreed premium of \$1.25 per hundred weight. The three year limitation period had not run against that breach, at least, when the action was started in November, 1950.

However, plaintiffs also asked damages for failure of the defendant to pay the agreed increase in the wholesale price as the retail price increased, beginning May 16, 1947. The allegations in the complaint point to a series of breaches of this term of the contract; every payment by defendant to plaintiffs for milk delivered after May 16, 1947, failed to include the agreed share of the retail price increase, and was consequently a breach of the contract. If the statute of limitations ran separately on each such breach as it occurred, then recovery is barred for those which occurred more than three years before November 9, 1950, when the action was started. After pointing out that both parties

⁶ *Towery v. Carolina Dairy, Inc.*, 237 N. C. 544, 546, 75 S. E. 2d 534, 536 (1953). The Court spoke of the plaintiffs as "waiving" the defendant's breach, meaning probably that the plaintiffs waived any condition precedent which failed because of defendant's breach. Since the complaint asserted the right to collect damages for the breach, the breach itself was not released or waived.

continued to do business under the contract until 1949, the Court drew this conclusion: "Hence plaintiffs are entitled to be heard on their claim for damages alleged in the complaint."⁷

If this means that the 1947 damage claim alleged in the complaint is not barred it seems inconsistent with many authorities, including the early North Carolina case of *Robertson v. Pickerell*.⁸ Yet, a rule allowing the injured party to postpone court action as long as both parties are operating in any degree under the contract, and then to combine in one action all claims for breaches of one contract, tends to reduce litigation and seems most reasonable.⁹

REMEDIES

Abatement

In the case of *Queen v. Sisk*,¹⁰ the Court was called on to distinguish between the situation wherein a specific tract of land is purchased in gross for a lump sum or stipulated amount and that where land is sold at a stipulated price per acre. A tract of land was sold for an agreed price of \$100 per acre, the vendee paying an amount computed at this rate for a deed which gave the area as 23.1 acres. In fact, the tract covered only 13.7 acres. Suit was instituted to require the vendor to convey more land or else to refund the excess payment received.

The Court abated the deficiency in acreage conveyed by allowing recovery of the excess payment. Since the purchase price could be ascertained only by multiplying the number of acres purchased by the agreed price per acre the number of acres was of the essence of the con-

⁷ *Towery v. Carolina Dairy, Inc.*, 237 N. C. 544, 547, 75 S. E. 2d 534, 536 (1953).

⁸ 77 N. C. 302 (1887).

⁹ The contract in the *Towery* case appears to have been divisible, in the precise sense of the word as used in 3 WILLISTON ON CONTRACTS § 860 A (Rev. Ed. 1936); i.e., it called for a series of exchanges in each of which the value received by each party was agreed compensation for the performance rendered by him in that exchange. According to this authority, the statute of limitations runs separately against every breach of such a contract. 6 WILLISTON ON CONTRACTS § 2024 (Rev. Ed. 1938). But if the contract is not divisible, and both parties continue performance in spite of a partial breach, recovery for all breaches should be permitted in an action begun within the limitation period after completed performance was due (or presumably, after the injured party justifiably terminates his performance because of a later breach). 6 WILLISTON ON CONTRACTS § 2028 (Rev. Ed. 1938). Corbin concedes that there is "much authority" for raising the statutory bar piece-meal where separate actions would lie for a series of breaches, yet intimates that in many cases the rule should not be applied strictly. 4 CORBIN ON CONTRACTS § 951 (1951). One of this writer's illustrations for which he cites North Carolina authority, is the case of anticipatory repudiation, which gives an immediate right of action, yet on which the limitation period does not run until the date set for performance, unless the injured party clearly indicates an intent to treat the repudiation as a breach. *McCurry v. Purgason*, 170 N. C. 463, 87 S. E. 244 (1915).

¹⁰ 238 N. C. 389, 78 S. E. 2d 152 (1953).

tract. This decision follows prior North Carolina cases which refused to apply the doctrine of caveat emptor except where a specific tract of land is sold for a lump sum.

BROKERAGE CONTRACTS

In *Banks v. Nowell*¹¹ the Court pointed out the well established rule in this state that in an action for commissions a broker must not only prove his contract to sell land and that he has produced a buyer ready, willing and able to buy, but also that the buyer was willing to purchase on the terms stipulated by the seller.

PAROL EVIDENCE RULE

In *Neal v. Marrone*¹² the Court applied the parol evidence rule in holding that a contemporaneous oral agreement in conflict with a written contract could not be shown to vary the written agreement in the absence of allegations of fraud or mistake. This was so even though the defendant alleged that he had difficulty in speaking, writing or reading English and had signed the contract only in reliance on the assurances of the plaintiffs that the oral agreement would be considered a part of the contract.¹³ In disallowing the defense the Court stated:

A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writings.¹⁴

Although the North Carolina parol evidence rule is in a somewhat confused state this case is apparently in accord with prior decisions since the defendant, though alleging reliance on representations of the plaintiffs, did not allege fraud in the execution or inducement of the contract. Had fraud been alleged and proved earlier decisions indicate that the parol agreement could have been introduced.¹⁵

TERMINATION

The same basic rule of contract construction was applied to two

¹¹ 238 N. C. 737, 78 S. E. 2d 761 (1953).

¹² 239 N. C. 73, 79 S. E. 2d 239 (1953).

¹³ The contract provided that: "Any compensation to Walters & Neal for their services in selling said properties shall be determined solely by . . . virtue of their authority to regulate the gross sales price . . . and the excess of sales price above the hereinbefore recited net return(s) to the property owner, less the costs of such sales, shall constitute their entire compensation." *Id.* at 75, 79 S. E. 2d at 240.

¹⁴ *Id.* at 77, 79 S. E. 2d at 242.

¹⁵ See, Chadbourn and McCormick, *The Parol Evidence Rule in North Carolina*, 9 N. C. L. Rev. 151 (1930-31); Note, 17 N. C. L. Rev. 32 (1938-39).

different fact situations in the cases of *Fulghum v. Town of Selma*¹⁶ and *Howell v. Commercial Credit Corp.*¹⁷ In *Fulghum* the plaintiff had a contract to purchase water from the Town of Selma at a stipulated price but the contract failed to fix its duration. The town by city ordinance proposed to increase the rates charged the plaintiff and if plaintiff refused to pay the higher rates to cut off delivery. In refusing to grant the plaintiff an injunction the Court stated that:

Where the parties to a contract calling for a continuing performance fix no time for its duration and none can be implied from the nature of the contract or from the surrounding circumstances, the contract is terminable at will by either party on reasonable notice to the other.¹⁸

In the *Howell* case an action was brought for breach of an employment contract by wrongful discharge and the same rule was followed inasmuch as the contract did not specify any definite time for the duration of the employment. The Court did not refer to *Fulghum v. Town of Selma*, which was decided only a few weeks earlier in the term, but held the contract to be one for employment for an indefinite term and terminable at the will of either party, relying on two earlier North Carolina cases.¹⁹

The Court upheld the right of an infant to rescind a contract to purchase an automobile which he had made after representing himself to be of age.²⁰ It was not material that he was adult enough to be convicted for transporting boot-leg liquor in the automobile.

COURTS

It is well settled in this state that a judge of the superior court has no authority, outside the county where an action is pending, to hear a motion or make an order substantially affecting the rights of parties to that action, absent authorization by statute or consent of the parties.¹

¹⁶ 238 N. C. 100, 76 S. E. 2d 368 (1953).

¹⁷ 238 N. C. 442, 78 S. E. 2d 146 (1953).

¹⁸ *Fulghum v. Town of Selma*, 238 N. C. 100, 104, 76 S. E. 2d 368, 370 (1953).

¹⁹ *May v. Tidewater Power Co.*, 216 N. C. 439, 5 S. E. 2d 308 (1939); *Elmore v. Atlantic Coast Line R. R. Co.*, 191 N. C. 182, 131 S. E. 633 (1926).

²⁰ *Williams v. Aldridge Motors, Inc.*, 237 N. C. 352, 75 S. E. 2d 237 (1953).

¹ Apparently this is a case-made rule. G. S. § 7-65 states that in all matters not requiring jury trial or in which jury trial has been waived, the resident judge shall have concurrent jurisdiction with the judge holding the courts of the district, and "may hear and pass upon such matters and proceedings in vacation, out of term or in term time." But our Court has held flatly that no superior court judge can take valid action outside the county where an action is pending, except by consent of the parties or by statutory authorization. *Patterson v. Patterson*, 230 N. C. 481, 53 S. E. 2d 658 (1949). As long ago as 1888, "out of term" in such a statute was held not to include "out of county." *McNeill v. Hodges*, 99 N. C. 248, 6 S. E. 127 (1888).

In *Griffin v. Griffin*,² a wife whose divorce action was pending in Wilson County appeared in response to an order before the resident judge of the district in Nash County, where a hearing was duly held on the custody of the children. When on appeal she attacked the validity of the judgment, the Supreme Court held that her appearance and participation in the hearing constituted consent to the irregularity of the place of its holding.

In *Lewis v. Harris*,³ the Court held that an emergency judge is without power, even with the consent of the parties, to make rulings in a cause when the term of court that he has held has expired. This proposition the Court thought fundamental enough to be noticed *ex mero motu* when the ruling in question was appealed. "While the parties debate in this court the question as to whether the judge below erred . . .," it said, "there looms at the threshold, of this appeal, another question: Did [the Emergency Judge] have jurisdiction to enter the order now being challenged? The answer is No."⁴ Article 4, Section 11 of the North Carolina Constitution gives emergency judges "the power and authority of regular judges of the Superior Courts, *in the courts which they are so appointed to hold. . .*" (Italics supplied.) See also G. S. § 7-52.

In sharp contrast to this ruling on the jurisdiction of emergency judges, two recent decisions, *Spaugh v. Charlotte*⁵ and *Parker v. Underwood*,⁶ expounded the quite broad jurisdiction now enjoyed by special judges under a 1951 amendment to G. S. § 7-65.⁷ The effect of the statute is to give the resident judge and special judges residing within a judicial district concurrent jurisdiction with the judge regularly presiding over the courts of the district in "all matters and proceedings where the Superior Court has jurisdiction out of term. . . ." Thus, in the *Spaugh* case, Special Judge Clarkson's "In Chambers" decision of a controversy without action, heard in Charlotte, the place of his residence, was held to be entirely within his jurisdiction, and the Court went on to hold that Chapter 1119 of the 1951 Session Laws⁸ did not by implication cut down the jurisdiction conferred by G. S. § 7-65.

In re *Melton*⁹ increased the confusion over the jurisdiction of the juvenile court and the superior court in matters involving the custody

² 237 N. C. 404, 75 S. E. 2d 133 (1953).

³ 238 N. C. 642, 78 S. E. 2d 715 (1953).

⁴ 238 N. C. 642, 645, 78 S. E. 2d 715 (1953).

⁵ 239 N. C. 149, 79 S. E. 2d 748 (1954).

⁶ 239 N. C. 309, 79 S. E. 2d 765 (1954).

⁷ A 1950 amendment to N. C. CONST., Art. 4, § 11 enabled the legislature to make the change.

⁸ This statute, now G. S. § 7-58, gave to special judges the "same power and authority in all matters whatsoever that regular judges holding the same courts would have."

⁹ 237 N. C. 386, 75 S. E. 2d 303 (1953).

of children under sixteen years of age. This case is discussed along with other custody decisions in the section on Domestic Relations.¹⁰

*Jones v. Brinson*¹¹ involved a change of venue that miscarried. The action started in Pamlico County; the parties agreed to transfer it to Craven, but for some reason the papers in the case were never received in that county. Consequently, the superior court judge who sat there directed a remand to Pamlico. But a superior court judge in Pamlico, before the order of remand was filed in that county, affirmed a referee's award to the defendants, proper notice having been given to all parties. This the plaintiffs sought to upset on appeal for want of jurisdiction, proceeding "on the contention that the actual filing in the Pamlico Court of the order of remand was a *sine qua non* to its recapture of jurisdiction."¹² The Supreme Court thought, since the "transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein" had never gotten to Craven, that the court there never acquired jurisdiction, because the statute dealing with the removal of causes, G. S. § 1-187, had not been complied with, and that consequently "the dormant jurisdiction of the Pamlico Court was sufficiently reactivated to restore its power to hear and determine the rights of the parties."¹³ It expressly left open the possibility that the plaintiffs might have the judgment set aside for mistake, surprise, or excusable neglect, under G. S. § 1-220.

Our conglomerate collection of courts inferior to the superior court produced, in *State v. Sloan*,¹⁴ an absurd dilemma, which, however, was of no avail to the defendant who apparently invoked it as a means to escape conviction. Craven County has had a county recorder's court since 1919, and the City of New Bern a municipal court since 1947. The defendant was tried on a warrant in the county recorder's court, where he pleaded *nolo contendere*, and appealed to the superior court when judgment was pronounced, contending that the county recorder's court had no jurisdiction over the offense charged. And surely enough, it appeared that G. S. § 7-222 gave the county court exclusive original jurisdiction of offenses below the grade of felony committed anywhere in the county, while G. S. § 7-190 gave the New Bern Municipal Court exclusive original jurisdiction over such offenses committed in the municipality or within a five-mile radius thereof. It was admitted that the alleged offense occurred within the limits of the New Bern court. Said the Supreme Court: "The two sections are irreconcilable

¹⁰ *Infra* p. 446.

¹¹ 238 N. C. 506, 78 S. E. 2d 334 (1953).

¹² 238 N. C. 507, 508, 78 S. E. 2d 334 (1953).

¹³ 238 N. C. 507, 511, 78 S. E. 2d 334 (1953).

¹⁴ 238 N. C. 547, 78 S. E. 2d 312 (1953).

to the extent they attempt to confer on both courts exclusive original jurisdiction of general misdemeanors committed within the territorial limits of the Municipal Recorder's Court of New Bern."¹⁵ It therefore concluded that the two courts possessed and might exercise concurrent jurisdiction therein, and remanded the cause for further prosecution. A similar anomaly had arisen before,¹⁶ and its reoccurrence makes pertinent the observation that it is high time the state set up a uniform system of courts inferior to the Superior Court.

In a 1952 case,¹⁷ the Supreme Court struck down as unconstitutional a statute¹⁸ providing that when any person before the County Court of Greene County demanded a jury trial, the cause should be transferred to the superior court, there to be heard on the warrant in the case. The statute contravened the constitutional right to be tried by indictment.¹⁹ Asked last year, in *State v. Norman*,²⁰ to take the same attitude towards a similar statute²¹ applying to the Recorder's Court of Washington County, the Court refused to do so. The statute in question did not mention trial by warrant in the superior court, providing simply that on demand for a jury the recorder should "transfer said case to the Superior Court of Washington County for trial. . . ." The Supreme Court stated that this wording clearly contemplated indictment. It went on to "indulge the observation that the General Assembly has moved in a somewhat mysterious way to deprive defendants in criminal cases in the Recorder's Court of Washington County of their statutory right to be tried by a jury of six men. G. S. § 7-228."²² The gist of all this is that trial below and appeal are necessary for a valid trial in the Superior Court on the original warrant.²³ But minor irregularity in the warrant can be waived by appearance and submission to trial in the original court, and a defendant convicted in the inferior court, who has had his conviction affirmed on appeal to the superior court, will not be heard to say in the Supreme Court that there was no trial in the inferior court and therefore no valid decision in the superior court when he appealed to that tribunal.²⁴

¹⁵ 238 N. C. 547, 549, 78 S. E. 2d 312 (1953).

¹⁶ *In re Barnes*, 212 N. C. 735, 194 S. E. 499 (1938).

¹⁷ *State v. Thomas*, 236 N. C. 454, 73 S. E. 2d 283 (1952).

¹⁸ N. C. Laws 1951, c. 435.

¹⁹ N. C. CONST., Art. 1, § 12: (As amended in 1950) "No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment, but any person, when represented by counsel, may, under such regulations as the Legislature shall prescribe, waive indictment in all except capital cases."

²⁰ 237 N. C. 205, 74 S. E. 2d 602 (1953).

²¹ N. C. Laws 1951, c. 589.

²² 237 N. C. 205, 212, 74 S. E. 2d 602 (1953).

²³ *State v. Thomas*, 236 N. C. 454, 73 S. E. 2d 283 (1952).

²⁴ *State v. Doughtie*, 238 N. C. 228, 77 S. E. 2d 642 (1953).

*Lovegrove v. Lovegrove*²⁵ involved a divorce action begun in recorder's court in Nash County. Both parties were residents of Edgecombe County. When prayed to remove the action to Edgecombe, the clerk of superior court in Nash entered, with the consent of the parties, an order transferring the action to Edgecombe County Recorder's Court. It was tried there, appealed to the superior court, and thence to the Supreme Court. The latter court noted of its own volition that the clerk of superior court had no statutory authority to remove the cause and that, since neither the Edgecombe Recorder's nor the superior court acquired jurisdiction under the removal, the Supreme Court could not hear the case on appeal. "The jurisdiction of this Court is derivative. Since the court below had no authority to enter the order from which plaintiff appealed, we have no jurisdiction to entertain the appeal on its merits."²⁶

G. S. § 1-189 requires that a summons shall be signed by the clerk of court. By judicial interpretation,²⁷ it may be signed in the clerk's name by his agent, usually the deputy clerk. *Beck v. Vonnannon*²⁸ held that a summons signed by the deputy clerk *as deputy*, while irregular, is not void and is sufficient for bringing the summoned party into court.

CREDIT TRANSACTIONS

CHATTEL MORTGAGES

In *Hawkins v. M & J Finance Corp.*¹ the owner of a truck and an automobile left them with a used car dealer to be sold. He also left his certificates of title with the assignment forms on the backs signed but not filled out. The dealer, without the permission of the owner, mortgaged the vehicles to the defendant, who saw the certificates of title before taking the mortgage. Evidence showed there was a wide-spread custom in the used car business to rely on certificates of title so signed. The Court, however, allowed the owner to recover the vehicles from the mortgagee, holding that since the assignment forms on the certificates of title were not filled in according to the statute providing for registration of title,² the defendant was not justified in relying on them.

In *State Trust Co. v. M & J Finance Corp.*³ a dealer mortgaged

²⁵ 237 N. C. 307, 74 S. E. 2d 723 (1953).

²⁶ 237 N. C. 307, 310, 74 S. E. 2d 723 (1953).

²⁷ *Jackson v. Buchanan*, 89 N. C. 74 (1883); *Shepherd v. Lane*, 13 N. C. 148 (1828).

²⁸ 237 N. C. 707, 75 S. E. 2d 895 (1953).

¹ 238 N. C. 174, 77 S. E. 2d 669 (1953), 32 N. C. L. REV. 545 (1954).

² N. C. GEN. STAT. § 20-72 through 20-75 (1953).

³ 238 N. C. 478, 78 S. E. 2d 327 (1953).

automobiles to the plaintiff. The mortgagee knew the dealer sold mortgaged cars in the usual course of his business, but the lower court impliedly found that the mortgagor dealer had no authority from the plaintiff to sell the automobiles mortgaged to him without first paying the mortgage. The dealer sold one of the mortgaged cars, took a purchase money mortgage, and transferred the mortgage to the defendant. In an earlier case, the North Carolina Court had held mortgages by a dealer valid against the dealer's customer.⁴ An exception, however, had been recognized where the mortgagor dealer customarily sold mortgaged cars to the knowledge of the mortgagee without first paying the mortgages.⁵ The Court held in the *State Trust* case that the exception did not apply and that the plaintiff's mortgage was superior to the defendant's. Although this case differs from the earlier cases in that they involved the validity of a mortgage given by a dealer against a purchaser from the dealer, whereas the present case involves the validity of the dealer's mortgage against a purchase money mortgage given to the dealer by the customer and transferred by the dealer, the Court does not mention this distinction.

CONDITIONAL SALES

The validity of a conditional sales contract given and registered in South Carolina but not registered in North Carolina was the question in controversy in *Home Finance Co. v. O'Daniel*.⁶ The truck in litigation was purchased in June in South Carolina by a South Carolina resident under a conditional sales contract which was sold to the plaintiff finance company and which was recorded in the county of the residence of the purchaser as required by South Carolina law. A month later the purchaser brought the truck to North Carolina and sold it to the defendant used car dealer, who then resold it to the other defendant. The South Carolina registration card showed title in the conditional vendee and showed his South Carolina address. The defendants did not check the records in South Carolina for possible conditional sales contracts. Early in September the plaintiff learned that the truck was in North Carolina and thirteen days later started suit to recover the truck. The conditional sales contract was not recorded in North Carolina until after this suit was begun.

The Court apparently held that whether the plaintiff was entitled to the truck depended upon whether the conditional sales contract must be registered in North Carolina which in turn depended upon whether the truck acquired a situs in North Carolina. Under G. S. §

⁴ *Whitehurst v. Garrett*, 196 N. C. 154, 144 S. E. 835 (1928), 7 N. C. L. REV. 306 (1929).

⁵ *Atlantic Discount Corp. v. Young*, 224 N. C. 89, 29 S. E. 2d 29 (1944).

⁶ 237 N. C. 286, 74 S. E. 2d 717 (1953).

44-38.1(b) if the property acquires a situs in North Carolina the conditional sales contract given in another state will be valid against a purchaser for value only if registered in North Carolina within ten days after the conditional sales vendor has knowledge that the property has been brought into the state. Under G. S. § 44-38.1(a) property acquires a situs in this state when it is brought in with the intent that it be permanently located in the state, and keeping the property here for two consecutive months is prima facie evidence that the property has acquired a situs here. The truck in this case had been in North Carolina for more than two months before the plaintiff brought this action to recover it. The Court sent the case back for trial on the issue of whether the truck had acquired a situs in North Carolina.

The Court in its decision nowhere states why the defendant purchaser would prevail if the truck acquired a situs in North Carolina although it is probably because registration was not made within ten days after knowledge. Nor does the Court discuss why failure to register within that ten days should affect the rights of these parties in view of the fact that the truck was bought by the defendants prior to the time that the conditional vendor learned of the removal of the truck into North Carolina and the rights of the purchasers were presumably fixed at the time of the sale so that subsequent registration would have had no effect.

In *Williams v. Aldridge Motors, Inc.*⁷ plaintiff minor purchased a car under a conditional sales contract from the defendant motor company which immediately sold the note and contract to the defendant bank. While the plaintiff was using the car for the illegal transportation of intoxicating liquor, state authorities seized it and sold it pursuant to state law. In this action by the minor to disaffirm the contract and to recover payments made, the defendants counterclaimed for damages resulting from the tortious conduct of the plaintiff in illegally using the car to transport the liquor and in not notifying the defendants of the seizure so they could intervene and protect their lien.⁸ A judgment in the trial court allowing a set-off of the value of the property was reversed and remanded for further findings of fact. The counterclaim stated a cause of action but the defendants as lienors must show that they were without knowledge of the forfeiture proceeding from any source and for that reason failed to intervene; that they were without knowledge of the illegal use of the car so that they would have been entitled to the proceeds of the forfeiture sale; and the resultant loss sustained by the lienor.

⁷ 237 N. C. 352, 75 S. E. 2d 237 (1953).

⁸ N. C. GEN. STAT. § 18-6 (1953).

DEEDS OF TRUST

In *Barbee v. Edwards*,⁹ a suit involving an action to remove a cloud on the title to real estate, the decision depended on close analysis of the facts and the application of rather well-settled rules of law. In 1917 the plaintiff purchased land from Lindsey and his wife and gave a purchase money deed of trust to Mrs. Lindsey as trustee securing the indebtedness to Lindsey. In 1927 the deed of trust was foreclosed and the property sold to Lindsey. The record of sales book showed a report of the trustee made in 1927 to the effect that the sale was made under the power of sale in the deed of trust and that Lindsey was high bidder for \$300, but showed no final report of sale by the trustee. Either no trustee's deed was given or if given was lost and none was recorded. In 1934 Lindsey and his wife conveyed the property to Weaver. Defendant claims title as purchaser under this deed. In 1945 Mrs. Lindsey as trustee deeded the property to Lindsey under the power of sale in the 1917 deed of trust. Plaintiff testified that he had paid everything due on the property. The Supreme Court reversed an involuntary nonsuit at the close of plaintiff's evidence and sent the case back for trial. The Court pointed out that where a deed of trust is given to secure a debt, payment of the debt extinguishes the power of sale and terminates the title of the trustee and that a sale conducted under the power after full payment is invalid and ineffectual to convey title to the purchaser. It found that there was sufficient evidence to support but not to compel a finding that the debt was paid before the trustee's deed to Lindsey in 1945. If the debt was paid, the trustee's deed in 1945 was void. If this deed fails, so does the defendant's since the only way his deed under Weaver can be made good is under the doctrine of feeding the estoppel. The question of payment must, therefore, go to the jury. Pleas of limitation set up by the defendant under various statutes were considered, but the Court concluded that on the record none of them could be invoked at the nonsuit level to defeat the plaintiff's prima facie case.

In *Dobias v. White*¹⁰ a deed of trust on land already owned by the vendee given to secure the purchase price of other land was held not to be a purchase money deed of trust and therefore the vendor would be entitled to a deficiency judgment, since G. S. § 45-21.38 abolishing deficiency judgments on foreclosure of purchase money mortgages is not applicable.

In *Casey v. Grantham*¹¹ two partners had given a deed of trust covering both partnership property and individual property of one

⁹ 238 N. C. 215, 77 S. E. 2d 646 (1953).

¹⁰ 239 N. C. 409, 80 S. E. 2d 23 (1954).

¹¹ 239 N. C. 121, 79 S. E. 2d 735 (1954).

of the partners to secure a partnership debt. The creditor was the father of the other partner. On default of the debt the trustee advertised the property for public sale under the deed of trust. The partner whose individual property was mortgaged alleged that his partner aided by that partner's father, the lien creditor, had usurped complete control and exclusive possession of the assets and the books of the partnership. He sought and obtained an injunction to prevent sale under the deed of trust until an accounting and settlement of the rights between the partners were had and the firm assets were first applied to the debt. Two judges dissented.

SURETYSHIP

In *Vanderbilt Tire & Rubber Corp. v. Bowen*¹² evidence that the automobile tires in question were furnished by the plaintiff to one defendant on the credit of the other and on the strength of that other's unconditional promise to pay for them was held sufficient to make the latter's liability to the plaintiff for the price a question for the jury.

In *First-Citizens Bank & Trust Co. v. New Amsterdam Casualty Co.*¹³ the owner of land borrowed money from the plaintiff bank to build houses on the land and contracted to give plaintiff a bond with plaintiff as obligee conditioned on the owner's performing his agreement to build the houses. Instead, the owner then entered into a fictitious building contract in which he was designated contractor and another person was designated owner. He then gave to the bank his bond with the defendant as surety for the performance of the fictitious contract of building and running to the fictitious owner. The defendant knew that the plaintiff had made the furnishing of a performance bond by the owner running to the plaintiff a prerequisite to the loan. The bank lent the money without reading the bond and on default completed the houses after it had knowledge of the exact terms of the bond. The Court held that the defendant surety company was not liable to the bank either under the terms of the bond or under any doctrine of estoppel.

In *Langley v. Patrick*¹⁴ an indemnity contract was issued by the defendant surety company to the Beaufort County Alcoholic Beverage Control Board indemnifying the Board against loss of money caused by larceny, embezzlement, forgery, misappropriation, or other fraudulent or dishonest act committed by insured employees. The Court held the bond did not cover liability for assault on the plaintiff by an enforcement officer employed by the Board.

¹² 237 N. C. 426, 75 S. E. 2d 159 (1953).

¹³ 237 N. C. 591, 75 S. E. 2d 651 (1953).

¹⁴ 238 N. C. 250, 77 S. E. 2d 656 (1953).

LABORERS' AND MATERIALMEN'S LIENS

A materialman's lien for the balance due for erecting buildings less the cost of a well was allowed in *Lowery v. Haithcock*.¹⁵ The lien for the well was disallowed because the notice given under G. S. § 44-38 was not definite since it designated only the name of the well company and the amount; the well was furnished under an agreement separate from the original contract and the well was completed more than six months prior to the date notice of claim was filed; and the owner of the land did not authorize the expenditure.

CRIMINAL LAW AND PROCEDURE

Perhaps few decisions in the field of criminal law and criminal procedure made any significant changes in the law; and perhaps few can be characterized as especially significant. Nevertheless, the administration of criminal law has made up a good share of the business of the Court's recent dockets. And the pages that follow constitute an attempt at critical analysis of some facets of that business.

CRIMINAL LAW

Assault

Probably the most newsworthy case involved the law of assaults. And because the decision is the latest in a recent pattern of cases which have raised the question of broadening the concept of assault, it is worthy of extended discussion. The case was *State v. Ingram*,¹ and the issue was whether it is legally possible for a man to assault a woman by looking at her with a "leer." The Court held it was not.

The evidence was to the effect that the defendant drove past the prosecutrix, a girl of eighteen, while she was walking in a field. He looked out the car window and "leered" at her. (She defined a "leer" as "a curious look.") The girl immediately fled the scene, but a few moments later she heard the defendant stop his car and a few moments after that she saw him walking toward her. She hurried on in flight to a nearby field where her brothers were working and arrived there greatly upset and in tears.

During the whole episode not a word had been exchanged between the defendant and the girl. Nor had the defendant ever approached her closer than a distance of sixty-five feet. Holding that the state should have been non-suited on this evidence, the Court set forth several different definitions of assault,² distinguished some difficult precedents,

¹⁵ 239 N. C. 67, 79 S. E. 2d 204 (1953).

¹ 237 N. C. 197, 74 S. E. 2d 532 (1953).

² *E.g.*, "An intentional attempt, by violence, to do an injury to the person of another," [State v. Davis, 23 N. C. 125, 127 (1848)]; ". . . there must be an

and predicated its decision upon the reasoning that there had been no "overt act" on the part of Ingram "constituting an offer or attempt to do injury" to the girl.

The criminal law's concept of "overt act" is slippery at any time and perhaps especially illusory in the field of assaults as some of the North Carolina decisions³—cases which had to be distinguished here—would indicate. Overt acts amount, basically, to planned "muscular contractions,"⁴ and in the law of assault the term would seem to have reference to a series of muscular contractions which go far enough to constitute an "attempt" to inflict a battery.⁵ The question perhaps boils down to this: how far must the defendant go in physically demonstrating his purpose before the law will hold him criminally accountable?

It is not an easy question.

No doubt the law has an interest in protecting young ladies from fear or flight engendered by the "leers" of elements of the male population;⁶ and no doubt, too, a "leer"—even if it amounts only to a "curious look"—is, as a matter of logic, an "overt act." But it also may be an equivocal act as the prosecutrix's own testimony in the *Ingram* case shows. And, as the Court indicates, it is precisely because a "leer" is an equivocal act that the risk of using the criminal law to protect the feelings of the prosecutrix is too great. The law of assaults has never concerned itself with insults alone and seldom with mere verbal or gesticulated affronts to chastity; the crime is derived from and concentrates first and foremost on the attempted battery;⁷ the injured feelings or fear of the victim, while an element of the crime under

overt act or an attempt or the unequivocal appearance of an attempt, with force or violence, to do some immediate physical injury to the person of another."

³ *E.g.*, *State v. Williams*, 186 N. C. 627, 120 S. E. 224 (1923): Defendant "brushed" past prosecutrix and spoke an indecent proposal; the trial court charged that the jury could find an assault if the "language used by the defendant amounted to such a display of force as would, and did, cause the prosecuting witness reasonably to apprehend that she was about to receive injury or hurt..." The instruction was sustained. *State v. McIver*, 231 N. C. 313, 56 S. E. 2d 604 (1949): Defendant crossed the street, in the early morning hours and spoke an indecent proposal to the prosecutrix; conviction for assault affirmed on authority of the *Williams* case, *supra*. Compare, *State v. Sutton*, 228 N. C. 534, 46 S. E. 2d 310 (1948): Defendant, while making an inquiry in a public office, and while in a drunken condition, "stared" at a secretary after asking her a question and followed her into the hall and upstairs, putting her in fear. Conviction of assault affirmed. Compare the stricter view expressed in *State v. Daniel*, 136 N. C. 571, 48 S. E. 544 (1904).

⁴ HOLMES, *THE COMMON LAW*, 90-91 (1909). See *ibid.* at 54; Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L. J. 645 (1917).

⁵ *State v. Daniel*, 136 N. C. 571, 48 S. E. 544 (1904). MILLER, *HANDBOOK OF CRIMINAL LAW* 303-304 (1934).

⁶ See *Beausoliel v. United States*, 107 F. 2d 292 (D. C. Cir. 1939) to the effect that "Young girls . . . are more especially . . . within the protection of the law."

⁷ *Supra* note 5. *State v. Silver*, 227 N. C. 352, 42 S. E. 2d 208 (1947). Compare the common law authorities discussed in *Beausoliel v. United States*, 107 F. 2d 292 (D. C. Cir. 1939).

some circumstances and some definitions, are certainly not the focal point of the inquiry; the essence of the crime is the immediate danger of a battery. And the trend to broaden the reach of the crime to include persons who communicate, not threats of violence by physical manifestation, but insults and insults alone by physical manifestation⁸ poses a danger, the kind of danger which inevitably results from over-expansion of the elements of criminality by defining them in sweeping terms. Indeed, the law has long looked with suspicion on such crimes, and the principle which condemns vaguely rendered laws is so fundamental that it is embedded in the constitutional concept of "due process."⁹ If "leers," or even voiced lustfulness, are to be made criminal, the change should be accomplished by marking the boundaries of such prohibited conduct with an exacting precision.¹⁰ Otherwise the courts could well be flooded with cases involving conduct too trivial to warrant penal treatment; and unsuspecting males may yet find themselves enmeshed in grossly unfair prosecutions for crimes heretofore unknown to the law.

Self-defense

In dealing with assault and other alleged crimes against the person, the Court had occasion to consider in some detail the principle of self-defense as a justification of such conduct. In several cases the Court demonstrated liberality in reversing convictions when the trial judge had failed to give a requested instruction on self-defense where the evidence to support such a defense was not very strong.¹¹ In *State v. Rawley*,¹² however, the court was strict; it held that a defendant is entitled to no instruction on self-defense when his own testimony is to the effect that the act causing injury was an "accident" and not an intentionally inflicted wound.

In the *Rawley* case the defendant, a woman, was charged with murder. By way of confession, before trial, she admitted that during a

⁸ Cf. Greensboro Daily News, January 27, 1954 (Negro man who threw a note out of a car window at a white girl apparently charged with an assault on a female). The racial implications of borderline assault cases were discussed in *State v. Williams*, 186 N. C. 627, 120 S. E. 224 (1923), where the trial judge in his charge called attention to the fact that the defendant was a Negro and the prosecutrix a white woman. It was held that this constituted no error.

⁹ See, e.g., *Lanzetta v. New Jersey*, 306 U. S. 451 (1939).

¹⁰ Compare the statutory expansion of the crime effected by N. C. GEN. STAT. § 14-34 (assault by pointing a gun).

¹¹ *State v. Satterwhite*, 238 N. C. 674, 78 S. E. 2d 603 (1953); *State v. Poplin*, 238 N. C. 728, 78 S. E. 2d 777 (1953) (error for trial court not to instruct on self-defense, though no instruction was ever requested, citing N. C. GEN. STAT. § 1-180. Compare, *State v. Porter*, 238 N. C. 735, 78 S. E. 2d 910 (1953) (no error to refuse to instruct on self-defense in an assault case where defendant was drunk and was in prosecutrix's home and had insulted her and refused to leave and she struck first in an effort to remove him from the house).

¹² 237 N. C. 233, 74 S. E. 2d 620 (1953).

fight she struck a lethal blow with a knife upon the deceased, a powerful man, and the state relied heavily on this confession to convict. But at trial the defendant repudiated her previous account and related this story: there had been a serious fight; it occurred in defendant's house; the deceased threatened violence; he chased her upstairs and back down; she grabbed a knife and continued her retreat, but he knocked her down; he then fell upon her (there is more than a suggestion in the testimony that both were drunk); in falling he apparently impaled himself upon the knife and thus inflicted the mortal wound by his own act. Thus the defendant insisted that she didn't "strike at him with the knife," and so she necessarily answered "No" to a question asking whether she had "cut" in "self-defense."

The trial court refused to instruct on self-defense¹³ and this ruling was sustained on appeal. The reasoning upon which the decision rests is not too clear, for Justice Winborne's opinion on this issue is brief. However, the case may mean this: a defendant in a murder case cannot claim that a killing was an "accident" and then proceed to ask the jury to consider whether the killing was justified because the lethal blow was inflicted in self-defense.

A claim of self-defense does seem inconsistent with a claim of accident. And, of course, there should be some limit to instructions to the jury; where the evidence utterly negates one theory of defense, that theory should be withdrawn from the jury; thus, in cases such as this one, it may be proper to impose some sort of an "estoppel" on the defendant. But the *Rawley* case suggests some interesting questions.

In the first place the validity of the defense of accident may have depended initially on the defendant's right to have a knife in her hand,¹⁴ and that in turn depended on the necessity to arm herself to protect herself from bodily harm.¹⁵ And since the claim of accident was predicated upon a self-defense situation, the two defenses are, as a practical matter, consistent at least to a point. Secondly, while the defendant claimed she struck no blow, the state claimed that she did—that she "cut" intentionally. And if the defendant had finally admitted that she did "cut" intentionally, there could be no doubt but that she would have been entitled to invoke self-defense, for certainly—absent a claim of accident—the circumstances fully required submitting the issue to the jury.¹⁶ Why

¹³ The court also refused to admit evidence of the deceased's reputation for violence.

¹⁴ CLARK AND MARSHALL, LAW OF CRIMES § 272 (Kearney ed., 1940).

¹⁵ *Valentine v. Commonwealth*, 187 Va. 946, 48 S. E. 2d 264 (1948). Cf. the instructions approved in *State v. Lovelace*, 178 N. C. 762, 101 S. E. 380 (1919).

¹⁶ *State v. Poplin*, 238 N. C. 728, 78 S. E. 2d 777 (1953). See, *State v. Marshall*, 208 N. C. 127, 179 S. E. 427 (1935). Note, too, that in the *Rawley* case the defendant was a female; the deceased was a male; she was in her own house; she had no further duty of retreat; in fact retreat was impossible.

then should the defendant's insistence that there was no blow and no intent on her part to strike a blow preclude her from saying to the jury: but if you don't believe my story—if you believe the state—and if you find I did strike with the knife—then I ask you to find that the "cut" was necessary to save myself from serious bodily harm. The law allows inconsistent defenses in civil actions, so why not permit them in criminal actions—at least where the evidence shows that if there was an intentional killing it still might well have been a justifiable killing.

Finally, the decision may pose practical problems when somewhat similar situations arise in the future. It is not unreasonable to assume that in the *Rawley* case the defendant was quite intoxicated at the time of the homicide—even though she denied drunkenness. Hence it is not unreasonable to assume that her memory may actually have been hazy.¹⁷ Assume that it was; assume further that she only *thought* that the wounding was an accident, but she was not sure. Yet she also may have thought—and with good reason—that if she did strike, she struck with justification. What is the defense to do? It is faced with a dilemma by way of choice of one of the two defenses to the exclusion of the other. But should this dilemma be forced upon defendants in such cases? Is it conducive to a frank and open defense? Or is it conducive to distortions by hard pressed prisoners who must choose one or the other line of testimony?

Presumed Malice

Another homicide case demonstrates the treacherous pitfalls which are often encountered in trials for murder. The decision in *State v. Howell*¹⁸ dealt with "presumed malice"—the "strength" or "weight" of the presumption of malice flowing from intentional use of a deadly weapon.¹⁹

The trial court properly charged that the law "raises" this presumption on a proper showing by the evidence. But shortly thereafter the court charged in such a way as to create the inference that it was defendant's burden to overcome this "presumption" and mitigate the offense to manslaughter by proof of provocation "beyond a reasonable doubt."

That was the error which necessitated reversal. It was error because the trial court attributed too much weight to the original presumption.

¹⁷ In her testimony at trial, defendant said her memory was "clear." But when interviewed by the police she was, according to the officers, in a "stupor."

¹⁸ 239 N. C. 78, 79 S. E. 235 (1953).

¹⁹ That this is a confused and confusing part of the law of criminal homicide is indicated by a survey of the cases and "rules" in MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 38-41 (1940).

The defendant need not rebut the presumption by proof "beyond a reasonable doubt"; he has simply a "burden of proving to the *satisfaction of the jury* . . . the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon grounds of self-defense, accident²⁰ or misadventure."²¹

It is worthy of note that the trial judge elsewhere used the correct terminology ("satisfaction" and not "reasonable doubt") but this did not cure the charge of error.²² And it may also be true that the trial judge fell into the original error quite inadvertently.²³ Finally it is worth comment that the Supreme Court assumed that the slip in terminology would have an appreciable effect on the jury—that jurors would be acute enough to distinguish, without the distinction being called to their attention (for a charge describing the distinction is apparently unnecessary), between proof which satisfies and proof which dispels doubts for which a reason can be assigned.²⁴ Perhaps so. But just how much difference is there?²⁵ If reversals are to follow for errors

²⁰ *Query* as to whether the defense of accident should fall within the scope of the presumption at all. See *Commonwealth v. Kluska*, 333 Pa. 65, 3 A. 2d 398 (1939): "The defense that the killing was accidental is not of the affirmative type which threw upon the defendant the burden of proving it, either by the preponderance of evidence or otherwise; such a defense instead of admitting the intentional act charged in the indictment, directly challenges and controverts it." Cf. *State v. Rawley*, discussed *supra* in text at note 12.

²¹ Emphasis added. Compare, BLACKSTONE, COMMENTARIES 835 (Gavit ed., 1941): "All these circumstances of justification or alleviation the prisoner must show, to the satisfaction of both court and jury." (emphasis added)

²² This in accordance with the general rule that "where the court charges correctly in one part of the charge, and incorrectly in another part, [the Supreme Court] will cause a new trial, since the jury may have acted upon the incorrect part of the charge." *State v. Howell*, 239 N. C. 78, 83, 79 S. E. 2d 235, 238 (1953). See, to the same effect, *State v. Stroupe*, 238 N. C. 34, 76 S. E. 2d 313 (1953).

²³ One inference to be drawn from the offending portion of the charge is that the trial judge meant to imply that the *state* had the burden to make out the crime of manslaughter beyond a reasonable doubt.

²⁴ Compare *State v. Strauther*, 342 Mo. 618, 116 S. W. 2d 133 (1938): The Court disapproved a charge which stated that the defendant had the burden of proving self-defense "to the satisfaction of the jury" to overcome the "presumption" of malice. "A lawyer might work out a construction to reconcile and harmonize that positive direction (that the burden of proving he acted in self-defense was on defendant) with the . . . presumption of innocence to which the defendant was entitled, but it is not likely a jury of laymen could do so. To say the best of it, the instruction was likely to be misunderstood by, and to mislead the jury." That courts and lawyers also become confused may be seen from an analysis of few cases treating the presumption, *e.g.*, *Commonwealth v. York*, 50 Mass. 93 (1845) (opinion by Shaw, C. J.); *Commonwealth v. Wuchera*, 351 Pa. 305, 41 A. 2d 574 (1945); *People v. Wells*, 10 Cal. 2d 610, 76 P. 2d 493 (1938). And see the recent case of *State v. Cephus*, 239 N. C. 521, 80 S. E. 2d 147 (1954), where the court repudiated the principle of "presumed malice" in aggravated assault cases, saying that this shifting of the burden only "confuses the jury."

²⁵ Compare *State v. Harris*, 223 N. C. 697, 28 S. E. 2d 232 (1944), which says of the difference: "'Beyond a reasonable doubt' means fully satisfied . . . [or] satisfied to a moral certainty. . . . 'To the satisfaction of the jury' means such as satisfies the jury of the truth of the matter."

of this nature, it is arguable that the significance of the error—its seriousness—should be dramatized. Perhaps a fuller explanation would drive home the import of the distinction and hence reduce the possibility of recurrence of the error.

Drunken Driving

While on the subject of correct terminology in charges, it should be noted that the court had several occasions to deal with the proper interpretation, by way of charge to the jury, of the statute²⁶ which makes driving "under the influence" of alcohol a crime. This pattern of cases dealt with the question: how should a jury be instructed on the meaning of "under the influence?" Obviously, to be guilty the offending driver must have indulged in drink and his faculties—at least those which he uses for driving—must suffer some degree of impairment.

But how much? Should there be an "appreciable" impairment?²⁷ A "material" impairment?²⁸ A "perceptible" impairment?²⁹ Or a "partial" impairment?³⁰ Or what? The court has recently sanctioned the use of any of these adjectives;³¹ but it has urged that "appreciable" is the proper word.

There may be a quibble over whether these adjectives are fungible. Yet jurors would probably be not too impressed with the difference. The important thing, presumably, is to relate the impairment of the defendant's faculties to his capacity to drive; it is the creation of a risk on the highway and not alcoholic stupidity in the abstract at which the statute is aimed. And, in the interest of defining a crime with the sharpest possible delineation between criminal conduct and innocent conduct, those who enjoy going to parties may appreciate the Court's standard of "appreciable impairment" as opposed to a standard of "perceptible impairment."³²

Aiding and Abetting

One more case in the field of substantive criminal law should be noted. This was *State v. Ham*.³³ It dealt with the law of accomplices to crime—"aiding and abetting"; it focuses attention on the liability of a husband for a crime perpetrated in his presence by his wife.

In the *Ham* case the wife committed manslaughter when she and

²⁶ N. C. GEN. STAT. § 20-138 (1953).

²⁷ *State v. Carroll*, 226 N. C. 237, 37 S. E. 2d 688 (1946).

²⁸ *State v. Bowen*, 226 N. C. 601, 39 S. E. 2d 740 (1946).

²⁹ *State v. Lee*, 237 N. C. 263, 74 S. E. 2d 654 (1953).

³⁰ *State v. Turbevill*, 239 N. C. 25, 79 S. E. 2d 359 (1953).

³¹ In cases cited *supra*, notes 27, 28, 29, and 30.

³² Cf. *State v. Carroll*, 226 N. C. 237, 37 S. E. 2d 688 (1946), disapproving a charge to the effect that a person is "under the influence" if his "faculties" are "affected" by alcohol "however slightly."

³³ 238 N. C. 94, 76 S. E. 2d 346 (1953).

three other female defendants joined in a pitched battle against another group of women. Bad blood apparently had existed between the two groups, and on the day of the homicide there had been an exchange of threats. The husband knew this. As he was driving his wife and her allies along a narrow road, his car suddenly passed another containing the other group of women. Both cars were stopped. The ladies exchanged such pleasantries as: "Crawl out of there if you want to fight"; the challenges were mutually accepted, and "a general affray in which rocks and other weapons were used ensued." The husband, however, was not a participant; he was a spectator; he simply "alighted," after stopping the car, and "watched the fight."

His wife and her allies apparently had the best of it. One of the women in other group was struck first by a rock and then by a bottle. Thereupon the husband called to his wife and her cohorts: "Girls, you all get in the car and let's go." They obeyed. But lethal blows had already been struck—a fact which the husband recognized when he answered one of the women defendants who protested his advice to return to the car: "You done killed one and you had better get in here."

The four female perpetrators of the affray and the husband were all convicted of manslaughter. On appeal the Court held *inter alia*, that the husband, as a matter of law, was not guilty.

The decision seems to be pegged to the established principle that an inactive "bystander" to a crime incurs no liability simply by being present and refusing to intervene. The language in the *Ham* decision, apparently overruling some prior dicta to the contrary,³⁴ would seem to make this principle govern the situation where the bystander is a friend of the perpetrator and the perpetrator is aware of his presence; absent some other showing of physical assistance or communicated incitement—to meet the elusive standard of "aiding and abetting"—guilt will not be imputed, this on the theory that guilt is personal, and it is not to "rest upon surmise or conjecture."

Despite such persuasive argument, the peculiar facts in the *Ham* case may provoke further questions. The "bystander" in this case was a man; the perpetrators and their victim were female. The picture of any man standing back and doing nothing but enjoying himself while women engage in a lethal fight is only a shade less shocking than the man who sits back and lets small children mangle each other in combat. And certainly where the spectator is the husband of one of the perpetrators, it may be presumed that he has a peculiarly strong rela-

³⁴ See, e.g., *State v. Jarrell*, 141 N. C. 722, 53 S. E. 127 (1906); *State v. Williams*, 225 N. C. 182, 33 S. E. 2d 880 (1943); *State v. Holland*, 234 N. C. 354, 67 S. E. 2d 272 (1951).

tionship with the outcome of the fight and the measures used by his spouse to participate in it. Nor is it negation of women's rights to assume that he has more than a usual amount of control—both physical and moral (or disciplinary) over his wife's participation. Of course, the law has moved a long way from the old common law presumption which automatically assumed that a crime committed by a wife in her husband's presence was committed only as a result of his duress,³⁵ but the point is that the husband still is, in most situations anyway, something more than the mere "bystander" to which the traditional black letter rules of nonliability relate. So the *Ham* case provokes this question: is it imposing an unreasonable burden on a husband to compel him to do something—short of physical intervention perhaps, but to use some means³⁶—to attempt to stop the bloodletting? The opinion in the *Ham* case did not proceed on the assumption that the law of aiding and abetting will treat husbands in any different fashion from other passive bystanders; nor did it close the door to a possible differentiation in future cases. The question is, perhaps, worthy of more discussion in the future.

CRIMINAL PROCEDURE

In the field of criminal procedure the cases ran the gamut from matters pertaining to arrest to matters pertaining to appeal.

Warrants

At the arrest stage an interesting—and to this reviewer—an important problem has arisen. It deals with the issuance of warrants: under the State and federal constitutions, can a police officer be vested with the authority to issue arrest and search warrants? If so, what special duties and limitations, if any, are to be imposed upon the officer in the exercise of this power?

The problem was presented on appeal in *State v. Wilson*.³⁷ In that case a warrant for arrest for a liquor offense was issued by a Sergeant of a municipal police force. The report of the case does not disclose whether the officer was a qualified Justice of the Peace. But it would appear that he was not because a local statute vested all officers in his department of the rank of Sergeant, Captain, or Chief with the

³⁵ *State v. Williams*, 65 N. C. 398 (1871).

³⁶ There is, surely, a definable standard of conduct which falls between non-concerned nonintervention and actual, physical intervention. Compare the Colorado statute, COL. STAT. ANN. c. 48, § 13 (1935), which requires the bystander to give such help as may be in his or her power to prevent the commission of the crime.

³⁷ 237 N. C. 746, 75 S. E. 2d 924 (1953). A similar question seems to have been raised in *State v. Doughtie*, 238 N. C. 228, 77 S. E. 2d 642 (1953), but the issue was not discussed, the Court holding that the defendant had "waived" any defect in the arrest warrant by entering an "appearance" and pleading to the merits of the charge.

power "to issue warrants and all other criminal process . . . and to receive bail."³⁸

On appeal the defendant apparently contended, *inter alia*, that the act was unconstitutional. However, the constitutional claim had not been properly raised below, so the Supreme Court refused to decide it.

The Court's avoidance of the issue certainly accords with standard practice. But it is unfortunate that the Court was unable to reach the merits because of the significance of the issue.

At least since the John Wilkes episode in 18th Century England and the epochal constitutional litigation³⁹ which resulted from the conduct of the King's messengers who acted pursuant to their own "General Warrants," the issuing of warrants has been deemed to be judicial business. The whole theory of a requirement that—subject to narrow exceptions founded in emergency—men be not arrested or disturbed in their privacy by officers except pursuant to warrant is grounded on the assumption that courts of justice should stand between those who enforce the law and their suspect. A warrant is nothing more than a grant of permission to do an act which, but for the warrant, would be unlawful. And who but the courts should have the power to grant such permission?

Under the statute involved in the *Wilson* case, the power delegated to the officers may be constitutionally suspect on two grounds. First, it seems to vest judicial powers in executive officers (the power to hear evidence and determine probable cause); thus it may run contrary to the principle of the separation of powers.⁴⁰ Second, and perhaps more realistic, is the argument that it offends both Article I, Section 15 of the Constitution of North Carolina⁴¹ and the 14th Amendment of the federal Constitution.

The former, if it is aimed at anything, should be aimed at law enforcement officers who assume the power—whether pursuant to statute or not—to write their own ticket in the securing of warrants.⁴² Its very

³⁸ N. C. Sess. Laws 1949, c. 1258, § 1.

³⁹ *Entick v. Carrington*, 19 How. St. Trials 1044 (1765).

⁴⁰ Embodied in full in the North Carolina Constitution, Art. I, Sec. 8. See Stacy, J., in *Long v. Watts*, 183 N. C. 99, 110 S. E. 765 (1922). Cf. *Miller v. Alexander*, 122 N. C. 718, 30 S. E. 125 (1898). Compare Clark, C. J., dissenting in *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899).

⁴¹ The Constitution of North Carolina, Art. I, Sec. 15, provides: "General Warrants whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted." See Coates, *The Law of Arrest in North Carolina*, 15 N. C. L. Rev. 101 (1937).

⁴² See *Brewer v. Wynne*, 163 N. C. 319, 79 S. E. 629 (1913). See the history of Constitutional provisions, both state and Federal, in Mr. Justice Frankfurter's classic dissent in *Harris v. United States*, 331 U. S. 145 (1947). See *Entick v. Carrington*, 19 How. St. Trials 1044 (1765) holding that "General Warrants" were invalid on the ground, *inter alia*, that they were not issued by judges.

words, "General Warrants," call to mind the odious practice employed in the Wilkes episode, a practice which must have been fresh in the minds of the framers of that constitutional guarantee. And it is hard to see how, either as a matter of logic or experience, a system which permits an officer to be both an applicant (or an interested party to the application) for a warrant and also a disinterested judge of the need for a warrant differs in material respects from the "General Warrants" system which was so vigorously repudiated in the Eighteenth Century.

Further, the prohibitions of the Fourth Amendment of the Bill of Rights are relevant here. The "due process" clause of the 14th Amendment appears to incorporate the Fourth's prohibition against "unreasonable" searches.⁴³ And it should be beyond question that the Fourth Amendment—if it contemplates anything in respect to the manner of the issuance of warrants—contemplates a judicial proceeding and a judicial decision as a prerequisite to the grant of permission.⁴⁴ That principle would seem to be of the essence of our constitutional guarantee of privacy.

Of course it goes without saying that local officers may well exercise their authority with care and responsibility. That is not the issue. It is the possibility of abuse which counts. And it was precisely the

⁴³ *Wolf v. Colorado*, 338 U. S. 25 (1949). The "due process" clause does not, of course, require exclusion of evidence seized in violation of the guarantee against unreasonable searches and seizures. *Ibid.* But in the *Wolf* case the Court declared, "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the states. The knock at the door, whether by day or by night, as a prelude to a search without authority of law, but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the concept of human rights enshrined in the history . . . of English-speaking peoples.

"Accordingly, we have no hesitation in saying that were a State affirmatively to sanction police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." *Id.* at 27, 28.

⁴⁴ See Mr. Justice Jackson, speaking for the Court in *Johnson v. United States*, 333 U. S. 10, 13, 14 (1947): "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

removal of that possibility, one may suspect, which was a first objective of the first citizens of North Carolina and the United States.⁴⁶

In this connection another search warrant case, *State v. Brady*,⁴⁶ may be worthy of mention. It involved the admissibility of evidence seized pursuant to a warrant issued by a clerk of court. There was no claim that clerks, like the law enforcement officers, should be powerless under the Constitution to issue warrants. Indeed such a claim would be of dubious force.⁴⁷ Rather the issue of validity turned on the question of how much detailed evidence in support of probable cause must be presented to the person issuing the warrant.

In the *Brady* case there was not much of a factual showing: the clerk acted simply on an "information and belief" statement which apparently amounted to little more than a bare assertion of conclusions by the applicant for the warrant, the affiant. Because of this paucity of "probable cause" the warrant's validity was challenged by the defendant at trial—and with it the admissibility of the evidence seized pursuant to it. The Court upheld the warrant, relying on G. S. § 18-13⁴⁸ which the Court has construed⁴⁹ to relax the evidentiary requirements for obtaining a search warrant in liquor cases.

Again, it is worth considering whether—regardless of any liberalization effected by the language of G. S. § 18-13—the Constitution does not fix minimum standards for a showing of "probable cause," standards which must govern the validity of every warrant. The facts in the *Brady* case may not prompt concern. But it should be a matter of concern that officers be not empowered to storm into homes to search for liquor on the basis of some warrant obtained by a perfunctory oath which contains no more than some such vague conclusion as: "I have reason to believe that Mr. Home Owner may have a pint too much whiskey in his house."

Jurisdiction in Nonsupport Cases

Turning from procedural matters bearing on the investigation of crime to other problems of procedure, an interesting case dealing with jurisdiction should be noted.

⁴⁶ See Mr. Justice Frankfurter in *Harris v. United States*, 331 U. S. 145 (1947), for an elaborate discussion of the history underlying constitutional guarantees of privacy.

⁴⁷ 238 N. C. 407, 78 S. E. 2d 129 (1953).

⁴⁸ Clerks are judicial officers, and of course they exercise many other judicial powers, e.g., in the probate of wills and in cases involving commitment to mental institutions. The issuance of a warrant by a clerk cannot so easily be likened to the issuance of a warrant by a police officer.

⁴⁹ N. C. GEN. STAT. § 18-13 (1953) says in part: "Upon the filing of a complaint . . . or information furnished under oath by an officer before [an officer empowered to issue warrants] . . . that he has reason to believe that any person has in his possession . . . liquor for the purpose of sale . . . a warrant shall be issued. . . ."

⁴⁹ *State v. McLamb*, 235 N. C. 251, 69 S. E. 537 (1952).

In *State v. Tickle*⁵⁰ the defendant was indicted under the "Bastardy Statute" for nonsupport. The statute (G. S. § 49-2) imposes liability on anyone who "wilfully neglects or who refuses to support and maintain his or her illegitimate child." In the *Tickle* case the question was whether these penal provisions could reach a father who was and who had been living in Virginia during all material stages of the offense.

Thus, the evidence showed that the child had been conceived in Virginia. The mother, lacking support from the father, had repaired to her family home in North Carolina, and the child had been born in North Carolina—defendant having "nothing to do" at any time with these arrangements. And, thereafter, the defendant, ignoring a letter from the mother pleading for material assistance, remained in Virginia and did nothing to help the child. But he made one mistake; he went hunting in North Carolina, and on that trip he was arrested and charged with nonsupport.

Affirming his conviction, the Supreme Court held that North Carolina had jurisdiction over the offense despite the defendant's total absence from this state. The reasoning proceeded on the assumption that the injury contemplated and proscribed by the statute—wilful nonsupport—occurred in North Carolina. It was there that the child languished; it was there that the "duty to support . . . should be discharged."⁵¹ As if to clinch the issue the Court concluded that the defendant was "constructively present" in North Carolina.⁵²

Unless the assumption that the harm occurred in North Carolina be misplaced, the case accords with the recognized, conceptual principle of the common law that it is the situs of the impact of the injury which determines jurisdiction. Many cases, by analogy, seem to support the *Tickle* decision.⁵³ Certainly the policy of the Bastardy Statute should require an assumption of jurisdiction.⁵⁴ Nor is there any sub-

⁵⁰ 238 N. C. 206, 77 S. E. 2d 632 (1953), *cert. denied*, 74 S. Ct. 378 (1954).

⁵¹ Another possible basis for asserting criminal jurisdiction might be that the crime of bastardy (like vagrancy) is a "continuing" offense. *State v. Johnson*, 212 N. C. 566, 194 S. E. 319 (1937). Presumably the defendant was still committing the crime when he entered North Carolina to hunt. Therefore, he rendered himself subject to the jurisdiction of North Carolina by entering the State and committing an offense therein. There would still remain, however, the question of venue.

⁵² It may be a matter of doubt whether the doctrine of "constructive presence" adds anything by way of clarity to the law of jurisdiction. See Levitt, *Jurisdiction Over Crimes*, 16 J. CRIM. LAW, 316 (1926), for the various rationales of "constructive presence." See the discussion of *State v. Hall*, *infra* note 58.

⁵³ *E.g.*, *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052 (1918) (nonsupport of legitimate child); *State v. Piver*, 74 Wash. 96, 132 Pac. 858 (1913) (libel printed in one state circulated in a second state; *held*, the second state had jurisdiction). Compare *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894) (shot fired in North Carolina striking victim in Tennessee; *held*, Tennessee, not North Carolina, had jurisdiction. See Levitt, *Jurisdiction Over Crimes*, 16 J. CRIM. LAW, 316 (1926).

⁵⁴ For other recent interpretations of N. C. GEN. STAT. § 49-2 (1950), see

stantial unfairness in the result; neither the radiations of "due process"—nor of any other provision of the Constitution—should impose a bar to the prosecution.⁵⁵

Of course some practical problems may be encountered in the extra-territorial enforcement of the statute. For instance, in the situation disclosed by the *Tickle* case, it would be impossible to extradite the father unless the state wherein he resided was a party to the Uniform Extradition Act.⁵⁶ This is so because the father is no "fugitive" from justice, and the Interstate Rendition Act⁵⁷—as well as the terms of Article 4, Section 2 of the Federal Constitution—apply only to those who have fled to avoid prosecution, a requirement which pre-supposes actual physical presence in the state which seeks to prosecute.⁵⁸ But this obstacle should never negate the need to give G. S. § 49-2 the extraterritorial force which it was given in this case.

Indictments

In the field of pleading the Court had several occasions to adhere to the rigorous rules requiring an indictment or warrant to charge, with much exactness, the commission of every material element of an offense. An instructive opinion on the rationale of these rules—and an opinion which demonstrates their rigorous nature in this age when relaxation and liberality seem to be the general trend⁵⁹—is to be found in *State v. Greer*.⁶⁰ The *Greer* case reaffirms the rule that is is not enough to plead an offense in the words of the statute where the statute

State v. Love, 238 N. C. 283, 77 S. E. 2d 501 (1953) (discussing instructions to be submitted to jury and the nature of the duty to support and maintain); *State v. Moore*, 238 N. C. 743, 78 S. E. 2d 914 (1953) (discussing the requirement that the failure to maintain be "wilful"); and *State v. Chambers*, 238 N. C. 373, 78 S. E. 2d 209 (1953) (sufficiency of the evidence).

⁵⁵ See *Strassheim v. Daily*, 221 U. S. 280 (1911). Cf. *Travellers Health Ass'n v. Virginia*, 339 U. S. 643 (1949). But cf. *State v. Knight*, 1 N. C. 65 (1799) and *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261 (1892) (North Carolina lacks constitutional power to extend its jurisdiction by statute to punish the uttering of counterfeit state notes or the contracting of a bigamous marriage outside of this state, even when the parties subsequently are found in North Carolina). The persuasiveness of these cases may be open to some question today. See the extensive discussion of the issue by Judge Yankwich in *Ex parte Morgan*, 78 F. Supp. 756 (S. D. Cal. 1948).

⁵⁶ See N. C. GEN. STAT., §§ 15-55 to 84 (1953).

⁵⁷ 62 STAT. 822 (1948); 18 U. S. C. § 3182 (Supp. 1952).

⁵⁸ See e.g., *State v. Hall*, 115 N. C. 811, 20 S. E. 729 (1894), which was the aftermath of *State v. Hall*, 114 N. C. 909, 19 S. E. 602 (1894), discussed *supra* note 53. When Tennessee sought to extradite the defendant, who had stood in North Carolina and fired into Tennessee, the Court held that extradition was impossible because the defendant, although "constructively present" in Tennessee at the time of the killing, had never actually been in Tennessee and hence had never fled from its justice.

⁵⁹ Cf. Chapter 5 and commentaries thereto of THE AMERICAN LAW INSTITUTE CODE OF CRIMINAL PROCEDURE; ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 230-247 (1947); FED. R. CRIM. P. 7; *People v. Bogdanoff*, 254 N. Y. 16, 171 N. E. 890 (1930); *Carter v. United States*, 173 Fed. 684 (10th Cir. 1949).

⁶⁰ 238 N. C. 325, 77 S. E. 2d 917 (1953).

does not describe all the material elements of the crime. That principle was also applied in another case⁶¹ to an abortive attempt to amend a warrant at trial. And still another instance of the exactness required in pleading material elements is to be found in *State v. Scott*,⁶² where the court held that a faulty typographical rendering of the victim's name in an assault indictment was a "jurisdictional" defect.⁶³

Joinder of Offenses

The matter of joinder was involved in *State v. Griffin*.⁶⁴ There eight indictments charged four embezzlements and four larcenies; all indictments were founded upon four separate transactions where the defendant—working a species of the confidence racket—persuaded his victims to invest money in a charity raffle by means of promises and representations which were apparently utterly false. All eight indictments were consolidated for a single trial. The trial court overruled a motion to compel the state to elect between proceeding on a theory of larceny or a theory of embezzlement and the defendant was tried on all bills.⁶⁵ And, strangely enough, the jury found him guilty on all eight counts, though there had been but four transactions. Eight sentences were imposed, but all of the larceny sentences ran concurrently with those for embezzlement. The Supreme Court refused to award a new trial: conceding the utter inconsistency of the verdict, the court held that the error was harmless. Three dissenters failed to expose prejudice suffered by the result; but there might be this possibility: by suffering extra and unjustified convictions a defendant's potential liability under some habitual offender statutes may, theoretically at least, be increased.

Nolo Contendere

The Court has also had occasion to deal in detail with the nature of the plea of *nolo contendere*. The gist of the decisions in *State v.*

⁶¹ *State v. Thorne*, 238 N. C. 392, 78 S. E. 2d 140 (1953). The warrant apparently sought to charge "disorderly conduct" under N. C. GEN. STAT. § 14-197 (1953), and "resisting arrest" under N. C. GEN. STAT. § 14-223 (1953). It did not charge the commission of the elements of all these offenses. The solicitor moved to amend it so as "to charge the violation in the words of the statute." The amendment failed to cure the warrant because (1) it was not "self-executing" (it failed to state the wording of the warrants *as amended*), and (2) to charge the offenses in the words of the statute would not make the warrant valid for trial, because it would still fail to charge commission of all the elements of the offenses.

⁶² 237 N. C. 432, 75 S. E. 2d 154 (1953).

⁶³ Compare, *United States v. Denny*, 165 F. 2d 668 (7th Cir. 1947), *cert. den.*, 333 U. S. 849 (1948) (misprinting defendant's name in the indictment does not render indictment invalid).

⁶⁴ 239 N. C. 41, 79 S. E. 2d 230 (1953).

⁶⁵ *Cf. Pointer v. United States*, 151 U. S. 396 (1893), a leading case for the proposition that it is permissible to join different counts expressing different theories, and that the requiring of an election is a matter for the trial court's discretion. *Cf. FED. R. CRIM. P. 8(a), 14*, to the same effect.

*Cooper*⁶⁶ and *State v. McIntyre*⁶⁷ is that the plea, as far as its immediate procedural ramifications at trial are concerned, differs hardly a whit from a plea of guilty. There is nothing "conditional" in the plea; once accepted it may no more be withdrawn at the mere wish of the defendant than may a plea of guilty; and like the plea of guilty, *nolo contendere* admits the commission of the offense and renders the defendant subject to a judgment of guilt and sentence. The very recent case of *Winesett v. Scheidt*⁶⁸ denotes the only practical difference between *nolo contendere* and the plea of guilty. The Court there held that the plea never estops the defendant, in a *later* proceeding, to deny his guilt; nor may it ever be treated as evidence in a later judicial proceeding—either as evidence of an admission of guilt or as relevant evidence of a previous conviction.⁶⁹

Argument of Counsel

One more case in the field of criminal procedure warrants discussion, for it poses some interesting problems. This was the decision in *State v. Dockery*.⁷⁰ The case deals with the matter of argument of counsel in murder cases—argument which may be addressed to the advisability of the imposition of the death sentence. The problem is important because of the 1949 amendment to G. S. § 14-17, the provision which vests in the jury, in murder cases, the power to "recommend" (and the recommendation is conclusive) a life sentence in lieu of death.

In the *Dockery* case, a private prosecutor, while arguing to the jury, declared: "There is no such thing as life imprisonment in North Carolina today."⁷¹

No objection, no exception, no motion, indeed no mention, was made of this statement on the part of the defense during the rest of the trial. No instruction was given. Nor was any assignment of error, nor any argument over the matter advanced on appeal.⁷² Nevertheless the Supreme Court awarded a new trial. The Court's notice of the error—its "*ex mero motu*" reversal—deserves attention. So do the merits of the issue decided. The question arises: what argument, if any, may now be directed to the matter of sentencing in capital cases.

⁶⁶ 238 N. C. 241, 77 S. E. 2d 695 (1953).

⁶⁷ 238 N. C. 305, 77 S. E. 2d 698 (1953).

⁶⁸ 239 N. C. 190, 79 S. E. 2d 501 (1954).

⁶⁹ Of course a prosecutor may avoid these ramifications in driving cases by simply refusing to accept the plea. If he does, the defendant cannot avail himself of *nolo contendere*. See cases cited *supra* notes 72, 73, and 74. See Note, 12 N. C. LAW REV. 369 (1933).

⁷⁰ 238 N. C. 222, 77 S. E. 2d 664 (1953).

⁷¹ This was, apparently a reference to and a conclusion drawn from the parole, commutation and pardon statutes.

⁷² The trial court, *sua sponte*, made this excerpt of the argument a part of the record on appeal.

The 1949 amendment, making capital punishment in first degree murder cases discretionary⁷³ has been construed to give the jury an "unbridled discretion." The jurors' power of mitigation is absolute; it may apparently proceed from any assumption which the jurors wish to make; and any doubt as to the procedural implications of this will be dispelled by a glance at *State v. McMillan*⁷⁴ and *State v. Simmons*,⁷⁵ two recent cases in which the Court reversed trial judges who suggested—by even the faintest inference—that the jurors should look to the "facts and circumstances" of a case in deciding the defendant's punishment. Thus, the trial judge is totally confined, and the jury perforce is totally unconfined; it may roam at will in selecting reasons for or against death⁷⁶

But what about counsel? May they suggest, by frank argument or indirect inference, reasons pro or con the extreme penalty? If the judge's lips are sealed, why should counsel be allowed to plant reasons—arguments which may be of little social value—in the jury's mind? On the other hand, if counsel are to be strictly confined, if the question of how the jury should exercise its "unbridled discretion" is to be a taboo on summation, the courts may find it hard to police the rule; and it would be revolutionary, indeed, if the argument of counsel were to be scanned with the same exacting scrutiny which is focused on the instructions; yet, logically, such might be the necessary result if counsel are bound by the same strict rule which binds the judge.

In most if not all other jurisdictions, counsel are permitted to address arguments to the jury's discretion.⁷⁷ But the *Dockery* opinion supplies at least an inference that counsel are to avoid the issue in North Carolina. There is much to be said for such a rule—if that is the import of the decision. To permit the state to suggest the advisability of capital punishment throws an onerous burden on a defendant who has plead not guilty and insists on his innocence. He must not only refute evidence of guilt, but he must also spend a portion of argument—perhaps a sizable portion—assuming his guilt and re-

⁷³ N. C. GEN. STAT. § 14-17 (1953) defines first degree murder and calls for the death penalty, "Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury." On the history of this proviso see Popular Government, Jan., 1949, p. 13; Comment, 27 N. C. L. REV. 449 (1950).

⁷⁴ 233 N. C. 630, 65 S. E. 2d 212 (1950).

⁷⁵ 234 N. C. 290, 66 S. E. 2d 897 (1951).

⁷⁶ Compare Von Moschzisker, *Capital Punishment in the Pennsylvania Courts*, 20 PA. B. A. Q. 174, 188 (1949): "There either is or is not a rational way to approach the problem of whether a man should live or die. If there is such a way, a vigilant judiciary can define it and do much to assure that it is followed. If there is no rational basis for deciding between life and death, would not the latter penalty be better abandoned than imposed capriciously?"

⁷⁷ See Knowlton, *Jury Discretion in Capital Cases*, 101 U. OF PA. L. REV. 1099, 1118-1120 (1953), for a collection of cases.

futing the demand for the extreme penalty. Again, permitting counsel to refer to punishment is productive of abuse and frequent appeals, as even a cursory survey of the decided cases touching on the problem will show. But against all this stands the idea that every rational argument and every sensible thought on the matter of punishment should be drawn to the jurors' attention. To foreclose that by confining not only the trial judge but also counsel, is to invite irrational and hence senseless administration of the discretionary death penalty provision.

Even if counsel are to be allowed to touch upon the issue—a matter not wholly resolved by the *Dockery* case, there would seem to be no doubt but that the argument that "there is no life imprisonment . . . today" is bad. It departs from the record. That there may be an element of truth in the statement is immaterial; it is misleading; the parole and commutation laws do not render life imprisonment impossible, and they are predicated on the assumption that only the deserving and the rehabilitated prisoner—or at least only the safe risk—will be released. An argument of counsel which is addressed to the possibility of improper administration of the parole system does not supply a fair argument that a defendant ought to be executed. The decision in the *Dockery* case, taking, as it did, a stern view of such an argument, may help to eradicate that kind of appeal to the jury in the future.

In fact, the Court thought the argument so serious that it reversed *sua sponte*—despite the defendant's failure ever to preserve or argue the error.

The Court indicated that had there been an *immediate* objection to the argument by defense counsel, and had the trial court immediately given a curative instruction, then the improper argument would probably *not* have warranted reversal. The anomaly here is apparent: theoretically, at least, a defense lawyer well versed in this facet of the law would let the argument slip by without raising an eyebrow, with the knowledge that only by letting his opponent's improper argument alone will he thereby win a strong talking point for reversal if the jury fails to acquit. Moreover, the *Dockery* case might suggest this question: what other nonjurisdictional defects will the appellate court notice "*ex mero motu*"? If other sorts of disturbing and plainly prejudicial occurrences happen at trial and the defendant fails to object, except or ask for a mistrial, will the Court still reverse "*ex mero motu*"? How far will the Court delve into the record to find such errors? The problem calls to mind the famous *Newsome* case,⁷⁸ where the defendant was nearly lynched during a riot at the trial; defense counsel did nothing

⁷⁸ *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (1928). The case contains a detailed discussion (with four opinions) dealing with the subject of reviewing errors not properly preserved at trial.

to preserve the error, and a majority of the Court—deeming the matter nonjurisdictional—refused to treat the question whether the occurrence warranted a new trial.

Despite these ramifications, no one can dispute the essential justice of what was done in the *Dockery* case. And the decision accords with several other recent cases where the court reversed a capital conviction, despite defense counsel's failure to preserve error, because of improper argument.⁷⁹ These rulings and the *Dockery* decision are confined to death cases, and at least when life is at stake the administration of appellate justice ought to be charitable and liberal.⁸⁰ But it will be interesting to watch trends in the manner in which the Court dispenses this special power of mercy in the future.

DAMAGES

There was a paucity of damage litigation before the North Carolina Supreme Court during the past year. Of the total number of such cases only three merit special mention. These cases deserve attention, not because of any new points of law involved, but because the Court felt constrained to discuss, in each instance, the applicable law in some detail.

DAMAGES FOR BREACH OF CONTRACT

Loss of Prospective Profits

In an action for damages for breach of an oral contract to lease a tobacco warehouse for a period to cover three market seasons, where special damages in the nature of lost profits were alleged and proven, a sizable verdict was returned in favor of the plaintiff. Defendant appealed, assigning as error the court's charge that the measure of damages is related to the loss of prospective profits. In affirming,¹ the Court held that recovery may be had both for gains prevented and losses sustained by reason of the breach, including loss of prospective profits. It must be made to appear, however, that such loss of profits was the natural and proximate result or consequence of the breach, and such as may reasonably be supposed to have been within the contemplation

⁷⁹ *State v. Little*, 228 N. C. 417, 45 S. E. 2d 542 (1948); *State v. Hawley*, 229 N. C. 167, 48 S. E. 2d 35 (1948).

⁸⁰ Compare the stricter practice with regard to considering the merits of alleged error, even in capital cases, when the errors are brought forth by way of a proceeding under the Post Conviction Act, N. C. GEN. STAT. §§ 15-217 to 222 (1953). See the able opinion of Justice Ervin, in *Miller v. State*, 237 N. C. 29, 74 S. E. 2d 513 (1953), outlining the scope of review under this Act. See also *State v. Cruse*, 238 N. C. 53, 76 S. E. 2d 320 (1953), for a further amplification of the *Miller* opinion to the effect that the Act is "no substitute for an appeal."

¹ *Perkins v. Langdon*, 237 N. C. 159, 74 S. E. 2d 634 (1953).

of the parties, when the contract was made, as the probable result of its breach.

This the Court held to be but an application of the rule of *Hadley v. Braxendale*,² which North Carolina has followed for many years as the controlling guide in determining the measure of damages in breach of contract cases where special damages, arising out of special circumstances, are alleged and proven. Applying the principles of that case, the Court stated the general rule in North Carolina to be that the prospective profits from an established mercantile business, prevented or interrupted by breach of contract, are properly the subject of recovery when it is made to appear (1) that it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that such profits can be ascertained and measured with reasonable certainty, and, (3) that loss of such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of the breach.

DAMAGES IN TORT ACTIONS

Injury to Personal Property

In an interesting automobile injury case, the trial court allowed the plaintiff, after he had testified as to the value of his automobile immediately before and immediately after the collision, to further testify that he had expended \$300 to repair the damage done to his automobile. This was assigned as error. In affirming,³ the Court said:

It was competent for him to testify additionally that he had expended a specified sum to repair the damage sustained by the car in the collision. *Though the correct measure of damages for the tortious injury to personal property is the difference in*

² 9 Exch. 341 (1854). "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in the case; and of this advantage it would be unjust to deprive them. . . ."

³ *Simrell v. Meeler*, 238 N. C. 668, 78 S. E. 2d 766 (1953).

the market value of the property before and after the injury the cost of repairs necessitated by the injury may be shown in evidence. This is so because the law is realistic enough to recognize that the cost of the necessary repairs has a logical tendency to shed light upon the question of the difference in the market value. [Italics supplied.]

This decision is in accord with previous authority.

COMPENSATION FOR PROPERTY TAKEN BY THE PUBLIC

Permanent Easement Taken under Condemnation

In a well considered opinion,⁴ the Court rejected the arguments of the defendant that it was error to apply the same rule of damages where a permanent easement is taken through condemnation that is applied when a part or the whole of the property is taken in fee. The Court restated the rule of *Proctor v. Highway Commission*⁵ that where only a part of the land is taken

the measure of such damage is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. *The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion* which is to be offset under the terms of the controlling statute, G. S. § 136-19, by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway. This rule is applicable as well to easements as to taking the land in fee, and the fact that the state may in some future date abandon the easement will not change it one jot or tittle. [Italics the Court's.]

In conclusion, the Court pointed out that even if the entire right-of-way were not used by the state, the rule would be the same, for it is not what the condemnor actually does but what he acquires the right to do that determines the measure of the damage, and any use which the landowner may be allowed to make of the land covered by the easement is necessarily permissive and cannot be considered in diminution of compensation because it may be terminated by the condemnor at any time.

DOMESTIC RELATIONS

The North Carolina Supreme Court, during 1953, restated several propositions in the Domestic Relations area which would appear to be

⁴ *Highway Commission v. Black et al.*, 239 N. C. 198, 79 S. E. 2d 778 (1953).

⁵ 230 N. C. 687, 55 S. E. 2d 479 (1949).

in accord with the existing law, ruled on at least two questions that had never previously been before the court, and handed down one decision which might be considered as changing the existing law somewhat. These decisions will be discussed briefly below.

ALIMONY AND DIVORCE

In the case of *Johnson v. Johnson*¹ the Court affirmed the rule that a wife against whom a suit is brought for absolute divorce, upon a proper showing, is entitled to alimony pendente lite if she sets up a cross action for divorce from bed and board, sets up an affirmative defense, or merely denies the validity of the cause of action stated in the husband's complaint.²

In *Hester v. Hester*³ the Court recognized that reconciliation and resumption of cohabitation terminates an award of alimony pendente lite granted in an action for alimony without divorce under G. S. § 50-16.

The cases of *Walker v. Walker*⁴ and *Johnson v. Johnson*⁵ are in accord with the proposition that although the plaintiff who sues for a divorce on the grounds of two years' separation under G. S. § 50-6 does not have to allege or prove that he is the injured party, his prayer will be denied if the defendant establishes as an affirmative defense that the separation of the parties has been occasioned by the act of the plaintiff in wilfully abandoning the defendant.⁶

It has been clearly established in North Carolina that an award of alimony without divorce under G. S. § 50-16 will survive a subsequent divorce obtained by the husband on the grounds of two years' separation.⁷ Is the rule the same when the wife is the one who obtains the subsequent divorce? This question was presented to the Court, apparently for the first time, in the case of *Deaton v. Deaton*.⁸ The hus-

¹ 237 N. C. 383, 75 S. E. 2d 109 (1953).

² *Nall v. Nall*, 229 N. C. 598, 50 S. E. 2d 737 (1948); *Covington v. Covington*, 215 N. C. 569, 2 S. E. 2d 558 (1939); *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918); *Barker v. Barker*, 136 N. C. 316, 48 S. E. 733 (1904); *Webber v. Webber*, 79 N. C. 572 (1878).

³ 239 N. C. 97, 79 S. E. 2d 248 (1953).

⁴ 238 N. C. 299, 77 S. E. 2d 715 (1953).

⁵ 237 N. C. 383, 75 S. E. 2d 109 (1953).

⁶ *Cameron v. Cameron*, 235 N. C. 82, 68 S. E. 2d 796 (1952); *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. 2d 492 (1945); *Pharr v. Pharr*, 223 N. C. 115, 25 S. E. 2d 471 (1943); *Byers v. Byers*, 223 N. C. 85, 25 S. E. 2d 466 (1943); *Reynolds v. Reynolds*, 208 N. C. 428, 181 S. E. 338 (1935).

⁷ *Simmons v. Simmons*, 223 N. C. 841, 28 S. E. 2d 489 (1943); *Dyer v. Dyer*, 212 N. C. 620, 194 S. E. 278 (1937); *Howell v. Howell*, 206 N. C. 672, 174 S. E. 921 (1934). It should be noted that in 1953, N. C. GEN. STAT. § 50-11 (Supp. 1953) was amended so that an alimony decree will now survive a subsequent absolute divorce obtained on any grounds except adultery by the wife; and even then it will survive if the wife has not been personally served.

⁸ 237 N. C. 487, 75 S. E. 2d 398 (1953). In *Lentz v. Lentz*, 193 N. C. 742, 138 S. E. 12 (1927), the Court held that a consent judgment would survive a subsequent absolute divorce obtained by the wife.

band argued that the right of the wife to alimony stems from the marital obligation of the husband to support her, and that it would be unjust and contrary to public policy to allow the wife to receive alimony from the husband after she has put an end to the marital relation by procuring a decree of absolute divorce. The Court rejected this argument and held for the wife on the grounds that the statute⁹ allowing alimony without divorce to survive a subsequent divorce on grounds of two years' separation makes no distinction between divorces obtained by the husband and those obtained by the wife, and where the language of a statute is clear and unambiguous, the courts are without power to attribute any other meaning to its words on the ground of public policy, since public policy is in the exclusive province of the General Assembly.

SEPARATION AGREEMENTS

In one case¹⁰ an interesting question was raised but not answered since it had not been raised in the lower court. This question concerned the legal effect of the resumption of marital relations upon a deed executed pursuant to the terms of a separation agreement.

The Court in the case of *Merritt v. Merritt*¹¹ relied upon basic rules to answer a question raised by an unusual fact situation. It has generally been held that a valid separation agreement will survive an absolute divorce and is enforceable in contract, but a party failing to comply with the agreement is not subject to contempt proceedings.¹² But suppose the parties enter into a valid separation agreement and they are subsequently divorced, at which time the trial judge includes in his judgment the following:

Is is further ordered, adjudged and decreed, upon the answer to the fifth issue, and by consent, that the plaintiff continue in full force and effect his allotment through the U. S. Coast Guard made in accordance with his agreement of October 4, 1944 (the separation agreement) and that, should the defendant no longer receive an income from the said U. S. Coast Guard, that plaintiff pay to defendant the amount provided in said agreement as support and maintenance.

Since this is stated in terms of an order of the court, may the plaintiff be held in contempt of court for a failure to comply with it? Such was the situation in this case. The Court held that a judge entering a decree of absolute divorce is without jurisdiction to enter an order

⁹ N. C. GEN. STAT. § 50-11 (1950).

¹⁰ *Jones v. Percy* 237 N. C. 239, 74 S. E. 2d 700 (1953).

¹¹ 237 N. C. 271, 74 S. E. 2d 529 (1953).

¹² *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. 118 (1946); *Lentz v. Lentz*, 193 N. C. 742, 138 S. E. 12 (1927).

requiring the husband to continue to support his divorced wife;¹³ nor can jurisdiction be conferred by consent.¹⁴ Therefore, the order being void for want of jurisdiction, the plaintiff could not be held in contempt and the defendant could only pursue her contractual rights created by the separation agreement.

BASTARDY

The case of *State v. Chambers*¹⁵ restated the following principles concerning bastardy actions:

(1) The mere begetting of an illegitimate child is not a crime. It is the wilful neglect or refusal to support one's illegitimate child that constitutes the offense;¹⁶

(2) The neglect or refusal to support must be wilful, that is, intentionally done without just cause, excuse, or justification after notice and request for support;¹⁷

(3) The bastardy statute, as interpreted by our Court, constitutes a continuing offense;¹⁸ and

(4) The wilful failure to support must occur at or before time of charge in warrant or bill of indictment and cannot be based on a wilful failure occurring between time of charge and date of trial.¹⁹

CUSTODY OF CHILDREN

Cases decided during 1953 affirmed the existing rules that an award of custody is not final but may be modified upon a showing of changed conditions;²⁰ that the natural right of a father to custody of his child does not limit the discretionary power of the Court under the statute which makes the paramount consideration the best interests and the general welfare of the child;²¹ that an agreement between the father and mother of the child in question, made at the time of their separation, that the father is to have permanent custody of the child is not binding

¹³ N. C. GEN. STAT. § 50-11 (1950); *Feldman v. Feldman*, 236 N. C. 731, 73 S. E. 2d 865 (1952).

¹⁴ *Feldman v. Feldman*, 236 N. C. 731, 73 S. E. 2d 865 (1952); *McRary v. McRary*, 228 N. C. 714, 47 S. E. 2d 27 (1948).

¹⁵ 238 N. C. 373, 78 S. E. 2d 209 (1953).

¹⁶ *State v. Robinson*, 236 N. C. 408, 72 S. E. 2d 857 (1952); *State v. Bowser*, 230 N. C. 330, 53 S. E. 2d 282 (1949); *State v. Stiles*, 228 N. C. 137, 44 S. E. 2d 728 (1947); *State v. Dill*, 224 N. C. 57, 29 S. E. 2d 145 (1944).

¹⁷ *State v. Thompson*, 233 N. C. 345, 64 S. E. 2d 157 (1951); *State v. Ellison*, 230 N. C. 59, 52 S. E. 2d 9 (1949); *State v. Hayden*, 224 N. C. 779, 32 S. E. 2d 333 (1944).

¹⁸ *State v. Robinson*, 236 N. C. 408, 72 S. E. 2d 857 (1952); *State v. Johnson*, 212 N. C. 566, 194 S. E. 319 (1937).

¹⁹ *State v. Thompson*, 233 N. C. 345, 64 S. E. 2d 157 (1951).

²⁰ *In re DeFebio*, 237 N. C. 269, 74 S. E. 2d 531 (1953); *Griffin v. Griffin*, 237 N. C. 404, 75 S. E. 2d 133 (1953). See also N. C. GEN. STAT. § 110-36 (1952); *In re Blalock*, 233 N. C. 493, 64 S. E. 2d 848 (1951).

²¹ *Finley v. Sapp*, 238 N. C. 114, 76 S. E. 2d 350 (1953). See also, N. C. GEN. STAT. § 50-13 (1950); *Gafford v. Phelps*, 235 N. C. 218, 69 S. E. 2d 313 (1952); *In re Lewis*, 88 N. C. 31 (1883).

on the Court;²² and that under G. S. § 50-13 the Court has discretionary power, upon supporting findings of fact, either to divide custody between the parents for alternating periods or to award custody to one parent subject to visitation privileges in favor of the unsuccessful parent.²³

The last of the custody cases²⁴ appears to be very simple and innocent on its face but might turn out to be very significant. The contest in this case was between the father and maternal grandmother of the child, and was initiated by the father by means of a habeas corpus proceeding. An award of custody was made and the father appealed. Since the language of the Supreme Court may be important, the entire opinion is set out:

We must forego a decision on the merits. Under G. S. 110-21(3), the juvenile branch of the superior court has exclusive original jurisdiction in all cases wherein the custody of an infant under sixteen years of age is the subject of the controversy except (1) in cases between undivorced parents living in a state of separation, G. S. 17-39, or (2) where there is an action for divorce, in which a complaint has been filed, pending in this State, G. S. 50-13, or (3) where the parents have been divorced by decree of a court of a state other than North Carolina, G. S. 50-13. *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. 2d 906. Since this proceeding is not a contest as to custody between the parents of the child and does not come within the purview of any of the exceptions to the general rule, the judge had no jurisdiction to issue the writ of habeas corpus or to make any order thereon respecting the custody of Nellie Sue Melton. In consequence, the order of 6 September, 1952, is adjudged void, and the order of 22 November, 1952 is Reversed.

The statement that this case does not come within the purview of any of the exceptions to the general rule (the general rule being that the juvenile court has jurisdiction) makes one wonder whether the Court has merely overlooked another exception under G. S. § 50-13 or really means that contests between a parent and a third party must be decided in the juvenile courts. If it means the latter, the law in this respect appears to have changed. G. S. § 50-13 provides, in addition to the part that is stated in the opinion as the third exception,

²² *Finley v. Sapp*, 238 N. C. 114, 76 S. E. 2d 350 (1953). See also, *Gafford v. Phelps*, 235 N. C. 218, 69 S. E. 2d 313 (1952); *State v. Duncan*, 222 N. C. 11, 21 S. E. 2d 822 (1942).

²³ *Griffin v. Griffin*, 237 N. C. 404, 75 S. E. 2d 133 (1953); see also, *Tyner v. Tyner*, 206 N. C. 776, 175 S. E. 144 (1934).

²⁴ *In re Melton*, 237 N. C. 386, 74 S. E. 2d 926 (1953).

that "controversies respecting the custody of children not provided for by this article or § 17-39 of the General Statutes of North Carolina, may be determined in a special proceeding instituted by either of said parents, or by the surviving parent if the other be dead, in the superior court of the county wherein the child, at the time of the filing of the said petition, is a resident." This would seem to mean that if the controversy is initiated by either parent, and is not brought in connection with a divorce action or between an undivorced husband and wife living separate and apart, the proper procedure would be a special proceeding in the superior court rather than an action in the juvenile court.^{24a} In fact, the Court has recently held that the proper procedure for determining custody in an action between the mother of a child and its aunt was a special proceeding in the superior court brought under the above quoted portion of G. S. § 50-13.²⁵

Assuming that this case does not mean that an action between a parent and a third party should be brought in the juvenile court, as it intimates, another question arises: Was it necessary that the Court refuse to consider the case on its merits? This question is presented because of the holding in the recent case of *In re Cranford*.²⁶ In that case the mother of an illegitimate child brought habeas corpus to obtain custody of her child from an aunt who had custody. In the Supreme Court the mother contested the jurisdiction of the trial court on the ground that habeas corpus was not the proper procedure. The Supreme Court held that since the petition in habeas corpus adequately set up the grievance complained of with all its essentials, the answer of the respondent was correlative, there was no challenge to the jurisdiction, and the petition was hardly distinguishable, except in name, from the special proceeding contemplated by the statute (G. S. § 50-13), the Court would treat it as a petition in a special proceeding under the statute and consider the appeal on its merits. Did not the same considerations apply in the principal case? Could not the Court have treated that habeas corpus proceeding as a special proceeding and decided the case on its merits, thereby eliminating the necessity for the parties starting anew?

At least, this case leaves the "status of the law" on this point in greater doubt than existed prior to 1953.

HUSBAND AND WIFE

The constitutional limitation on the right of a married woman to convey real property was deemed not to require the husband's written

^{24a} See 27 N. C. L. REV. 452 (1949).

²⁵ *In re Cranford*, 231 N. C. 91, 56 S. E. 2d 35 (1949).

²⁶ 231 N. C. 91, 56 S. E. 2d 35 (1949).

assent to a deed from a wife to her husband in the case of *Perry v. Stancil*.²⁷

INSANE PERSONS

The Court in the case of *In re Dunn*²⁸ states that an insane person is liable, under an obligation imposed by law, for necessities furnished to him, provided there was an intent to charge therefor and credit was extended to him. Applying this rule to the facts of that case, the Court held that reasonable fees of a guardian ad litem, an attorney, and a psychiatrist furnished to an alleged insane person in connection with an inquisition of lunacy under G. S. § 35-2 constitute necessities for which they could recover from the estate of the insane person.

EQUITY

INJUNCTION

Vexatious Litigation

Two cases of first impression reached divergent results on injunction against vexatious litigation.

In *Amos v. Southern Railway Co.*,¹ a case arising under the Federal Employers' Liability Act, an employee had been injured in the course of railroad work in North Carolina. He started an action in the Circuit Court of the City of St. Louis, where the railroad was doing business,² and then, only one day before the three-year statute of limitations ran on him, started an action in a North Carolina superior court. The railroad sought an order from the North Carolina court restraining further prosecution of the "vexatious" action in St. Louis, a city located at the extreme western end of its system and the terminus of a line of rather secondary importance. A 1953 decision³ of the United States Supreme Court, reviving earlier rulings, had denied to a Georgia court the right to enjoin a suit under the Act in an Alabama tribunal involving an injury to a Georgia resident in Georgia. The holding there was

²⁷ See Real Property, *infra* p. 486.

²⁸ 239 N. C. 378, 79 S. E. 2d 921 (1953).

¹ 237 N. C. 714, 75 S. E. 2d 908 (1953). For details of the "racket" in out-of-state F. E. L. A. cases, see Note, 25 N. C. L. REV. 379 (1947).

² The Act, 62 STAT. 989 (1948), 45 U. S. C. § 56 (Supp. 1952) allows state courts concurrent jurisdiction with Federal district courts in these cases, either in the district of the residence of the defendant, the district where the cause of action arose, or a district in which the defendant is doing business at the time of the bringing of the action.

³ *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953), holding that the 1948 amendment to the Judicial Code, 62 STAT. 937 (1948), 28 U. S. C. § 1404(a) (Supp. 1952), permitting judicial transfer of an action to a more convenient forum, does not grant that power to state court judges. For further discussion of the operation of § 1404(a), see Notes, 28 N. C. L. REV. 100 (1949); 29 N. C. L. REV. 61 (1950). These developments have caused F. E. L. A. plaintiffs to resort to the state courts. See Note, 30 N. C. L. REV. 168 (1952).

that a 1948 amendment to the Judicial Code, allowing the transfer of cases to a more convenient forum under some circumstances, applied only to Federal courts.

The North Carolina Supreme Court conceded that the effect of the Federal decision was to deprive state courts of equity, in some instances, of their ability to apply the doctrine *forum non conveniens*. But it thought the situation in the *Amos* case distinguishable, in that the other cases had involved naked claims for injunction from a forum in which no litigation of the railroad's liability was pending. It thought the situation different when the party sought to be enjoined actually had an action pending in the court asked to issue the restraining order. For "when a resident or non-resident invokes the jurisdiction of our courts by issuing an action therein, the court may prescribe the terms upon which he may be allowed to prosecute such action. . . . We know of no provision in the Federal Employers' Liability Act which authorizes an injured employee to institute a multiplicity of actions for a single injury."⁴ The view that a court may prescribe the terms upon which it will allow its remedies to be availed of is well grounded in North Carolina law, and the *Amos* case is a commendable move towards abating, insofar as the Federal law allows, the current venue "racket" in F.E.L.A. cases. Unfortunately, its principles apply only to those rare cases where actions have been brought in two different forums, and it is important to remember that the injunction granted expires when and if the claimant discontinues his action in the North Carolina court.

Carolina Power and Light Co. v. Merrimack Mutual Fire Insurance Co. et al.,⁵ on demurrer to the complaint, refused to entertain a bill of peace to enjoin the further prosecution of twenty civil actions, pending in the same court, which arose from a fire alleged to have been caused by the power company's negligence. The bill of peace was based on two grounds: (1) that equity should intervene to prevent a multiplicity of suits which would result from attempting to try each of the twenty actions separately; and (2) that equity should enforce an estoppel by judgment against the twenty plaintiffs because of another action for the same cause on the same facts (the *Fleming* case), already adjudicated, which had absolved the power company of negligence. The fire had occurred in 1947, the *Fleming* case had been instituted in 1947 and determined in 1950, and the twenty actions had been pending since 1950 when the bill of peace was sought in 1953. In denying injunction, the Court suggested that the power company's remedy would be to interpose the pleas of *res judicata* and estoppel by judgment as defenses

⁴ 237 N. C. 714, 719, 75 S. E. 2d 908 (1953).

⁵ 238 N. C. 679, 79 S. E. 2d 167 (1953); rehearing denied by evenly divided Court, 240 N. C. 196, 81 S. E. 2d 404 (1954).

to the first of the twenty actions to be brought to trial, and to move in any one of them for a consolidation⁶ of all those cases for trial. And it found no basis in the facts for holding the twenty plaintiffs to be bound by the judgment in the *Fleming* case: they were not parties or privies, they had no interest or control, and the estoppel was not mutual.⁷

The power company had not sought to enjoin the twenty actions and to try the basic issues in a test case in equity.⁸ It is therefore unfortunate that the Court unnecessarily involved itself (and on the weaker side) in the Pomeroy-Campbell controversy⁹ as to the character of the community of interest among the several parties that must exist before equity will undertake to enjoin the many actions and to try the basic issues in a test case in equity. Moreover, only rarely have courts of equity been willing to try such a case where the basic issue was negligence;¹⁰ instead, the desirability of jury trial has usually caused such issues to be returned to the damage action for trial. That would not have been a factor in North Carolina, where jury trial in equity cases¹¹ as well as in common-law cases is available as a matter of constitutional right.

Encroachments

Two cases on interlocutory injunction against encroachments dealt with factors that made the granting of such relief improper. The fact that one who acquiesces in an act may be prevented from procuring an interlocutory injunction to have that act undone and enjoined in the future was emphasized in *North Carolina State Highway and Public Works Commission v. Brown*.¹² The Court upheld the refusal of the

⁶ See McINTOSH, N. C. PRACTICE AND PROCEDURE, § 506 (1929); Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. REV. 1, 53 (1946); Note, 63 YALE L. J. 493 (1954).

⁷ Compare *Dalehite et al. v. United States*, 73 S. Ct. 956 (1953) (Texas City disaster). "This is a test case, representing some 300 separate personal and property claims in the aggregate amount of two hundred million dollars. Consolidated trial was had . . . on the facts and the crucial question of federal liability generally. This was done under an arrangement that the result would be accepted as to those matters in the other suits." See, on this case, Note, 32 N. C. L. REV. 118 (1953).

⁸ Compare *Yuba Consolidated Gold Fields v. Kilheary et al.*, 206 F. 2d 884 (9th Cir. 1953). (disastrous flood alleged to have been caused by mining company's negligent operations; bill of peace to enjoin pending actions and to try basic issues in a test case in equity dismissed below for lack of equity jurisdiction; Court of Appeals reversed and remanded for discretionary exercise of equity powers, after consideration of factors involved).

⁹ *Id.*, Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

¹⁰ See Chafee, *supra* note 9, at pp. 1324-1325; McCLINTOCK, EQUITY, § 178 (2d ed. 1948); and the *Yuba* case, *supra* note 8.

¹¹ See Van Hecke, *Trial by Jury in Equity Cases*, 31 N. C. L. REV. 157 (1953).

¹² 238 N. C. 293, 77 S. E. 2d 780 (1953).

trial court to grant the Highway Commission an order to force the removal of a culvert extending across land comprising part of the right of way, where agents of the Commission had visited the construction job each day and had made no objection. And, underlining the importance of relative hardship in the interlocutory injunction cases, *Huskins v. Yancey Hospital*¹³ upheld refusal to grant such an injunction to compel the removal of and prohibit the use of a driveway constructed by the hospital on land alleged to be the plaintiff's but not in actual use by the plaintiff. The Court pointed to the fact that this was the only ambulance entrance the hospital had, and rejected the plaintiff's theory that the order should have been granted to restrain a continuing trespass, since any damages from such a trespass were likely to be slight.

In another trespass case, *McLean v. Town of Mooresville*,¹⁴ the plaintiff sought permanent damages for the placing in his land of a sewer pipe belonging to the municipality and also requested an injunction for its removal. The Court held that a request for permanent damages from a defendant having eminent domain powers enabled the court to grant informal condemnation of an easement for the defendant, making moot the question of injunction. The net result is to allow municipalities to condemn land by *fait accompli* without following the statutory eminent domain procedure outlined in G. S. § 40-11 *et seq.*

Miscellaneous

In other injunction cases, the Court ruled (1) that the fact that one tenant-in-common has already obtained an injunction against blasting does not confine the other tenant to a motion in that cause if he desires to restrain further blasting;¹⁵ and (2) that where interlocutory injunction is obtained to restrain a bond election and the disbursement of county funds and the propriety of the election and the impropriety of the disbursement are later established, the defendant cannot recover on the injunction bond.¹⁶

DECLARATORY JUDGMENTS

Two cases involved the use of declaratory judgments to test, respectively, the right of the state and the right of a county to tax the plaintiffs. In *Buchan v. Shaw, Commissioner*,¹⁷ the Court held that the declaratory judgment remedy is not available to a taxpayer as a means of preventing the collection of a tax which he feels the law does not require him to pay. In other words, declaratory judgment is to

¹³ 238 N. C. 357, 78 S. E. 2d 116 (1953).

¹⁴ 237 N. C. 498, 75 S. E. 2d 327 (1953).

¹⁵ *Lance v. Cogdill*, 238 N. C. 500, 78 S. E. 2d 319 (1953).

¹⁶ *Rider v. Lenoir County*, 238 N. C. 632, 78 S. E. 2d 745 (1953).

¹⁷ 238 N. C. 522, 78 S. E. 2d 317 (1953).

this extent classified with injunction against collection or assessment,¹⁸ in that the taxpayer's only remedy is to follow G. S. § 105-267 and § 105-406, which require him, in almost all cases, to pay first and sue to recover. The county tax case¹⁹ found the Court, while speaking of the need for a cause of action in declaratory judgment cases, actually dealing with a controversy without action. The two seem to be easily confused.

ACTION TO QUIET TITLE

*Pressly v. Walker*²⁰ adds another decision to a series holding that the action to quiet title set up by G. S. § 41-10 enlarged the old equitable bill to remove cloud to the extent that the statutory action is available even when the owner is not in possession and might maintain ejectment.

EVIDENCE

ADMISSION AND EXCLUSION

Perhaps the most important evidence case before the Supreme Court during the past year was *Hunt v. Wooten*.¹ In overruling defendant's objection to the admission of certain evidence the Court stated the general rule in North Carolina to be, that in order to obtain a new trial for error of the trial court in admitting evidence, the appellant must establish three propositions: (1) that he objected to the admission of the evidence in the trial court; (2) that the evidence was inadmissible in law because it was incompetent; and (3) that the evidence was prejudicial to him.

Applying this rule it appears, and the Court so held, defendant had no complaint that the trial judge erred: (1) in admitting opinion evidence in relation to the effect of depletion of the battery on the headlights of a car similar to the one involved in the accident; (2) in allowing plaintiff's doctor to express his opinion as to what percentage of plaintiff's face was disfigured; (3) in permitting plaintiff's aunt to point out to the jury where skin grafts had been made on plaintiff's face; (4) in permitting plaintiff to exhibit the hydrant which the car struck; (5) in admitting in evidence photographs of plaintiff taken before and after the injury; (6) in admitting posed photographs of the hydrant after the accident; and (7) in admitting in evidence the mortuary tables embodied in G. S. § 8-46, as proper objection was not made at the trial.

Although rendered unnecessary by the holding above, the Court

¹⁸ See Perkins, *Tax Injunctions and Suits to Recover Taxes Paid Under Protest in North Carolina*, 12 N. C. L. REV. 20 (1933).

¹⁹ Bragg Development Co. v. Braxton, 239 N. C. 427, 79 S. E. 2d 918 (1953).

²⁰ 238 N. C. 732, 78 S. E. 2d 920 (1953).

¹ 238 N. C. 42, 76 S. E. 2d 326 (1953).

examined the evidence objected to and stated that the opinion evidence of plaintiff's doctor and plaintiff's aunt was competent evidence as to the physical condition of the plaintiff before and after the injury. The doctor was a medical expert testifying to matters within his personal knowledge, and the aunt was merely pointing out the physical appearance of the injured plaintiff as observed by a lay witness.²

The evidence tended to show that the injuries were permanent, so it was proper to admit the mortuary tables where the judge instructed the jury, as here, that the mortuary tables are merely evidentiary on the question of life expectancy.

The hydrant, offered in evidence, was identified by plaintiff's witness who testified positively that it had not been altered in any way since the accident. There was no error in admitting it into evidence since inspection of this object was calculated to enable the jury to understand the evidence, and to realize more completely its cogency and force.

The photographs of the plaintiff were correctly received in evidence under the rule that whenever it is relevant to describe a person, photographs of such person are admissible for the purpose of explaining the evidence of witnesses relating to his appearance and aiding the jury in understanding such evidence. The witness testified the photographs were excellent likenesses of the plaintiff at the time taken, and the trial judge gave the jury the customary instruction that the photographs were not admitted as original or substantive evidence, but received solely for the purpose of enabling the witnesses to explain, and the jury to understand the testimony.

Finally, the Court said, notwithstanding that the pictures of the hydrant scene were posed and taken months after the accident, it was not error to admit them when verified by the maker, for the limited purpose sanctioned by cited cases. Posed photographs of a reconstructed scene of an accident are admissible where such photographs are properly identified by a witness as being accurate representations of the conditions at the scene at the time in issue.

Admissions

In an automobile collision case³ plaintiff was permitted to testify over

² *Accord*, *Hawkins v. McCain*, 239 N. C. 160, 79 S. E. 2d 493 (1953), where in a malpractice case non-experts were allowed to testify as to the appearance of the plaintiff before and after taking the treatments. The court refused, however, to allow such non-experts to testify as to what advice they gave the plaintiff upon observing her condition, and reasons for offering such advice. The excluded testimony constituted nothing more than mere conjecture or surmise on the part of the witnesses as to cause and effect in a field of knowledge in which only an expert could give a competent opinion, that is, one as to whether the health of the plaintiff had been injuriously affected by taking the prescribed medicine.

³ *Gibson v. Whitton*, 239 N. C. 11, 79 S. E. 2d 196 (1953).

objection, that while he and the defendant were in the hospital the defendant told him if he would wait until the defendant got out of the hospital the defendant would take care of everything. Defendant objected on the ground that this testimony should have been excluded as amounting to an offer of compromise. In overruling this objection the Court quoted *Wigmore on Evidence*,⁴ and stated that it was elemental that evidence of an offer of compromise, as such, is inadmissible as an admission of the party making it. However, the Court held the challenged statement, when considered in context, not to have been made on the theory of an offer of compromise, but rather as tending to show an admission of liability on the part of the defendant. The evidence was competent and admissible for that purpose.

Testimony at Former Trial

A cardinal rule governing the admissibility of a transcript of testimony given at a former trial is that it must appear that the issues in the former case were substantially the same as in the pending action; if the issues were not the same, the cross-examination would not have been directed to the same material facts, and could not have been an adequate test for exposing testimonial inaccuracies. Thus in *Parrish v. Bryant*⁵ the Court correctly excluded from evidence the transcript of the testimony of Patrolman Mullen given in an earlier criminal case growing out of the same automobile collision and involving the same defendants, even though on the occasion of the earlier trial he was cross-examined by the defendants' present attorney who defended them there.

The Court held the question of identity of issues to be a preliminary one to be decided from the record of the former trial. Here no such preliminary determination was shown, and whether, as against the defendants, the issues in the criminal case were the same as in the present civil action was entirely conjectural. The Court said:

One of the main issues in the present case is the issue of contributory negligence. Certainly this issue was not directly in issue in the former criminal action. For this failure to show identity of issues, the proffered testimony was properly excluded.

This is in line with previous decisions.

⁴ VOL. IV, § 1061, p. 28 (3rd ed. 1940). "The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversary's claim is well founded, but rather a belief that further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of a wrong done."

⁵ 237 N. C. 256, 74 S. E. 2d 726 (1953).

In another damage action growing out of an automobile collision,⁶ defendant assigned as error the exclusion of testimony of a highway patrolman that he observed certain tire marks on the shoulder of the highway at the scene of the accident some ten or twelve days after the accident. In holding no error, the Court cited *State v. Palmer*⁷ where it was said:

In the nature of things, evidence of shoe prints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) That the shoe prints were found at or near the scene of the crime; (2) that the shoe prints were made at the time of the crime; (3) that the shoe prints correspond to shoes worn by the accused at the time of the crime.

The Court held similar criteria to apply to evidence of automobile tracks offered to identify the owner of the vehicle as the perpetrator of an offense. Here the test was not met as the witness had testified that on the night of the collision he did not see the tire marks; that he saw them at a later date; and that he did not know what vehicle had made them.

Res Gestae

In *Lee v. R. R.*,⁸ plaintiff's intestate was struck by defendant's train and killed. Plaintiff offered testimony in respect to a conversation the witness had with some one he referred to as the engineer, and to what he overheard between this man and another whom he took to be an employee of the defendant. Plaintiff contended that the conversation took place within five to seven minutes after deceased was killed and was admissible as part of the *res gestae*. The Court held, however, that such statements, if made by an agent of the defendant, fall within the well defined principle of law that a mere narration of a past occurrence is only hearsay and is not admissible as against the principal or employer.

Evidence of Subsequent Repairs

In another railroad accident case⁹ the Court, in passing on the exclusion of evidence that after the accident the plaintiff railroad company installed gates at the crossing, reiterated the rule that testimony of subsequent repairs and changes as evidence of negligence should be excluded. The rule is founded, said the Court, "on the policy that

⁶ *McAbee v. McAbee & Love*, 238 N. C. 560, 78 S. E. 2d 405 (1953).

⁷ 230 N. C. 205, 52 S. E. 2d 908 (1949).

⁸ 237 N. C. 357, 75 S. E. 2d 143 (1953).

⁹ *Atlantic Coast Line Ry. v. McLean Trucking Co.*, 238 N. C. 422, 78 S. E. 2d 159 (1953).

men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers."

JUDICIAL NOTICE

Courts take judicial notice of subjects and facts of common and general knowledge. Illustrative of this is *Dowdy v. R. R.* and *Burns v. R. R.*¹⁰ where judicial notice was taken that the engineer's seat is on the right side of the locomotive. In other recent cases the Court has taken judicial notice of the regulations of the Inter-state Commerce Commission,¹¹ and of the fact that the game of billiards is not a game of chance.¹²

In some instances judicial notice is required by statute.¹³ Thus, in a civil action for recovery of an automobile, the Court in affirming a verdict for the plaintiff held that as the transaction sued on occurred in Pennsylvania the Court must look to the Pennsylvania law, and that G. S. § 8-4 required the Court to take judicial notice of the laws of that state governing the question under consideration.¹⁴ Likewise, in pleading a private statute or right derived therefrom, it is sufficient to refer to the statute by its title or the day of its ratification for the Court will take judicial notice of it¹⁵ under G. S. § 1-157. In line with general practice, however, our Court refuses to take judicial notice of municipal ordinances.¹⁶

OBJECTIONS AND EXCEPTIONS TO EVIDENTIAL RULINGS

The importance of an attorney's voicing his disapproval at the time of the trial court's ruling on the admissibility of evidence notwithstanding G. S. § 1-206(3) was strikingly demonstrated in two recent cases.

In the first of these cases defendant was testifying when plaintiff's motion to strike a part of that testimony was allowed. Although no exception was taken at that time the defendant on appeal contended that an exception to the ruling of the court was implied. In holding this contention to be without merit, the Court in *Cathey v. Shope*¹⁷ cited the statute. It provides in part:

¹⁰ 237 N. C. 519, 75 S. E. 2d 639. "This law does not require us (the court) to be blind and deaf, and ignorant of facts of common knowledge of all men."

¹¹ *Schroeder v. Railway Express Agency, Inc.*, 237 N. C. 456, 75 S. E. 2d 393 (1953).

¹² *State v. Stroupe*, 238 N. C. 34, 76 S. E. 2d 313 (1953). "If anyone think they (billiards and pool) are games of chance, let him go and play them for a stake, and he will promptly discover his error."

¹³ See note, 9 N. C. L. REV. 373 (1930).

¹⁴ *Motor Company v. Wood*, 238 N. C. 469, 78 S. E. 2d 391 (1953).

¹⁵ *Jamison v. Charlotte*, 239 N. C. 423, 79 S. E. 2d 797 (1953).

¹⁶ *Fulghum v. Town of Selma*, 238 N. C. 100, 76 S. E. 2d 368 (1953).

¹⁷ 238 N. C. 345, 78 S. E. 2d 135 (1953).

In any trial or hearing no exception need be taken to any ruling upon an objection to the admission of evidence. Such objection shall be deemed to imply an exception by the party against whom the ruling was made.

The Court held this to be applicable when a party objects to the admission of evidence and his objection is overruled. It does not protect the other party who sits by and fails to except when an objection to evidence is sustained. Stated the Court:

The Legislature wisely omitted any such provision, *for a trial judge should be advised, at the time, that his ruling is challenged*. The objection gives him notice on the one hand, but silence on the other does not. Instead, it indicates the ruling is accepted as being in accord with rules governing the admission of evidence. (Italics supplied.)

In the second case,¹⁸ the defendant did not object to the trial court's refusal to allow him to call a witness in rebuttal. Later, the defendant was allowed to recall the witness and ask him one question only. Defendant admitted that no formal objections were taken at the trial but contended that exceptions were implied under provisions of G. S. 1-206(3).

In overruling this contention the Court, citing *Cathey v. Swope*, *supra*, held:

This statute provides that no exception need be taken to any ruling *upon an objection* to the admission of evidence, but it does not do away *with the necessity of making an objection* to the ruling of the court. (Italics the Court's.)

PROBATIVE VALUE OF CONFLICTING TESTIMONY

In a divorce action where custody of a minor child was contested, visitation rights were granted the father. The mother appealed, challenging the sufficiency of the evidence to support the findings of fact on which the court awarded visitation. The evidence was sharply conflicting. The court stated¹⁹ that the probative force of the conflicting testimony is decided exclusively by the presiding judge. "The rule is well established that findings of fact by the trial court in a proceeding to determine the custody of a minor child ordinarily are conclusive when based on competent evidence."

¹⁸ State v. Howell, 239 N. C. 78, 79 S. E. 2d 235 (1953).

¹⁹ Griffin v. Griffin, 237 N. C. 404, 75 S. E. 2d 133 (1953).

Sufficiency of the Evidence

In view of the large number of fatal highway accidents in North Carolina, and criminal prosecutions arising therefrom, it is deemed apt, at this time, to quote a recent holding of the Supreme Court:²⁰

Evidence which tended to show that shortly before the accident defendant was staggering and cursing, that he declared his intention to drive his car, and got into the car and drove off in a rapid manner in the direction of the scene of the collision, that the car was not stopped nor the driver changed, and that immediately before and at the point of the collision the car was being driven on left side of the center line at speed from 40 to 50 miles per hour approaching crest of a hill, resulting in a collision with a car traveling in the opposite direction, in which several occupants of the cars were fatally injured is sufficient to maintain a verdict of involuntary manslaughter.

FUTURE INTERESTS

DOCTRINE OF ACCELERATION

In *Blackwood v. Blackwood*,¹ the Court construed a will devising land and bequeathing personalty to ". . . my beloved wife. . . in fee simple so long as she remains my widow, and in the event of her marriage . . . equally divided between all my children then living and in the event that any of them are dead leaving children or heirs at law, that their said heirs shall inherit and take the same interest that their parent would have taken, had he been living."² The Court, relying upon three North Carolina cases,³ concluded that the widow took only a life estate under the will with a vested remainder in the children. In this case, the widow dissented from the will within the statutory period,⁴ therefore, the Supreme Court ruled that the trial court had properly applied the doctrine of acceleration in holding that the remainder which was vested in the children became possessory subject to the dower rights

²⁰ State v. Turberville, 239 N. C. 25, 79 S. E. 2d 910 (1953).

¹ 237 N. C. 726, 76 S. E. 2d 122 (1953).

² *Ibid.* at 727, 76 S. E. 2d at 122 (1953).

³ Alexander v. Alexander, 210 N. C. 281, 186 S. E. 319 (1936); Sink v. Sink, 150 N. C. 444, 64 S. E. 193 (1909); *In re Brooks' Will*, 125 N. C. 136, 34 S. E. 265 (1899).

⁴ N. C. GEN. STAT. § 30-1 (1950). Provides: "Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant, or insane, she may dissent by her guardian." N. C. GEN. STAT. § 30-2 (1950): "Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate."

of the wife. As the wife had also executed a release of her dower interest in the real property to the children, they now hold all of the land in fee simple.

Mr. Justice Denny, speaking for the Court, also pointed out that if the estate to the wife had been construed to be a fee simple estate, defeasible *only* upon her remarriage, the limitation over to the children would have been an executory devise and the renunciation by the wife would not have accelerated the limitation over.⁵

REMAINDERS

*Marks v. Thomas*⁶ involved the interpretation of a will reading: to *A* during her lifetime, and at her death to *B* and *C* only during their lifetime, and at their death, *back to my estate*. The Court, citing one North Carolina case,⁷ construed the last limitation as if it read "to my heirs," so the effect was to give a remainder after the life estates to the heirs of the testatrix.⁸

In *Mewborn v. Mewborn*⁹ the heirs at law of the testator brought an action against the remaindermen to have the will construed at the death of one of the two life tenants. Reduced to its simplest form, the will read: two farms to *W* for life, then to *G* and *P* for life, "said tracts to be equally divided between them and after the death . . ." of *G* and *P*, ". . . the aforesaid tracts of land to go to *their* children." The testator died, and shortly before this action *P* died without any child or children surviving him. The Court held that, by the will, the farms went to *G* and *P* as tenants in common subject to the preceding life estate of *W*, and, at her death, *G* and *P* were to hold their shares in severalty and ". . . upon their respective deaths their respective shares would go to their respective children, if each one of them had children." As *P* died without children, his share reverted to the estate of the testator. In reaching this decision, the Court relied on its own interpretation of the intention of the testator,¹⁰ a rule of construction pronounced by a New York court,¹¹ and a Virginia case exactly in point.¹²

⁵ *Blackwood v. Blackwood*, 237 N. C. 726, 728, 76 S. E. 2d 122, 123 (1953).

⁶ 238 N. C. 545, 78 S. E. 2d 340 (1953).

⁷ *Reid v. Neal*, 182 N. C. 192, 108 S. E. 769 (1921).

⁸ *Contra*: *Arnold v. Groobey*, 195 Va. 214, 77 S. E. 2d 382, 386 (1953). "An 'estate' is not a legal entity and is neither a natural nor artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, or of an incompetent, or of a bankrupt.", *quoting from*, *Brights' Estate v. Western Air Lines*, 104 Cal. App. 2d 827, 232 P. 2d 523, 524 (1951); *Downing v. Grigsby*, 521 Ill. 568, 96 N. E. 513, 514 (1911) ("revert to my estate" held to mean "return to the aggregate of all the property which I may leave at my death.")

⁹ 239 N. C. 284, 79 S. E. 2d 398 (1953).

¹⁰ *Id.* at 287, 79 S. E. 2d at 399; *Heyer v. Bullock*, 210 N. C. 321, 186 S. E. 356 (1936).

¹¹ "It is very generally held that, where the gift is to several persons for life and at 'their death' to 'their' children, the fact that the phrase 'their death' must be read 'their respective deaths' may warrant the reading of the phrase 'their

RULE AGAINST PERPETUITIES

The case of *Clayton v. Burch*¹³ deals primarily with the Rule in Shelley's case and is treated under that heading. However, it also presents the curious case of a limitation by a testator of land to J. W. for life, remainder to his heirs, if any, to them down to the tenth generation and not to be sold for any purpose whatsoever. The Court, citing *Jackson v. Powell*,¹⁴ held the devise down to the tenth generation void as being within the rule against perpetuities. The Court also held the provision, that the property shall never be sold, void. In such case, said the Court, the invalid provision in restraint of alienation fails and the conveyance or devise stands.¹⁵

The rule against perpetuities was raised again in *Fuller v. Hedgpeth*¹⁶ where the plaintiffs make a "general and broadside" attack on the provisions of a testamentary trust to have them declared void. The challenged provisions direct a trustee to hold property for support of the testator's wife for life, then for named children and grandchildren, who were living at the time the will was made, and, at the death of each, to the ultimate beneficiaries. The Court quotes two short explanations of the rule against perpetuities¹⁷ which make it "manifest" that all interests involved would vest within the period of perpetuities as the remainders in fee vest at the death of the living persons named in the will.

RULE IN SHELLEY'S CASE

The case of *Clayton v. Burch*¹⁸ is an interesting presentation of what is perhaps the leading exception to the application of the Rule in Shelley's case. The testator devised a tract of land to a grandson, J. W. for life, then to his bodily heirs, if any, but, if J. W. should die without bodily heirs, then to another grandson, with a further limitation to another grandson if the first two should die without bodily heirs.

children' as 'their respective children.'" *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; 16 A. L. R. 123 (1922); 57 AM. JUR., WILLS, § 1315 (1948).

¹² *Horne v. Horne*, 181 Va. 685, 26 S. E. 2d 80 (1943).

¹³ 239 N. C. 386, 80 S. E. 2d 29 (1953).

¹⁴ 225 N. C. 599, 35 S. E. 2d 892 (1945) (conveyance to grantees for life . . . then to their bodily heirs to the third generation."). The words "to the third generation" were void as being in contravention of the rule against perpetuities.

¹⁵ *Lee v. Oates*, 171 N. C. 717, 88 S. E. 889 (1916).

¹⁶ 239 N. C. 370, 80 S. E. 2d 18 (1953).

¹⁷ *McQueen v. Trust Co.*, 234 N. C. 737, 741, 68 S. E. 2d 831, 835 (1951) (" . . . no devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not less than twenty-one years, plus the period of gestation, after some life or lives in being, at the time of the creation of the interest."); MORDECAI'S LAW LECTURES, 589 (2d ed. 1916) ("Every estate must vest during a life or lives in being and twenty-one years—plus the usual period of gestation—thereafter.").

¹⁸ 239 N. C. 386, 80 S. E. 2d 29 (1953).

Lacking neither logic nor authority,¹⁹ the Court held that the Rule in Shelley's case did not apply to give J. W. a fee simple. When the testator expressed his will that the land go to J. W. for life, remainder to his heirs, he had created the magic formula for the application of the Rule in Shelley's case. But he went beyond this and, by the use of "superadded words," he made his intention clear that the term "heirs" after the limitation to J. W. was used to designate *certain* persons and not the general heirs of the testator. The ulterior takers after the devise to J. W. for life, remainder to his heirs, were also "heirs" of J. W. in the technical sense. If the testator intended to use "heirs" in the technical sense, then why should he name some of the general heirs of J. W. specifically *after* having named them as a part of a class?²⁰

INSURANCE

CONSTRUCTION OF THE CONTRACT

Coverage Clauses

Coverage clauses were construed in two cases: *U Drive It Auto Co. v. Atlantic Fire Ins. Co.*,¹ and *Suttles v. Blue Ridge Ins. Co.*²

In the *Auto Company* case,³ a provision in the plaintiff's auto insurance policy covering damage caused by theft, larceny, robbery or pilferage, was held not to contemplate damage caused by temporary larceny, as defined by the statute.⁴ The Court apparently reasoned that since theft, larceny, robbery and pilferage all contain an element of felonious taking which is absent in the statutory crime of temporary larceny the latter offense must not have been within the contemplation of the parties to the insurance contract.

In refusing to find the damages within the coverage clause, the Court also seemed to give some weight to the fact that it was not convinced that there actually had been a violation of the temporary larceny statute, despite the fact that there had been a conviction for violation of that statute growing out of the same transaction giving rise to the damages. If the Court's restrictive construction of the clause cannot be explained on that basis the case would seem to be at least an exception

¹⁹ *Hampton v. Griggs*, 184 N. C. 13, 113 S. E. 501 (1922). This is probably the leading case in North Carolina on the rule of ulterior limitations preventing the application of the Rule in Shelley's case. There are many others cited by the Court in *Clayton v. Burch*, Note 18, *supra*.

²⁰ Block, *The Rule in Shelley's Case In North Carolina*, 20 N. C. L. Rev. 49, 72, 79 (1941) (where the rule controlling this case and many other aspects of the Rule in Shelley's case are fully discussed).

¹ 239 N. C. 416, 80 S. E. 2d 35 (1954).

² 238 N. C. 539, 78 S. E. 2d 246 (1953).

³ *U Drive It Auto Co. v. Atlantic Fire Ins. Co.*, 239 N. C. 416, 80 S. E. 2d 35 (1954).

⁴ N. C. GEN. STAT. § 20-105 (1953).

to the broad rule of construction followed in *Suttles v. Blue Ridge Ins. Co.*,⁵ decided less than three months earlier.

In *Suttles*, the Court construed the word "accident" in a coverage clause to cover the wreck of the insured auto in a stock-car race. The Court stated that the coverage clause is to be "strongly construed against the insurer on the basis that, if it desired to insert exceptions precluding liability under the circumstances presented, it would have done so by inserting such exceptions as would limit the effect of the general terms employed."⁶

Construction of coverage clauses against the insurer is the rule generally adopted by the authorities and followed in a majority of the courts.⁷ Apparently this rule has been adopted by North Carolina in *Suttles*, despite what was said in the *Auto Company* case, since the latter decision appears to have been decided on its own peculiar facts without particular attention to rules of construction.

DEFENSES

Fraud of the Agent

The question of whether fraud of the agent is imputed to the insurance company arose during the 1953 term of Court though the issue seems to have been substantially settled by earlier decisions in North Carolina. In *Thomas-Yelverton*,⁸ the plaintiff's evidence tended to show that the insurer's agent suggested and committed fraud in executing an application for insurance on the life of the plaintiff's decedent by misrepresentations as to the health of the decedent. Refusing to accept the plaintiff's theory that the fraud of the agent was the fraud of the insurer in such a case, the Court held that the plaintiff's own evidence established an affirmative defense⁹ since the misrepresentation or suppression of a material fact was sufficient to avoid the policy.

In its decision the Court pointed out the distinction between those situations where knowledge of the agent constitutes knowledge of the insurer and the insurer is estopped to deny the validity of the policy¹⁰

⁵ 238 N. C. 539, 78 S. E. 2d 246 (1953).

⁶ *Suttles v. Blue Ridge Ins. Co.*, 238 N. C. 539, 541, 78 S. E. 2d 246, 247 (1953).

⁷ See, 13 APPLEMAN, INSURANCE LAW AND PRACTICE § 7465 (1943) and cases cited therein.

⁸ *Thomas-Yelverton Co. v. State Capital Life Ins. Co.*, 238 N. C. 278, 77 S. E. 2d 692 (1953).

⁹ The Court pointed out that the instant case fell within an exception to the general rule that the burden of proving an affirmative defense is on the insurer in an action of a life insurance policy, citing North Carolina cases.

¹⁰ *Heilig v. Home Security Life Ins. Co.*, 222 N. C. 231, 22 S. E. 2d 429 (1942) (Where insurance agent inserted false answers in policy relying on misrepresentations of applicant, but without any collusion, the insurer was held bound by the contract.); *National Life Ins. Co. v. Grady*, 185 N. C. 348, 117 S. E. 289 (1923) (Where agent was required by insurer to ascertain good health of insured before delivering policy but failed to do so, relying on representation of

and the situation, as in the present case, where the agent and the insured participate in a fraud by inserting false answers in the application for insurance. The knowledge of the agent in such latter instance is not imputed to his principal, the insurance company.¹¹

GROUP POLICIES

Two decisions rendered during the past term of court involved conversion or termination of group policies. In *Haneline v. Turner White Casket Co.*,¹² the plaintiff's decedent was covered by an employee's group policy terminable at the end of the month in which the insured left the employ of the employer. Premiums were paid partially by the employer and partially by the employee. The insured's share of the premium for a full quarter was deducted from his salary but he was discharged before the end of the first month of that period. After the month had ended and before the end of the quarter, the decedent died and the beneficiary under the policy sued the insurer for the amount of the insurance. In refusing recovery, the Court gave effect to the policy clause specifying that the coverage under the contract terminated at the end of the month in which the employment was terminated,¹³ and rejected the contention of the plaintiff that since the insurance company had made no refund before the date of the decedent's death the plaintiff was entitled to recover the full amount of the policy.

A more interesting question arose in *Lineberry v. Security Life and Trust Co.*¹⁴ This case ultimately turned on whether the date of issuance of an individual life insurance policy, issued as a matter of contract right on termination of employment covered by a group policy, related back to the date of issuance of the group policy (so as to make applicable to the individual policy) a one-year incontestability clause in the group policy. The Court held that the date of issuance did not relate back, pointing out that the group and individual policies constituted two separate policies of insurance, so that the advantage of the clause in the group policy was not available to the plaintiff.¹⁵ In

insured's representative to the effect that insured was in good health, it was held that the insurer was still bound in the absence of collusion or mutual participation in the fraud.)

¹¹ *Inman v. Woodmen of the World*, 211 N. C. 179, 189 S. E. 496 (1936) (Where soliciting agent knew of the fraud involved, the misrepresentations were not imputed to the insurer.); *Gardner v. North State Life Ins. Co.*, 163 N. C. 367, 79 S. E. 806 (1913).

¹² 238 N. C. 127, 76 S. E. 2d 372 (1953).

¹³ The Court said, "A contract of life insurance, like any other contract..., is to be interpreted and enforced according to the terms of the policy," citing earlier North Carolina cases. *Haneline v. Turner White Casket Co.*, 238 N. C. 127, 129, 76 S. E. 2d 372, 374 (1953).

¹⁴ 238 N. C. 264, 77 S. E. 2d 652 (1953).

¹⁵ The individual policy contained a two-year self-destruction clause. Death

particular, the Court pointed to the fact that the policies were inconsistent in various provisions and were in fact entered into by different parties since the group policy was a contract between the employer and the insurer while the individual policy was a contract between the individual insured and the insurer.

PREMIUM RATES

The case of *In re Blue Bird Taxi Company of Asheville, Inc.*¹⁶ involved the power of the North Carolina Automobile Rate Administrative Office to adjust insurance rates for taxicabs under G. S. § 58-246 as it stood prior to amendment by the 1953 General Assembly.¹⁷ That case is discussed fully under the subject, *Administrative Law*, in this study.

SUBROGATION

Four cases during the 1953 term dealt with some aspects of subrogation.¹⁸ Of these, three were of some interest. In *Jackson v. Baggett*¹⁹ the Court reiterated the principle laid down only a year ago in the case of *Burgess v. Trevathan*,²⁰ that:

Since an insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payments in the proceeds of the judgment in the action brought by the insured against the tort-feasor . . . , it has a direct and appreciable interest in the subject matter of the action, and by reason thereof is a proper party to the action.²¹

In so restating the law, the Court reversed the trial judge who had refused a motion to join the insurance company as a party, but was careful to point out that the error committed by the trial judge occurred before he had an opportunity to read the *Burgess* opinion.²²

In *Penn Dixie Lines v. Grannick*,²³ the Court again relied on *Bur-*

was self-inflicted by the insured within the two-year period. It was the theory of the plaintiff beneficiary that the defense of self-destruction under the individual policy could not be raised because if the date of issuance related back so that the two policies constituted one contract, the defense would be barred by the one-year clause in the predecessor group policy. The Court refused this contention.

¹⁶ 237 N. C. 373, 75 S. E. 2d 156 (1953).

¹⁷ N. C. GEN. STAT. § 58-246 (1950); discussed in 23 N. C. L. REV. 283-285 (1944-45); amended Chapter 674, S. L. 1953.

¹⁸ *Winkler v. Appalachian Amusement Co.*, 238 N. C. 589, 79 S. E. 2d 185 (1953); *Penn Dixie Lines v. Grannick*, 238 N. C. 552, 78 S. E. 2d 410 (1953); *Jackson v. Baggett*, 237 N. C. 554, 75 S. E. 2d 532 (1953); *Dowdy v. Southern Ry.*, 237 N. C. 519, 75 S. E. 2d 639 (1953).

¹⁹ 237 N. C. 554, 75 S. E. 2d 532 (1953).

²⁰ 236 N. C. 157, 72 S. E. 2d 231 (1952), discussed in Note, 31 N. C. L. REV. 224 (1952-53).

²¹ *Burgess v. Trevathan*, 236 N. C. 157, 161, 72 S. E. 2d 231, 234 (1952).

²² *Jackson v. Baggett*, 237 N. C. 554, 555, 75 S. E. 2d 532, 533 (1953).

²³ 238 N. C. 552, 78 S. E. 2d 410 (1953).

gess to state that where the insurer has paid the insured his full loss, the insurer is the proper party plaintiff and that payment by the insurer, if proved, is a good defense to an action by the insured for damages. In *Winkler v. Appalachian Amusement Co.*,²⁴ it was pointed out that the plaintiff insured is entitled to introduce evidence that the insurer has not fully paid the loss to controvert allegations of complete subrogation by the insurer to all rights in the cause of action.

Prior North Carolina cases, including *Burgess*, concerning the right of subrogation in the insurer, are discussed more fully in a recent note in this *Law Review*.²⁵

LABOR LAW

UNEMPLOYMENT COMPENSATION

Two cases dealt with the Employment Security Law of 1936, G. S. § 96-1 *et seq.*

In *re Stevenson*¹ was an action for the recovery of unemployment compensation. The Court found that the unemployment in question was the direct result of a strike which, although officially terminated before the period complained of, had been of such a nature that the company could not resume full operation immediately. It was held, for the first time in this state, that the claimant employees, having participated in the strike, were denied recovery by G. S. § 96-14(d).² One possible future extension of this holding might be the denial of compensation where the work stoppage results from the employer's laying off of workers as he prepares to close his plant *before* and in anticipation of a labor dispute. Courts of other states have already reached such a result under similar statutes.³

In *State ex rel. Employment Security Commission v. Coe*,⁴ the Court affirmed the Commission's finding that a shoe-shine boy, whose remuneration was from shines and tips, and who performed incidental services at the command of the manager of the barber shop where he

²⁴ 238 N. C. 589, 79 S. E. 2d 185 (1953).

²⁵ 31 N. C. L. REV. 224 (1952-53).

¹ 237 N. C. 528, 75 S. E. 2d 520 (1953).

² This section disqualifies an individual for compensation "For any week with respect to which the Commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory . . . at which he is or was last employed." An employee not participating in or interested in the labor dispute, and not a member of a group that is, is exempted from the disqualification. Compare Note, 29 N. C. L. REV. 472 (1951).

³ *Ablondi et al. v. Board of Review*, 8 N. J. Super. 71, 73 A. 2d 262 (1950); *Bako et al. v. Unemployment Compensation Board of Review*, 171 Pa. Super. 222, 90 A. 2d 309 (1952).

⁴ 239 N. C. 84, 79 S. E. 2d 177 (1953).

was "engaged," was an "employee" within the terms of the Employment Security Law, and that the barber shop therefore employed eight persons and was liable for contributions under the Act. But the Court was interpreting G. S. § 96-8(g) (6) as it operated prior to January 1, 1949, and not the present G. S. § 96-8(g) (1), since the alleged employment went back of January 1, 1949, and coverage once effectuated can be terminated only by the occurrence of certain events enumerated in G. S. § 96-11. Hence, some of the authorities quoted in support of the opinion, holding that the purpose of the Act was to break out of the barriers imposed by the classical common-law doctrines of master, servant, and independent contractor, would be irrelevant in an interpretation of the present law. G. S. § 96-8(g) (1) now expressly excludes from the classification "employee" any person who would be considered an independent contractor or not an employee under the common-law scheme of classification. The value of the *Coe* case as precedent is therefore limited to that extent.

ARBITRATION

*Calvine Cotton Mills v. T.W.U.A.*⁵ upheld an arbitrator's award to the workers of a *pro rata* part of their yearly vacation pay where the employer had suspended operations at a point somewhat more than half-way through the period on which such pay was based. It follows *Thomasville Chair Co. v. U.F.W.A.*⁶ and the Labor Arbitration Act of 1951,⁷ in holding that an arbitrator's award will not be reversed for alleged errors of fact or law, if his interpretation of the collective bargaining agreement was within the scope of his authority.

MUNICIPAL CORPORATIONS

CREATION

Delegation of power to an administrative agency or to a local legislative body to create special types of municipal corporations has been consistently upheld by the court where the agency or legislative body has only to determine, under proper guiding standards, the facts upon which the state law authorizing creation of such a corporation is to become effective.¹ The statutory provisions (first passed in 1949 and

⁵ 238 N. C. 719, 79 S. E. 2d 181 (1953).

⁶ 233 N. C. 46, 62 S. E. 2d 535 (1950).

⁷ N. C. GEN. STAT. § 95-36.9(c) (1950). See Note, 29 N. C. L. REV. 460 (1951). Compare the Commercial Arbitration Act, N. C. GEN. STAT. § 1-559 (1953), and *Bryson v. Higdon*, 222 N. C. 17, 21 S. E. 2d 836 (1942).

¹ *E.g.*, *Cox v. Kinston*, 217 N. C. 391, 8 S. E. 2d 252 (1940), concerning creation of housing authority by city council; *Sanitary District v. Prudden*, 195 N. C. 722, 143 S. E. 530 (1928), concerning creation of sanitary districts by the State Board of Health; *cf.* *Coastal Highway v. Turnpike Authority*, 237 N. C. 52, 74 S. E. 2d 310 (1953), where the proper guiding standards were not provided.

amended in 1953) authorizing the Medical Care Commission to create hospital districts were held to come within this constitutional area of delegation in *Williamson v. Snow*.² Under the provisions of the law the Commission may create a hospital district if, after a hearing, the Commission determines that the residents of all the territory to be included in the special tax district will be benefited by the creation of the district.³

LOCAL LEGISLATIVE POWER

The Supreme Court has again affirmed the complete power of the legislature over municipal corporations. In *Greensboro v. Smith*⁴ the power of Greensboro's city council to modify the powers of the Greensboro War Memorial Fund Commission was in question. That Commission had been established by the city council but subsequently a special act of the General Assembly "approved, ratified, and validated" the ordinance creating the Commission. Following the legislative act the council modified the original ordinance by increasing the membership of the Commission and narrowing its powers. The Court held that all action taken by the Commission following its increase in membership was void, for by passage of the act of the General Assembly the Commission "as a legal entity became solely the creature of the General Assembly of North Carolina, deriving all its legal functions and powers from that body. Thenceforth, the City Council of Greensboro was without power or authority to amend the Commission's charter or modify its corporate powers."

In one case the Court briefly considered the power of a municipal corporation to submit a dispute to arbitration. It was alleged in *Rex Hospital v. Commissioners of Wake*⁵ that the county had agreed to arbitration of differences arising under a contract. While the Court found under the facts of that case that there had been no agreement to arbitration, it stated that arbitration would amount to an unconstitutional bargaining away of the county's discretionary power.⁶

TORT LIABILITY

The Court re-affirmed in separate cases that the installation and maintenance of traffic light signals⁷ and the maintenance of wires for

² 239 N. C. 493, 80 S. E. 2d 262 (1954).

³ N. C. GEN. STAT. § 131-126.31 *et seq.* (1952).

⁴ 239 N. C. 138, 79 S. E. 2d 486 (1954).

⁵ 239 N. C. 312, 79 S. E. 2d 892 (1954).

⁶ Cf. resolution of the North Carolina League of Municipalities opposing the suggestion that the City of Durham should submit the question of the reasonableness of its out-of-town water rates to arbitration by the North Carolina Utilities Commission. Raleigh News and Observer Feb. 16, 1954.

⁷ *Hamilton v. Hamlet*, 238 N. C. 741, 78 S. E. 2d 770 (1953); see also *Hodges v. Charlotte*, 214 N. C. 737, 200 S. E. 889 (1938).

transmitting electricity solely for street lighting purposes⁸ are governmental functions in the performance of which a municipality is not liable for any negligence of its officers and agents. Since determination of whether a particular function is governmental or proprietary in nature is a judicial responsibility, the Court will not, however, permit a demurrer to the complaint on the ground that the city was engaged in a governmental function unless facts are alleged in the complaint which support the defense of governmental immunity.⁹

Another facet of the tort liability problem was highlighted in *McKinney v. High Point*,¹⁰ in which the Court held that under certain circumstances adjoining property owners may be entitled to compensation for a "taking" of their property when a city erects a water tank. The Court declined to follow the reasoning of a previous decision holding that maintenance of a water system is a proprietary function of the city and, consequently, not clothed with governmental immunity.¹¹ It held that the erection of the tank was a governmental function, which freed the city of liability for committing a nuisance and from the necessity of complying with its own zoning ordinance (under the law as it existed at that time, prior to enactment of G. S. § 160-181.1). But it then applied the principle of *Dayton v. Asheville*¹² to hold that the property damage resulting from erection of the tank constituted a "taking" for which compensation must be paid.

In determining just what actions by the city constituted the "taking," the Court staked out what seemed to be a rather extreme position in the first of its two opinions and then restricted its earlier ruling in the second opinion. The case first came up on demurrer. Speaking to the point of what constituted the "taking," the Court declared:

The amended complaint does not state how far the tank is located from the plaintiffs' property in feet, but says their property is located just across Howard Street from it. The amended complaint alleges that the construction and maintenance of this tank in a zoned Residence 'A' District has cheapened, and materially damaged their property; that the maximum height of a public or semi-public building permitted by defendant's ordinance is 60 feet and this tank is 184 feet high; that their home stands in the shadow of it; that it is painted a bright silver color so that the reflection of the rays of the sun upon it causes a con-

⁸ *Baker v. Lumberton*, 239 N. C. 401, 79 S. E. 2d 886 (1953); see also *Beach v. Tarboro*, 225 N. C. 26, 33 S. E. 2d 64 (1945).

⁹ *Foust v. Durham*, 239 N. C. 306, 79 S. E. 2d 519 (1954).

¹⁰ 237 N. C. 66, 74 S. E. 2d 440 (1953); 239 N. C. 232, 79 S. E. 2d 730 (1954).

¹¹ *Woodie v. Wilkesboro*, 159 N. C. 353, 74 S. E. 924 (1912); cf., *Foust v. Durham*, *supra* note 9.

¹² 185 N. C. 12, 115 S. E. 827 (1923).

tinuous and blinding glare; that the construction, maintenance and operation of the tank has defeated the purpose for which the section was zoned. These allegations allege a taking of plaintiff's property for which compensation must be paid. . . .¹³

The Court went on to say that the possibility of the tank's menacing plaintiffs' property through the danger of aircraft collision, windstorms, tornadoes, cyclones, electrical storms, leakage, or bursting was too speculative to be considered as an element of damages.

Following a jury decision awarding plaintiffs \$2,000 for the "taking," the case came up again.¹⁴ This time Chief Justice Barnhill, speaking for the Court, declared:

This cause is again before us in large measure because counsel and the trial court misconstrued and misinterpreted our former opinion. . . . When that opinion is considered contextually and correctly analyzed and construed, it appears that we, in effect, held that the complaint alleged only one act on the part of defendant which, if established by evidence, will support a finding that defendant has made a partial appropriation of plaintiffs' property for a public use without just compensation. . . . [Plaintiffs'] cause of action arose, if at all, when the defendant painted the tank with aluminum paint, thereby allegedly concentrating reflected rays of the sun on their property. Theretofore they had suffered no injury for which compensation may be recovered.¹⁵

Justice Barnhill then held that the zoning ordinance gave the property owner no vested right and that it was error for the trial judge to allow the jury to consider, in fixing compensation for the "taking," (a) the deprivation of this "right," (b) the proximity of the tank to plaintiffs' premises, (c) the fact that the tank is taller than other buildings in the vicinity, or (d) the fact that it is a commercial structure in a residential section.

EMINENT DOMAIN

In *McLean v. Mooresville*¹⁶ the Court reaffirmed its previous rulings¹⁷ that when permanent damages are assessed for the creation of permanent structures or conditions by a city for a public purpose, the transaction amounts to an exercise of eminent domain. This being so, the property-owner involved is not entitled to an injunction against

¹³ 237 N. C. 66, 76, 74 S. E. 2d 440, 447 (1953).

¹⁴ *McKinney v. High Point*, 239 N. C. 232, 79 S. E. 2d 730 (1954).

¹⁵ 239 N. C. 232, 234-235, 79 S. E. 2d 730, 732 (1954).

¹⁶ 237 N. C. 498, 75 S. E. 2d 327 (1953).

¹⁷ *E.g.*, *Rhodes v. Durham*, 165 N. C. 679, 81 S. E. 938 (1914).

further use of the structure. In the particular case, the city had constructed a storm sewer line across the property.

In *Lyda v. Marion*¹⁸ the Court considered the effect upon such an action of a charter provision requiring that notice of any action for damages be given to the Board of Aldermen within a specified period after infliction of the injury. The Court distinguished two lines of cases. Where the injury consisted of periodic flooding of one's property by water running off a newly paved street, the Court held that a cause of action based on continuing trespass accrued at the time of the first substantial injury and that it was barred if notice was not given during the statutory period thereafter.¹⁹ But where there was a physical entry upon the land by the city and construction of drainage ditches, the Court held that the charter provision was inapplicable since such a provision does not include a claim for compensation arising out of physical appropriation of private property for public use.²⁰

POLICE POWER

Zoning Ordinances

The Court's only zoning decision of the year upheld the constitutionality of the proviso to G. S. § 160-173, which provides that when two or more corners at an intersection are zoned in a particular way, the owners of the other corners are entitled to have their property zoned in the same way.²¹ The decision left unanswered several questions of statutory interpretation: (a) Must the application for rezoning come from the owners of all remaining corner lots or may a single owner secure this relief? (b) Must the City Council rezone the entire distance of 150 feet from the intersection, or may it rezone only those lots whose owners apply? (c) Are other lot owners within 150 feet of the corner entitled to rezoning, and if so, how must they proceed?

Sunday Laws

A claim that a municipal ordinance which permits one class of business to sell articles of merchandise on Sunday while other businesses carrying similar articles are required to remain closed is an unreasonable and discriminatory exercise of police power was rejected by the Supreme Court in *State v. Tower*.²² A full treatment of this decision appears in a note in this issue of the *Law Review*.²³

Earlier the Court had rejected the contention of a drive-in operator

¹⁸ 239 N. C. 265, 79 S. E. 2d 726 (1954).

¹⁹ Applying the rule of a line of cases including *Dayton v. Asheville*, 185 N. C. 12, 115 S. E. 2d 827 (1923).

²⁰ See *Stephens v. Charlotte*, 201 N. C. 258, 159 S. E. 414 (1931).

²¹ *Marren v. Gamble*, 237 N. C. 680, 75 S. E. 2d 880 (1953). See Constitutional Law, "Separation of Powers," at p. 405 in this survey.

²² 239 N. C. 274, 79 S. E. 2d 513 (1953).

²³ 32 N. C. L. REV. 552 (1954).

that a Charlotte ordinance preventing him from opening until 9:00 on Sunday night was discriminatory, arbitrary and unreasonable, an interference with religious freedom in violation of the First Amendment of the United States Constitution and of Article I, Section 26 of the North Carolina Constitution, and invalid because the General Assembly had impliedly repealed the authority of cities to adopt Sunday ordinances when it repealed G. S. § 103-1 which had, since 1741, provided a penalty for working on Sunday.²⁴

TAXATION AND FINANCE

Non-Tax Funds

The use of non-tax funds to finance non-necessary expenses was approved in a new fact situation in *Greensboro v. Smith*.²⁵ In interpreting Article VII, Section 7, of the North Carolina Constitution, the Court has previously held that non-necessary expenses may be financed from surplus funds and non-tax revenues,²⁶ but in the previous cases, no vote had been held on the question of tax support for the non-necessary expenses being so financed. Greensboro wished to use profits derived from the operation of ABC stores to supplement tax funds levied with the approval of the voters to finance a recreation program,²⁷ and the Court held that the city could do so, there being no statute prohibiting such a supplement and no stipulation in the tax issue submitted to the voters limiting recreation funds to the proceeds of the tax so voted. The Court distinguished *Rider v. Lenoir*²⁸ wherein it was held that non-tax revenues could not be used to supplement bond proceeds for a hospital,²⁹ because in that case there had been a stipulation that funds of the local government required to finance the hospital would not exceed a certain amount and hence non-tax revenues could not be used to exceed the amount stipulated.

Necessary Expenses

In *Wilson v. High Point*³⁰ the Court enjoined High Point from issuing bonds, without the approval of the voters, to construct a building for the joint use of High Point and Guilford County, even though the county had contracted to pay the city in full for the building over

²⁴ *State v. McGee*, 237 N. C. 663, 75 S. E. 2d 783 (1953).

²⁵ 239 N. C. 138, 79 S. E. 2d 486 (1953).

²⁶ See McMAHON, SOURCES OF MUNICIPAL REVENUE 8 (Chapel Hill: Institute of Government, 1953) and the cases cited therein, particularly *Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. 2d 803 (1945).

²⁷ Recreation has been held to be a non-necessary expense. *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. 2d 702 (1947).

²⁸ 236 N. C. 620, 73 S. E. 2d 913 (1952).

²⁹ The construction and operation of a hospital has been held to be a non-necessary expense. *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668 (1937).

³⁰ 238 N. C. 14, 76 S. E. 2d 368 (1953).

a period of time. Resting its decision on Article VII, Section 7, of the North Carolina Constitution³¹ the Court held that the proposed pledging of High Point's credit was equivalent to the exercise of the taxing power and that the construction of a building by one government for the use of another was not a necessary expense of the former. The Court indicated that the same result would not necessarily have been reached if the proposed bonds had been approved by the voters of High Point or if the funds to be used in the construction of the building had been non-tax funds.³²

The Court in *Board of Managers v. Wilmington*³³ reaffirmed previous decisions that the construction and operation of a hospital is not a necessary expense for a city or county within the meaning of the Constitutional limitation.³⁴ It was noted by the Court, however, that Wilmington and New Hanover, the city and county involved, were expressly exempted from the provisions of G. S. § 153-152 and G. S. § 160-229 which empower the governing body of any municipality or county to contract with a public or private hospital for medical treatment and hospitalization of the sick and afflicted poor of the town and county and which deem such contracts to be for "necessary expenses," requiring no vote of the people to make them valid. By appropriate legislation, the Court said, the city and county might bring themselves within the provisions of those acts.³⁵

³¹ "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof unless approved by a majority of those who shall vote thereon in any election held for such purpose."

³² In developing its decision the Court used language and cited cases which suggested that the arrangement was double taxation of the city taxpayer and therefore unconstitutional as a violation of Article V, Section 3 of the Constitution which requires that taxation be uniform. This raised a grave question about the legality of many of the present financial arrangements between counties and cities within their boundaries whereby the city appropriates money to assist the county in the financing of some functions of government. Recently, however, in *Jamison v. Charlotte*, 239 N. C. 682, 80 S. E. 2d 904 (1954) the Court was directly confronted with the problem and dispelled all doubts about the constitutionality of such city-county financing by holding that it is neither double nor non-uniform taxation for a city taxpayer to have to contribute to a governmental function through both city and county taxes.

³³ 237 N. C. 179, 74 S. E. 2d 749 (1953).

³⁴ *Armstrong v. Commissioners*, 186 N. C. 405, 117 S. E. 388 (1923); *Nash v. Monroe*, 199 N. C. 306, 151 S. E. 634 (1930); *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668 (1937).

³⁵ As a result of the Wilmington hospitalization case, the General Assembly of 1953 enacted N. C. GEN. STAT. §§ 153-176.1 through 176.4 which authorize a county with a population of 60,000 or over and a city within the county having a population of 44,000 or over "to provide hospitalization, medical care and attention of the indigent sick and afflicted poor of such county or city." Such a county and city, separately or jointly, may provide for hospitalization either by contract with hospitals or by payment for the cost of care rendered to indigents.

Contracts with Nonresidents

Further clarification of a municipality's relation with nonresident water consumers was reached in *Fulghum v. Selma*.³⁶ There a resident purchased water from the town under an agreement and resold the water to nonresidents. The action of the city council in increasing the rates charged the resident distributor was upheld, the court pointing out that the municipalities are under no duty to furnish water to nonresidents and may change the terms under which service is provided so long as the rates and fees charged are nondiscriminatory as applied to all nonresidents.³⁷ In making sales to nonresidents, the town undertakes no duty or obligation similar to those of a public service corporation.

DEDICATION OF PUBLIC PROPERTY TO A SPECIFIC PURPOSE

In *Spaugh v. Charlotte*³⁸ the court faced the question of whether a city can so dedicate its property to a particular use as to be unable subsequently to withdraw it from that use. Charlotte purchased a tract of land in 1883 for the purpose of establishing a public school. It turned the property over to the local school administrative unit, but retained record title. During the intervening years the property was used continuously for school purposes. In 1953 the city proposed to raze the old school building and use the property as part of its contribution to the right-of-way for the extension of Independence Boulevard. In a controversy without action brought by the Board of School Commissioners, the Court held (a) that the city had by its actions dedicated the property for public school purposes, (b) that this dedication could not be withdrawn, and (c) that the school board, consequently, was entitled to fair compensation for the property so taken.

PUBLIC UTILITIES

RATES

Discrimination

Discrimination by a subsidiary electric company in favor of its parent, a manufacturing company presented a problem to the North Carolina Supreme Court in 1953.

The Nantahala Power and Light Company applied to the North Carolina Utilities Commission for an increase in rates for electric power to industrial customers. The applicant's stock is wholly owned by the Aluminum Corporation of America, referred to as Alcoa. During the twelve months ending June 30, 1952 Alcoa received from the applicant

³⁶ 238 N. C. 100, 76 S. E. 2d 368 (1953).

³⁷ See also *Construction Co. v. Raleigh*, 230 N. C. 365, 53 S. E. 2d 165 (1949).

³⁸ 239 N. C. 149, 79 S. E. 2d 748 (1954).

81.65% of the electricity it produced, and paid 2.3 mills per K.W.H. The Mead Corporation, another industrial customer, opposed the proposed increase. It paid 5.09 mills per K.W.H., and under the application this would be increased to 5.98 mills. No increase was proposed in the rates to Alcoa, but only in the rates of other industrial customers. Although Alcoa used 81.65% of the electricity produced by the applicant, it paid only 47.3% of the applicant's revenue. The Utilities Commission granted the increase, but the superior court reversed the order, and the Supreme Court affirmed the reversal.

Although it appeared that even with the proposed increase the applicant would operate at a loss, the Supreme Court upheld the superior court in denying the increase on the ground of discrimination in rates between Alcoa and the Mead Corporation, which discrimination would be heightened if the rates of other industrial users were increased, but not Alcoa's. The applicant attempted to justify the difference in rates on the ground that Alcoa bought only secondary, or undependable, power, but the superior court found no evidence to support the conclusion of the Utilities Commission that 81.65% of the power produced by the applicant was secondary, and the Supreme Court agreed.¹

The report of the case does not spell out what practical differences would follow if Alcoa paid higher rates. Since Alcoa owns the applicant and bears its losses, if Alcoa paid higher rates it would be the beneficiary of its own increased payments.

The Rate Fixing Process

The North Carolina Public Utilities Commission granted the Southern Bell Telephone and Telegraph Company an increase in its intrastate telephone rates. In deciding that the cause must be remanded to the commission the Supreme Court stated its view of the rate making process.² It indicated that what is a just and reasonable rate depends on four factors to be determined by the commission. First is the "value of the investment," called the rate base. By "value of the investment" the court apparently means the value of the company's properties, not the amount invested in them, for one of the errors the court finds in the commission's procedure was that it did not take into account present cost of replacement of the properties, a matter which bears on the value of the properties, not the amount invested in them. The second factor is the company's gross income. The third is its operating expenses, which must be deducted from gross income. The fourth is the just and reasonable rate of return on the rate base. When the commission

¹ State *ex rel.* Utilities Commission v. Mead Corp., 238 N. C. 451, 78 S. E. 2d 290 (1953).

² State *ex rel.* Utilities Commission v. North Carolina, 239 N. C. 333, 80 S. E. 2d 133 (1954).

finds these ultimate facts the amount of additional revenue needed to produce the desired return can be calculated.

In determining the rate base the commission erred, according to the Court, in adopting book value, or cost less depreciation. This excluded from consideration present cost of construction of the properties, which the applicable statute requires to be considered.³

But depreciation, says the Court, citing decisions of the United States Supreme Court and of state courts, is to be allowed on the basis of the cost of the properties, not their present value. Obviously the result of this view is to allow the company to recapture in depreciation charges what it paid for the properties, not what they are worth.

The company collected and had on hand a monthly average of \$2,-723,738 in federal taxes. This money it was not required to transmit to the government for more than a year after collection. The company used this money for its own purposes. Nevertheless the commission allowed a sum for working capital in the rate base, on the ground that it would not condone or encourage the use of the government's money for such a purpose. The Court took an opposite position, and said that the propriety of the company's use of the money was a matter concerning the company and the federal government, but so long as it did use such money for working capital, no additional allowance for such purpose was in order.

The Court in its discussion says the government assures that the stockholders of a "quasi-public utility"⁴ shall have a fair return on their investment. It is not clear what the Court means by this statement, on the basis of which it justifies a relatively low rate of return on the value of the company's properties. Certainly the government guarantees no fair return to public utilities. It does permit them to earn such a return—if they can. Many public utilities, notably street railways, have gone out of business by reason of their inability to earn any return, and the government has not rescued them. But it is true that by protecting telephone companies from unlimited competition the government does place them in a favorable position to earn a fair return.

³ N. C. GEN. STAT. § 62-124 (1950). General discussions of rate making are to be found in BAUER, *EFFECTIVE REGULATION OF PUBLIC UTILITIES* (1925); Hanft, *Control of Electric Rates in North Carolina*, 12 N. C. L. REV. 289 (1934); Rose, *The Bell Telephone System Rate Cases*, 37 VA. L. REV. 699 (1951).

⁴ Apparently the court uses this term in lieu of "public utility."

REAL PROPERTY

ADVERSE POSSESSION

Of eleven cases¹ dealing with adverse possession, only *Newkirk v. Porter*² has any major significance. The Court relied on *Jennings v. White*³ and held that the plaintiff, who claimed title by seven years adverse possession under color of title,⁴ could not tack his own adverse possession to that of his grantor as to a strip of land not described in the plaintiff's deed. The case, by way of dictum, also stands for the further proposition that the plaintiff-grantee "... who went into actual physical possession of the strip not covered by his deed would become an adverse possessor in his own right and not a tenant at will of his grantor, but tacking of the preceding adverse possessions of the non-included strip nevertheless would not be allowed."⁵ The case changed the rule of *Jennings v. White*, *supra*, to this extent.

The other cases involve adverse claims against private persons and interpret the statutes⁶ controlling such actions or repeat settled tests for setting up the claim by adverse possession. For example, in *Everett v. Sanderson*,⁷ where the plaintiffs established title in themselves by more than twenty years of adverse possession,⁸ the Court quotes the celebrated definition of adverse possession from an opinion rendered in 1912.⁹ The Court, in *Justice v. Mitchell*,¹⁰ quotes an established and

¹ Lovett v. Stone, 239 N. C. 206, 79 S. E. 2d 479 (1953); Brewer v. Brewer, 238 N. C. 607, 78 S. E. 2d 719 (1953); Everett v. Sanderson, 238 N. C. 564, 78 S. E. 2d 408 (1953); Justice v. Mitchell, 238 N. C. 364, 78 S. E. 2d 122 (1953); Barbee v. Edwards, 238 N. C. 215, 77 S. E. 2d 646 (1953); Sessoms v. McDonald, 237 N. C. 720, 75 S. E. 2d 904 (1953); Powell v. Mills, 237 N. C. 582, 75 S. E. 2d 759 (1953); Washington v. McLawhorn, 237 N. C. 449, 75 S. E. 2d 402 (1953); Walston v. W. H. Applewhite and Co., 237 N. C. 419, 75 S. E. 2d 138 (1953); Wilson v. Wilson, 237 N. C. 266, 74 S. E. 2d 704 (1953); Newkirk v. Porter, 237 N. C. 115, 74 S. E. 2d 235 (1953).

² 237 N. C. 115, 74 S. E. 2d 235 (1953).

³ 139 N. C. 23, 51 S. E. 799 (1905) (holding that a claimant by adverse possession of a strip not included in his deed is a tenant at will of his grantor).

⁴ N. C. GEN. STAT. § 1-38 (1953).

⁵ 31 N. C. L. REV. 478 (1953). The author of a student note explains the full significance of this case to the law of adverse possession.

⁶ N. C. GEN. STAT. § 1-36 *et seq.* (1953).

⁷ 238 N. C. 564, 78 S. E. 2d 408 (1953).

⁸ N. C. GEN. STAT. § 1-40 (1953).

⁹ Locklear v. Savage, 159 N. C. 236, 237, 74 S. E. 347 (1912). "What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

¹⁰ 238 N. C. 364, 366, 78 S. E. 2d 122 (1953).

concise test from *Lewis v. Covington*¹¹ for the kind of possession necessary to ripen colorable title into good title. This case also illustrates an interesting point in connection with a claim of adverse possession under a deed of gift. Such a deed, though unregistered, conveys good title for two years,¹² so it cannot be color of title until the expiration of the two years, at which time the deed becomes void *ab initio* and title reverts in the grantor.¹³

In connection with what is necessary to establish a claim of title by adverse possession, the Court held that the possession must be "continuous, though not necessarily unceasing, for the statutory period";¹⁴ that the requisite "continuity of the possession of an adverse claimant is not interrupted by his act in purchasing or bargaining for an outstanding title"¹⁵ and that adverse possession must be "hostile," meaning possession of land and claim of "exclusive right thereto."¹⁶

On questions of evidence involved in proving the claim of ownership by adverse possession, the Court held that listing and paying taxes is not alone enough to show adverse possession but it is some evidence, and the same applies to keeping a garden or permitting others to keep a garden on the lot and to building a fence around the premises.¹⁷ In *Everett v. Sanderson*,¹⁸ the Court agreed with the trial judge that putting up fences, raising hogs and cattle, and such other uses for which lands are suited will help to mature the claim. This case also raised but did not answer the question, whether evidence of reputation in the community that claimant owns the land is competent, not to establish title in the claimant, but to show notoriety of possession. In *Brewer v. Brewer*,¹⁹ the Court gave an affirmative answer to this question.

The case of *Wilson v. Wilson*²⁰ presents an unusual though not new situation. The defendant was relying on twenty years adverse possession in her predecessor and herself. Her predecessor, A, held the

¹¹ 130 N. C. 541, 543, 41 S. E. 677 (1902). "And the rule is, to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. *This is said to be the test.*"

¹² N. C. GEN. STAT. § 47-26 (1950). "All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration."

¹³ *Winstead v. Woolard*, 223 N. C. 814, 28 S. E. 2d 507 (1944).

¹⁴ *Sessoms v. McDonald*, 237 N. C. 720, 722, 75 S. E. 2d 904, 907 (1953), quoting from *Vance v. Guy*, 223 N. C. 409, 413, 27 S. E. 2d 117 (1943). This phrase is a paraphrasing of the language of the court in describing adverse possession in *Locklear v. Savage*, 159 N. C. 236, 239, 74 S. E. 347 (1912).

¹⁵ *Brewer v. Brewer*, 238 N. C. 607, 614, 78 S. E. 2d 719, 724 (1953).

¹⁶ *Ibid.* at 611, 78 S. E. 2d at 722.

¹⁷ *Sessoms v. McDonald*, 237 N. C. 720, 75 S. E. 2d 904 (1953).

¹⁸ 238 N. C. 564, 78 S. E. 2d 408 (1953).

¹⁹ *Brewer v. Brewer*, 238 N. C. 607, 612, 78 S. E. 2d 719, 722 (1953).

²⁰ 237 N. C. 266, 74 S. E. 2d 704 (1953).

property for fourteen years adversely to *B*. When *B* died, *A* held for five more years until he died and his interest passed to the defendant. The defendant held for nine more years until the bringing of this action. The Court held that possession by *A* before the death of *B* could not be tacked with his possession after the death of *B*, because *A* was an heir of *B* and, at the death of the latter, *A* began to hold as a tenant in common with and for the other heirs of *B*. In order to mature title by adverse possession against his tenants in common, *A* would have to start all over and hold for twenty years against them.

BETTERMENTS

A claim for betterments under the controlling statutes²¹ arose in an unorthodox manner in *Board of Commissioners of Roxboro v. Bum-pass*²² where the grantees of the purchaser at a tax foreclosure sale intervened and claimed betterments from the remainderman when the latter caused the action under which the property had been sold to be reopened, by a motion to vacate the order of sale as to him, some six years after the sale. The end result of this action and an earlier appeal of the same action²³ was that the sale was declared void insofar as any interest of the remainderman was concerned. Consequently, the interveners, who are tenants *per autre vie* under the sale, cannot claim for betterments from the remainderman until the life estate expires and the remainderman asserts his right to immediate possession. The opinion of Mr. Justice Barnhill is a short but excellent review of the origin, growth, and present state of the law of betterments.

When the life estate expires and the remainderman asserts his claim to the land, the respondent in possession must prove that he made improvements under belief that his color of title to the interest of the remainderman was good. Absent this, there can be no recovery from the remainderman for betterments, and the Court so held in *Lovett v. Stone*.²⁴

BOUNDARIES

Four of the eight cases²⁵ in 1953 concerning questions of boundaries involve the statutory processioning proceeding.²⁶ The case of *Welborn*

²¹ N. C. GEN. STAT. § 1-340 *et seq.* (1953).

²² 237 N. C. 143, 74 S. E. 2d 436 (1953).

²³ 233 N. C. 190, 63 S. E. 2d 144 (1951).

²⁴ 239 N. C. 206, 215, 79 S. E. 2d 479, 485 (1953).

²⁵ *Holloman v. Davis*, 238 N. C. 386, 78 S. E. 2d 143 (1953); *Welborn v. Bate Lumber Co.*, 238 N. C. 238, 77 S. E. 2d 612 (1953); *Powell v. Mills*, 237 N. C. 582, 75 S. E. 2d 759 (1953); *Cherry v. Roanoke Tobacco Warehouse Co.*, 237 N. C. 362, 75 S. E. 2d 124 (1953); *White v. Price*, 237 N. C. 347, 75 S. E. 2d 244 (1953); *Goodwin v. Greene*, 237 N. C. 244, 74 S. E. 2d 630 (1953); *Linder v. Horne*, 237 N. C. 129, 74 S. E. 2d 227 (1953); *Newkirk v. Porter*, 237 N. C. 115, 74 S. E. 2d 235 (1953).

²⁶ N. C. GEN. STAT. § 38-1 *et seq.* (1950).

*v. Bate Lumber Company*²⁷ gives a terse explanation of the nature of the processioning proceeding. The plaintiffs started the action in trespass *quare clausum fregit* for damages from defendant for cutting timber on the plot of land between their respective tracts and claimed by both of them. On trial, the parties stipulated that each had title to this property and that the only question was as to the true boundary between the contiguous tracts. This, said the Court, converted the action into a processioning proceeding,²⁸ so the defendant could not have been entitled to the involuntary nonsuit awarded below.²⁹

Although it is apparently the most elementary rule involved in processioning proceedings, the court twice repeated that *what* constitutes a boundary is a question for the court and *where* the line is must be settled by the jury under correct instructions based upon competent evidence.³⁰

In connection with this review of the decisions involving boundaries, attention should be called to Mr. Justice Winborne's concise lesson in how to meet the requirements of our statute of frauds in a deed of conveyance of land³¹ as set out in *Powell v. Mills*.³² The same case

²⁷ 238 N. C. 238, 77 S. E. 2d 612 (1953).

²⁸ *Ibid.* at 240, 77 S. E. 2d at 613. See also *Goodwin v. Greene*, 237 N. C. 244, 74 S. E. 2d 630 (1953).

²⁹ *Welborn v. Bate Lumber Co.*, 238 N. C. 238, 77 S. E. 2d 612 (1953), *citing*, *Plemmons v. Cutshall*, 230 N. C. 595, 55 S. E. 2d 74 (1949); *Cornelison v. Hammond*, 225 N. C. 535, 35 S. E. 2d 633 (1945). The processioning proceeding is an *in rem* action which puts the location of the true boundary line in dispute. The court is technically inaccurate in *Plemmons v. Cutshall* in saying that the processioning proceeding "... puts title to a small part of the land in issue." But that is the practical effect of the processioning proceeding.

³⁰ *Welborn v. Bate Lumber Co.*, 238 N. C. 238, 77 S. E. 2d 612 (1953); *Linder v. Horne*, 237 N. C. 129, 74 S. E. 2d 227 (1953).

³¹ N. C. GEN. STAT. § 22-2 (1953) "All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

³² 237 N. C. 582, 588, 75 S. E. 2d 759, 764 (1953). "... decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds, G. S. 22-2, must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers. The office of description is to furnish, and is sufficient when it does furnish means of identifying the land intended to be conveyed. Where the language is patently ambiguous, parol evidence is not admissible to aid the description. But when the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought. See *Self Help Corp. v. Brinkley*, 215 N. C. 615, 2 S. E. 2d 889, where the authorities are cited."

sets out the general rule in locating boundaries which requires lines to be run with the calls in the regular order from a known beginning; ". . . the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line."³³

Finally, the case of *Linder v. Horne*³⁴ raised a question which had never been directly answered by the Court. The defendants owned the corner lot and the petitioners owned an adjoining lot. Both lots were part of a subdivision platted in 1923. In 1941 the rights of way of both intersecting streets were enlarged. In 1947 the parties received deeds from a common grantor with a reference for descriptive purposes to the 1923 plat. At the same time, the description of both lots was based on the point of intersection of the streets' margins adjacent to the corner lot owned by the defendants.

The controversy arose over the true location of the mutual boundary of the petitioners and defendants. If the point of intersection to be used were that shown on the 1923 plat, then the common boundary between the lots would be a few feet north of where it would be located if the point of intersection to be used were to be considered as of 1947 after the rights of way had been widened in 1941.

The answer given by the court was to the effect that the old point of intersection of the margins of the streets was intended by the deeds to be the point of departure for descriptive purposes, or, as the court expressed it, "the fact that the rights of way . . . have been extended to greater widths than as originally laid out, has no effect upon the location of the boundaries of the fee in lands adjacent thereto."³⁵

DEEDS

At least two cases merit attention under the broad topic of interpretation of deeds. One of these is *Hardison v. Lilley*³⁶ in which the Court upheld a provision in a fee simple deed "reserving and excepting" to himself, his heirs or assigns all the timber of certain kinds and sizes for the period of fifty years and the right to enter, cut and remove such timber. The Court cites a long line of cases permitting exception of timber rights from deeds conveying lands and explains that the result of a valid exception in a deed is that the thing excepted remains the property of the grantor and his heirs. The Court cites authority for a technical distinction between the words "reservation" and "ex-

³³ *Ibid.* at 589, 75 S. E. 2d 765 (with cases cited).

³⁴ 237 N. C. 129, 74 S. E. 2d 227 (1953).

³⁵ *Ibid.* at 135, 74 S. E. 2d at 231 (1953).

³⁶ 238 N. C. 309, 78 S. E. 2d 111 (1953).

ception" in deeds,³⁷ then minimizes the distinction and calls this provision a "reservation" and gives effect to it as if it were an "exception"³⁸ or both. In view of this, it seems in order to suggest to practicing attorneys that they employ these technical words with care in their conveyances and, at the same time, attempt to make the intention of the grantor clear since this, in the final analysis, may control the interpretation of the technical words.³⁹

The Court, in *Whitson v. Barnett*,⁴⁰ decided that a deed ". . . to Roy Whitson and Bodily heirs, and their heirs and assigns . . ." does not convey a fee simple title to Whitson. The plaintiff, Whitson, contended that the rule in Shelley's case should apply to give him a fee in the land, but this clearly could not be so, said the Court, because "Bodily Heirs" was used to mean children and not heirs general in the technical sense. The effect of the wording of the deed, said the court, is to give Roy Whitson and his children a fee simple estate as tenants in common.⁴¹

EASEMENTS

A statement in the deed to defendant that he takes subject to an easement granted in the deed of a predecessor in title is binding on the defendant-grantee when the deed in which the easement was set out has been duly recorded.⁴² This is the holding of *Borders v. Yarbrough*⁴³ where the land conveyed to the defendants was described by reference to a prior deed and as being "Subject to the restrictions and provisions contained in the deed . . . referred to. . ." The deed "referred to" described the lot as being ". . . sold subject to an easement across the same for a sewerage line running from lot No. 5 to the disposal in the street. This shall be a perpetual easement over this lot." The plaintiff, seeking to have the easement enforced, is owner of lot

³⁷ *Trust Co. v. Wyatt*, 189 N. C. 107, 109, 126 S. E. 93, 94 (1924). "Technically, a *reservation* is a clause in a deed whereby the grantor reserves something arising out of the thing granted *not then in esse*, or some new thing created or reserved, issuing or coming out of the thing granted and not of the thing itself; whereas, by an *exception* the grantor withdraws from the effect of the grant some *part of the thing* itself which is *in esse* and included under the terms of the grant." (italics added for emphasis).

³⁸ By the technical definition in *Trust Co. v. Wyatt*, it would seem to be an "exception" in the sense that only trees *in esse* at the time of the deed are construed as being affected by the deed. See Note 37, *supra*.

³⁹ *Vance v. Pritchard*, 213 N. C. 552, 557, 197 S. E. 182, 185 (1938). "The modern tendency of the courts has been to brush aside these fine distinctions and look to the character and effect of the provision itself."

⁴⁰ 237 N. C. 483, 75 S. E. 2d 391 (1953).

⁴¹ The second headnote of this case in the advance sheets incorrectly states that the Court held that the deed gave a life estate to Whitson with a remainder in his children.

⁴² N. C. GEN. STAT. § 47-27 (1950) (providing for recordation of deeds of easement).

⁴³ 237 N. C. 540, 75 S. E. 2d 541 (1953).

No. 5. Apparently, his deed does not contain a reference to the easement, so the interesting result is that *A* has an easement over *B*'s land which easement is set out in the deed of *C* (*B*'s grantor). When thus stated, the result may seem odd, but it is actually sound and well-settled.⁴⁴ Difficulties such as arose in this case might easily be avoided by repeating the easement in all deeds affected. It would also be well to describe the easement with particularity so as to avoid the difficulty of "practical location and user" of the easement granted by the deed.⁴⁵ Little difficulty arose in this respect in *Borders v. Yarbrough*, *supra*, because of the nature of the easement. It was located by the presence of the pipe.

Two 1953 cases deal with easements by "implication of law" or "severance of the estate."⁴⁶ This method of creating easements upon severance of unity of title by the common grantor is well-settled and the Court has repeatedly demanded that three essentials be present to prove the easement.⁴⁷ Along with the issue of easement by severance of unity of title, *Green v. Barbee*⁴⁸ also raised the possibility of an easement arising in an alley by reference to the alley as a boundary, but the Court took the view that the alley was referred to for descriptive purposes only.⁴⁹

Two cases describe the type of use necessary to ripen a claim to an easement by prescription.⁵⁰ The Court in *Henry v. Farlow*⁵¹ an-

⁴⁴ *Waldrop v. Brevard*, 233 N. C. 26, 62 S. E. 2d 512 (1950); *Walker v. Phelps*, 202 N. C. 344, 162 S. E. 727 (1932).

⁴⁵ *Borders v. Yarbrough*, 237 N. C. 540, 542, 75 S. E. 2d 541, 543 (1953), quoting from, 110 A. L. R. 175 (1937): "where the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances" (Citing numerous authorities); and also at p. 178: "It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant."

⁴⁶ *Spruill v. Nixon*, 238 N. C. 523, 78 S. E. 2d 323 (1953); *Green v. Barbee*, 238 N. C. 77, 76 S. E. 2d 307 (1953).

⁴⁷ *Carmon v. Dick*, 170 N. C. 305, 308, 87 S. E. 224, 225 (1915). ("Three things are essential to the creation of an easement upon the severance of an estate, upon the ground that the owner before the severance made or used an improvement in one part of the estate for the benefit of another. First, there must be a separation of the title; second, it must appear that before the separation took place the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained.")

⁴⁸ 238 N. C. 77, 76 S. E. 2d 307 (1953).

⁴⁹ Note, 32 N. C. L. REV. 238 (1953) (for thorough student note on the creation of easements by implication by description in the deed as upheld in other jurisdictions; it appears that North Carolina law on this subject perhaps should be re-examined).

⁵⁰ *Henry v. Farlow*, 238 N. C. 542, 78 S. E. 2d 244 (1953); *Williams v. Foreman*, 238 N. C. 301, 303, 77 S. E. 2d 499, 500 (1953) ("mere permissive

nounced the North Carolina law to the effect that ". . . there must be some evidence accompanying the user, giving it a hostile character, and repelling the inference that it is permissive . . ." "This is necessarily so because the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears."⁵² This is not in accord with the view of the majority of states where user for the prescribed period is presumed to be adverse, with the burden on the owner of the land to show that the user was permissive.⁵³ However, the North Carolina rule has been often repeated by the Court and was adopted at an early date.⁵⁴

The presumption in favor of the owner may make it difficult to acquire an easement by prescription in North Carolina, but, in defense of this view, it must be said to be more analagous to the law of adverse possession than the majority view, and analogy is the basis for the law of acquiring easements by prescription.⁵⁵ In the law of adverse possession the burden of proving title by adverse use rests with the adverse claimant,⁵⁶ and possession is presumed to have been in the record title holder until it is shown otherwise.⁵⁷ North Carolina has a statute which gives the holder of the legal title the benefit of this presumption in cases involving a claim by adverse possession.⁵⁸ This statute and

use of a way over another's land, however long it may be continued, cannot ripen into an easement by prescription.").

⁵² 238 N. C. 542, 78 S. E. 2d 244 (1953).

⁵³ *Ibid.* at 544, 78 S. E. 2d 245 (citing supporting North Carolina decisions).

⁵⁴ 17 AM. JUR., *Easements*, § 72 (1938). "The prevailing rule is that where a claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of an easement by prescription, has the burden of rebutting this presumption by showing that the use was permissive."

⁵⁵ *Mebane v. Patrick*, 46 N. C. 22 (1853) (where Mr. Justice Pearson explains the reasoning behind the North Carolina view and cites earlier cases).

⁵⁶ 2 C. J. S., *Adverse Possession*, § 1 (1915). Headnote: "Prescription and adverse possession, while differing in certain respects, are essentially the same in that both confer rights in property through the medium of adverse enjoyment."

"Except as other provisions may be made by statutes, the character of adverse holding and its inception and duration are the same either in 'prescription' or 'adverse possession'."

⁵⁷ 1 AM. JUR., § 237 (1936); *Thomas v. Hipp*, 223 N. C. 515, 27 S. E. 2d 528 (1943); *Barrett v. Williams*, 217 N. C. 175, 7 S. E. 2d 383 (1940); *Barfield v. Hill*, 163 N. C. 262, 79 S. E. 677 (1913); *Berry v. McPherson*, 153 N. C. 4, 68 S. E. 892 (1910).

⁵⁸ 1 AM. JUR., *Adverse Possession*, § 238 (1936); *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907); *Kirkman v. Holland*, 139 N. C. 185, 51 S. E. 856 (1905); *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899).

⁵⁹ N. C. GEN. STAT. § 1-42 (1953). "In every action for the recovery or possession of real property or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action."

the analogy discussed indicate a general policy to favor the owner of record and may help to explain the reason for the North Carolina presumption that the use of the claimant by prescription is permissive rather than adverse.⁵⁹

EMINENT DOMAIN

Some of the cases that could properly be reviewed in this section are touched on elsewhere in this survey.⁶⁰ In *McLean v. Town of Mooresville*⁶¹ the Court held that the town would be entitled to a permanent easement across the plaintiff's property for the maintenance of its storm sewer lines after payment of permanent damages to the plaintiff.

The bulk of the cases before the Supreme Court in 1953 involving eminent domain were appeals in cases which started as special proceedings brought under the statute regulating compensation where the State Highway and Public Works Commission took land without condemnation proceedings.⁶² Four of the cases brought under G. S. § 136-19 were initiated by the private land owner.⁶³ One such proceeding was commenced by the Highway Commission.⁶⁴ In this last case, while setting out basic propositions (1) that there is no appreciable difference in the value of the fee and a permanent easement; and (2) that the compensation must be made on the basis of the value of the land as of the time of the taking, the Court also re-states the well settled rule of damages controlling in these cases.⁶⁵ It also made clear

⁵⁹ *Henry v. Farlow*, 238 N. C. 542, 78 S. E. 2d 244 (1953); *Williams v. Foreman*, 238 N. C. 301, 77 S. E. 2d 499 (1953).

⁶⁰ *Lyda v. Town of Marion*, 239 N. C. 265, 79 S. E. 2d 726 (1953) (in the section on Municipal Corporations); *McLean v. Town of Mooresville*, 237 N. C. 498, 75 S. E. 2d 327 (1953) (section on Equity); *McKinney v. City of High Point*, 237 N. C. 66, 74 S. E. 2d 440 (1953) (section on Municipal Corporations).

⁶¹ 237 N. C. 498, 75 S. E. 2d 327 (1953).

⁶² N. C. GEN. STAT. § 136-19 (Supp 1953) (Compensation without condemnation proceedings). See also, N. C. GEN. STAT. § 40-1 through 40-53 (Supp. 1953) (eminent domain statutes on power of condemnation and procedure to be followed).

⁶³ *Newton v. North Carolina State Highway and Public Works Commission*, 239 N. C. 433, 79 S. E. 2d 917 (1953); *Simmons v. North Carolina State Highway and Public Works Commission*, 238 N. C. 512, 78 S. E. 2d 308 (1953); *Collins v. North Carolina State Highway and Public Works Commission*, 237 N. C. 277, 74 S. E. 2d 709 (1953).

⁶⁴ *North Carolina State Highway and Public Works Commission v. Black*, 239 N. C. 198, 79 S. E. 2d 778 (1953).

⁶⁵ *North Carolina State Highway and Public Works Commission v. Black*, 239 N. C. 198, 203, 79 S. E. 2d 778, 783 (1953) ("Where the State, or one of its agencies or subdivisions, or a public utility takes by condemnation a perpetual easement entitling it to occupy and use the entire surface of a part of a tract of land, the land owner is entitled to recover just compensation from the condemnor for the easement taken, and just compensation in such case includes the market value of the part of the tract covered by the easement and the damage done to the remainder of the tract by the taking of the easement, subject to such deduction or set-off for benefits, special or general, resulting to the remainder of the tract from the taking of the easement as the statute authorizing the taking may specify.") (Citing numerous North Carolina cases.)

in these cases that the procedural statutes on notice in true eminent domain proceedings⁶⁶ apply when an action is brought under G. S. § 136-19.

*Moody v. Barnett*⁶⁷ involves an abandoned highway and the statutory procedure for having the same declared to be a neighborhood public road.⁶⁸ In order to prevail, the petitioners must show abandonment of the road by the highway commission, that the road has remained open and in general use, and that it is a necessary means of ingress to and egress from the dwelling house of one or more families. In the instant case, the petitioners failed to prove all of these essentials, so the road reverted to the defendants upon abandonment by the state of its easement for public road purposes.

HUSBAND AND WIFE

In *Perry v. Stancil* the Court held that a husband has "a fee simple, merchantable, indefeasible title" to land conveyed to him by his wife without his written assent.⁶⁹ The Court construed the constitutional requirement⁷⁰ that the husband give written assent to conveyances by the wife of her separate property to apply "only to conveyances executed by her to third parties, that is, persons other than her husband."⁷¹ To be valid it need only be acknowledged as is required by the statute governing contracts of married women with their husbands concerning her real estate.⁷² In so holding, the Court reviews the common law reasons behind the constitutional provision and statutes with the assertion that "the people of that day entertained the fiction that the husband was the dominant member of the household";⁷³ hence, any

⁶⁶ N. C. GEN. STAT. §§ 40-11 *et seq.* (Supp. 1953).

⁶⁷ 239 N. C. 420, 79 S. E. 2d 789 (1953).

⁶⁸ N. C. GEN. STAT. §§ 136-67 *et seq.* (1950).

⁶⁹ 237 N. C. 442, 75 S. E. 2d 512 (1953).

⁷⁰ N. C. CONST. Art X, § 6. "The real and personal property of any female in this State acquired before marriage, and all property, real or personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, *with the written assent of her husband*, conveyed by her as if she were unmarried." (Italics added.)

⁷¹ *Perry v. Stancil*, 237 N. C. 442, 448, 75 S. E. 2d 512, 516 (1953).

⁷² N. C. GEN. STAT. § 52-12 (Supp. 1953). "(a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proven as is required for the conveyances of land; and such examining or certifying officer shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to her."

⁷³ *Perry v. Stancil*, 237 N. C. 442, 445, 75 S. E. 2d 512, 515 (1953). This "fiction" is still alive and kicking.

transaction between the two affecting the separate property of a married woman was presumed to be under the coercive influence of the husband. The Court then traces, by way of statutes and decisions, the gradual emancipation of a married woman from her husband with reference to her contract and property rights. The clarifying effect of this decision is of considerable importance to conveyancers in North Carolina.

The Court, in *Elledge v. Welch*,⁷⁴ holds that, in the exchange of cross-deeds by tenants in common for partition purposes, a deed running to the husband and his wife will not create in them an estate by the entirety when the husband alone previously held as tenant in common with his grantor. And this in accord with the "great weight of authority" to the effect that the partition does not create an estate by the entirety but merely designates the share of each tenant so that it may be held by them in severalty.⁷⁵ This claim by the wife never would have arisen if the wife had not been unnecessarily named as grantee with her husband. Likewise, it is unnecessary to join the wife with her husband as grantor in the conveyance to his cotenant⁷⁶ if the partition is fair and equitable.⁷⁷

The case of *Elledge v. Welch*⁷⁸ also holds that the dower claim of the wife is entitled to priority as against claims by the husband's creditors⁷⁹ and as against costs and charges of administration.⁸⁰ This appears to be the first time the North Carolina Court has ruled directly on the priority of dower over costs and expenses of administration of the estate. There is surprisingly little case law available on the point and only one case favors the North Carolina holding.⁸¹ The authority

⁷⁴ 238 N. C. 61, 76 S. E. 2d 340 (1953).

⁷⁵ 40 AM. JUR., *Partition*, § 126 (1942); *Sprinkle v. Spainhour*, 149 N. C. 223, 62 S. E. 910 (1908); *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993 (1891).

⁷⁶ *Valentine v. North Carolina Granite Corp.*, 193 N. C. 578, 137 S. E. 668 (1927).

⁷⁷ *Ibid.*; 40 AM. JUR., *Partition*, § 127 (1942) ("partition deed is valid when partition is just and equal, even though not executed by the wife of the tenant"); Note, 57 L. R. A. 340 (1902).

⁷⁸ 238 N. C. 61, 76 S. E. 2d 340 (1953).

⁷⁹ *Ibid.* at 68, 76 S. E. 2d at 345 (the court was speaking of unsecured debts only); N. C. GEN. STAT. § 30-3 (1950). "The dower or right of dower of a widow, and such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, although she has not dissented from such will, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life."

⁸⁰ 28 C. J. S., *Dower*, § 40 (1941) (only authority cited by the North Carolina Court).

⁸¹ *Mayo v. Arkansas Valley Trust Co.*, 137 Ark. 331, 209 S. W. 276 (1919). The court construes a statute guaranteeing a widow a one-third minimum of the estate free of claims by creditors as also meaning free of expenses of administration.

to the contrary is not entirely discordant because of the difference in wording of the dower statutes involved⁸² as compared with the North Carolina dower statute.⁸³

In *Elledge v. Welch*,⁸⁴ the Court further noted that this might be a case in which the widow could have a homestead in the lands of the husband.⁸⁵ As it appears that she has already been allotted dower, it suggests the interesting question as to whether or not a widow may have both homestead and dower in her husband's lands, or the right of election.⁸⁶

In *Maples v. Horton*,⁸⁷ the plaintiff, devisee of certain lots by the will of her husband, sought to enforce restrictions in deeds to lots in a subdivision made by her husband during his lifetime. He had attempted to impose restrictive covenants on the lots but failed to do so effectively.⁸⁸ Hence, the restrictions could be enforced, if at all, only as personal covenants.⁸⁹ Then the Court apparently for the first time made clear statements that: (1) Only the grantor or his executors or administrators may enforce personal covenants in a deed;⁹⁰ and (2) the wife who signs her husband's deed as grantor for the sole purpose of releasing her inchoate dower rights cannot enforce the personal covenants in the deeds as a grantor.⁹¹

⁸² *Mayer v. Reinecke*, 28 F. Supp. 334, *reversed*, 130 F. 2d 350, *cert den.*, 317 U. S. 684 (1942). (The Circuit Court of Appeals for the Seventh Circuit interpreted the Illinois Dower Act defining the widow's interest as "... one-third of the personal estate after the payment of all debts." The court declares that costs and expenses of administration are "debts" to be paid ahead of dower); *Murphy v. Murphy*, 125 Fla. 855, 170 So. 856 (1936). The court interpreted the Florida dower statute allowing the widow a certain part of the estate free from all liabilities for debts "of the decedent," and held that costs of administration are not "debts of the decedent" but debts of the estate; hence, they are not exempt by the wording of the statute, and the dower interest of the widow is subordinate to expenses of administration, inheritance, estate, and succession taxes.

⁸³ N. C. GEN. STAT. § 30-3 (1950). "The dower . . . , shall not be subject to the payment of debts due from the *estate of her husband*, during the term of her life." (Italics added for emphasis.)

⁸⁴ 238 N. C. 61, 76 S. E. 2d 340 (1953).

⁸⁵ N. C. CONST. Art X, § 5; N. C. GEN. STAT. § 1-389 (1953).

⁸⁶ *Aycock, Homestead Exemption in North Carolina*, 29 N. C. L. REV. 143, 156 (1950-51); 28 C. J. S., *Dower*, § 73 (1941).

⁸⁷ *Maples v. Horton*, 239 N. C. 394, 80 S. E. 2d 38 (1953).

⁸⁸ *Ibid.* at 398, 80 S. E. 2d at 40. The deeds included restrictions for the benefit of the remaining land of the grantors, their heirs, and assigns with the further reservation of: "... the right to release any of said conditions and to sell any part of its [*sic*] remaining land free from all or any conditions at their discretion." The restrictive covenants failed as the subdivision was, by these words, not subjected to a general plan for the benefit of each purchaser. *See also*, 14 AM. JUR., *Covenants, Conditions and Restrictions*, § 202 (1942). *Phillips v. Wearn*, 226 N. C. 290, 37 S. E. 895 (1946); *Humphrey v. Beall*, 215 N. C. 15, 200 S. E. 918 (1938).

⁸⁹ *Thomas v. Rogers*, 191 N. C. 736, 133 S. E. 18 (1926).

⁹⁰ 14 AM. JUR., *Covenants, Conditions and Restrictions*, § 43 (1938).

⁹¹ 41 C. J. S., *Husband and Wife*, § 39 (1944).

LANDLORD AND TENANT

Early in 1953, the Court heard the third appeal in a lengthy action involving rights of an oral lessee of a warehouse against his lessor for selling the warehouse after one year to a bona fide purchaser without notice in contravention of an oral warranty not to sell until the expiration of the three year term.⁹² The case also deals with the relationship of short term oral leases to the recordation statute⁹³ and with notice to later purchasers of the lessee's rights. All of these aspects are discussed in a note in this *Law Review*.⁹⁴

The Court in *Alexander v. Grove Stone and Sand Co.*,⁹⁵ interpreted the meaning of a long term lease and held that the defendant-lessee had not abandoned the ten tracts leased to him so long as he quarried on any of the tracts. The case is of little significance unless it be used to serve as a reminder of the convenient and expeditious route taken here to have the court interpret the lease. The plaintiff, successor to the lessor, brought the action to remove cloud on his title⁹⁶ and the parties waived jury trial and submitted an agreed statement of facts.

In *Winkler v. Appalachian Amusement Co.*⁹⁷ the Court interpreted another lease in connection with an action by the landlord against his tenant for damage to the property by fire as a result of the actionable negligence of an employee of the tenant. The Court held that a provision in the lease making the lessee liable for repair of all damages except those caused by fire does not excuse the lessee from making reparation where the fire is caused by the actionable negligence of the tenant or his employee or agent.⁹⁸

QUIETING TITLES

The plaintiffs in *Walston v. Applewhite and Co.*⁹⁹ are remaindermen who started a direct action in 1951 under the statute for quieting titles¹⁰⁰ to set aside a sheriff's deed executed to the defendant almost twenty years before. The foreclosure and sale were allegedly held without the required statutory notice¹⁰¹ to these plaintiffs who were

⁹² *Perkins v. Langdon*, 237 N. C. 159, 74 S. E. 2d 634 (1953); *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. 2d 565 (1951); *Perkins v. Langdon*, 231 N. C. 381, 57 S. E. 2d 407 (1950).

⁹³ N. C. GEN. STAT. § 47-18 (1950).

⁹⁴ Note, 31 N. C. L. REV. 498 (1953).

⁹⁵ 237 N. C. 251, 74 S. E. 2d 538 (1953).

⁹⁶ N. C. GEN. STAT. § 41-10 (1950).

⁹⁷ 238 N. C. 589, 79 S. E. 2d 185 (1953).

⁹⁸ 32 AM. JUR., *Landlord and Tenant*, § 783 (1941) (citing cases from other jurisdictions).

⁹⁹ 237 N. C. 419, 75 S. E. 2d 138 (1953).

¹⁰⁰ N. C. GEN. STAT. § 41-10 (1950). ("An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims.")

¹⁰¹ N. C. GEN. STAT. § 1-339.54 (1953) (posting of notice on courthouse door for thirty days; advertising in paper once a week for four successive weeks; ten days before sale, serve the judgment debtor personally or by registered mail).

defendants in the first action. The Court cites an abundance of North Carolina cases in holding: (1) that a stranger at an execution sale is not bound to look beyond the official status of the one selling and his authorization by a court of competent jurisdiction to sell; (2) a judgment creditor, his attorney, or any other person affected with notice of an irregularity is not protected by that rule; (3) the recitals in a deed executed by a sheriff pursuant to execution sale are prima facie correct but only secondary evidence; (4) that the statute of limitations does not begin to run against the rights of a remainderman to bring an action to recover land until the life estate expires; (5) that such remainderman is not required to wait until the expiration of the life estate to quiet his title; and (6) that the gross inadequacy of the sale price plus other inequitable elements may be sufficient basis for equitable relief to the plaintiff, but the inadequacy of the sale price alone is not enough.

In *Pressly v. Walker*¹⁰² the plaintiffs were trustees of a church and they brought the statutory action to quiet title¹⁰³ against another faction of the church in possession of church property. The Court considers the statute broad enough to allow this possessory action under it although the plaintiffs might have maintained an action in ejectment.¹⁰⁴ The Court also declares that the trustees of the Synod, joined with the trustees of the local church are, under controlling statutes,¹⁰⁵ proper parties to bring the possessory action to recover the church property.

REGISTRATION

Only two cases in 1953 dealt to any appreciable extent with registration or recordation of contracts concerning interests in land.¹⁰⁶ The case of *Perkins v. Langdon*¹⁰⁷ as stated in the subtopic Landlord and Tenant has been the subject of a note in this *Law Review*.¹⁰⁸

In *Dulin v. Williams*¹⁰⁹ the Court repeats a familiar story of the ill consequences suffered by a grantee who forgets or neglects immediately to record his instrument concerning an interest in land. Here, the plaintiff purchased standing timber with two years within which to enter, cut, and remove it. He failed to register his deed for some ten months. In the meantime, his grantor had sold the same property

¹⁰² 238 N. C. 732, 78 S. E. 2d 920 (1953).

¹⁰³ Note 100, *supra*.

¹⁰⁴ 238 N. C. 732, 734, 78 S. E. 2d 920, 922 (1953), *citing* Ely v. New Mexico and Arizona R. R. Co., 129 U. S. 291 (1889) (construing a statute in same language as North Carolina statute).

¹⁰⁵ N. C. GEN. STAT. § 61-3 *et seq.* (1950).

¹⁰⁶ N. C. GEN. STAT. § 47-18 (1950); N. C. GEN. STAT. § 22-2 (1953).

¹⁰⁷ 237 N. C. 159, 74 S. E. 2d 634 (1953).

¹⁰⁸ Note, 31 N. C. L. REV. 498 (1953).

¹⁰⁹ 239 N. C. 33, 79 S. E. 2d 213 (1953).

to others, who registered their deed on the day of their purchase and prior to the plaintiff. Obviously they prevailed over the plaintiff. The Court cites authority and intimates a possible tort action by the plaintiff against his grantor for making the second conveyance with knowledge that the first deed is not recorded.¹¹⁰ It appears impossible for the plaintiff to plead a good cause of action against the later grantees for interference with the plaintiff's contract rights with the grantor.¹¹¹ This view finds its justification in the fact that it helps to preserve the efficacy of the recordation statute, the Connor Act,¹¹² and the doctrine of record notice,¹¹³ even though it may seem unfair to reward the instigator of a breach of contract while punishing an innocent purchaser who forgets to record.

SALES

TRANSFER OF TITLE

Worthless Checks in Cash Sales

Three cases involving worthless checks in sales transactions were decided by the Supreme Court last year.

In *Weddington v. Boshamer*¹ the seller sold for cash certain machines, took a check at the time of the sale, and, after refusal of the drawee bank to pay the check because of insufficient funds, sold the machines to another person. In an action by the first purchaser against the seller for breach of contract, the Court held that no title passed to that purchaser and that the seller had the right when he found the check was no good to resell the machines. This decision followed former decisions that where personal property is sold for a cash consideration and the buyer gives a check for the purchase price, the check, in the absence of an agreement to the contrary, does not constitute payment until it is paid by the drawee bank, and if the check is dishonored, no title passes to the buyer.²

The rights of a bona fide purchaser from the vendee were in question in *Wilson v. Commercial Finance Co.*³ The owner, a Virginia

¹¹⁰ 66 C. J., *Vendor and Purchaser*, § 1655 (1934); 26 L. R. A. (N. S.) 284 (1894-5); 20 Ann. Cas. 1124 (1911).

¹¹¹ *Dulin v. Williams*, 239 N. C. 33, 40, 79 S. E. 2d 213, 219 (1953) (cited cases); Note, 32 N. C. L. REV. 110, 113 (1953).

¹¹² N. C. GEN. STAT. § 47-18 (1950); *Eller v. Arnold*, 230 N. C. 418, 53 S. E. 2d 267 (1949); *Bruton v. Smith*, 225 N. C. 584, 587, 36 S. E. 2d 9, 10 (1945) (concurring opinion by Mr. Justice Barnhill).

¹¹³ *Eller v. Arnold*, 230 N. C. 418, 53 S. E. 2d 267 (1949); *Candler v. Cameron*, 229 N. C. 62, 47 S. E. 2d 528 (1948).

¹ 237 N. C. 556, 75 S. E. 2d 530 (1953).

² *Handley Motor Co., Inc. v. Wood*, 237 N. C. 318, 75 S. E. 2d 312 (1953); *Parker v. Trust Co.*, 229 N. C. 527, 50 S. E. 2d 304 (1948).

³ 239 N. C. 349, 79 S. E. 2d 908 (1954).

resident, sold for cash a car in North Carolina, took a check for the price, delivered possession of the car, kept the certificate of title, turned over to the vendee a Virginia registration card, but did not sign the transfer form on the card. When the check proved to be worthless, the seller brought suit to recover the car which had in the meantime been mortgaged to the defendant, allegedly a bona fide mortgagee for value. The Court in a lengthy discussion of the law of sales held that the vendor was entitled to recover the car. In a cash sale the title remains in the seller until the price is paid. Although the seller may waive his right to payment before passage of title, accepting a worthless check is not such a waiver. If no title passes to the buyer, the seller may recover the property from the buyer or from a subsequent bona fide purchaser from the buyer unless there is estoppel.⁴ A mortgagee of the buyer stands in the same position as a purchaser. The Court, recognizing a conflict of authority in other jurisdictions as to whether the seller may recover from a bona fide purchaser from the buyer where a worthless check is given in a cash sale, adopted the majority view that the seller may recover the chattel even against a bona fide purchaser.

The Court had faced essentially the same problem in *Handley Motor Co. v. Wood*.⁵ There the original sale occurred in the District of Columbia and the resale to the bona fide purchaser took place in Pennsylvania. On the first appeal the Court held that the sale in its substantive features was governed by the law of the District of Columbia and that no title passed to the buyer. On the second appeal it held that the plaintiff (original seller) could recover from a bona fide purchaser for value under its interpretation of the Pennsylvania law, which it held applicable under the circumstances.⁶ In that case the court indicated that such was also the law of North Carolina.

In both the *Wilson* case and the *Handley* cases the Court recognized the well-established rule that where the owner entrusts possession plus indicia of ownership to another, he is estopped against a purchaser who relies on the indicia of title, but in neither case did the court find an estoppel.⁷

In the *Wilson* case the plaintiff seller retained the certificate of title, which under the law of Virginia, where the car was registered, was the sole evidence of ownership. The registration card even if normally it

⁴ Note, 28 N. C. L. Rev. 132 (1949).

⁵ 237 N. C. 318, 75 S. E. 2d 312 (1953); second appeal 238 N. C. 468, 78 S. E. 2d 391 (1953).

⁶ See section on Conflicts in this article.

⁷ See also *Hawkins v. M & J Finance Company*, 238 N. C. 174, 77 S. E. 2d 669 (1953), discussed in section on Credit Transactions of this article, for question of North Carolina certificate of title as indicium of ownership.

might be an indicium of ownership was not in that case since the transfer form was unsigned, thereby showing title in the plaintiff. There was also some evidence and argument in the case that the defendant was not a bona fide mortgagee, but had attempted to practice fraud on the plaintiff vendor.

In the *Handley* case the plaintiff had kept the manufacturer's certificate of origin, but there was conflicting evidence as to whether a receipt and a temporary registration card had been given. Even if such papers were given, there was no evidence that the purchaser from the original buyer had relied on them and the evidence showed that subsequent purchasers including the defendants knew nothing about them. After indicating that in such circumstances there could be no estoppel, the Court added that estoppel was not available to the defendants because they had not pleaded it. On the second trial a denial by the superior court of defendants' motion for permission to amend their answer to allege estoppel was upheld. The Court said that since the evidence on the second trial was substantially the same as on the first, its statement that there was no evidence to support an estoppel still applied.

Title under Negotiable Warehouse Receipts

In *Ellison v. Hunsinger*⁸ there were put in issue the rights of various parties in cotton which was obtained from the owner in South Carolina by one pretending to represent a cotton broker with whom the owner had negotiated for the sale of the cotton. The pretended agent placed the cotton in a North Carolina warehouse bonded under G. S. § 106, Art. 38,⁹ received negotiable warehouse receipts without being required to sign certificates as to ownership and liens as required by law, and then sold the receipts to a bona fide purchaser. Under South Carolina law no title to the cotton passed to the pretended agent, and he could therefore transfer no title even to a bona fide purchaser. Under the usual rule even the bona fide holder of negotiable warehouse receipts issued on such cotton to the pretended agent without title would get no title as against the owner.¹⁰ Under the North Carolina statute dealing with warehousing of agricultural commodities, the bona fide purchaser of a warehouse receipt gets an indefeasible title.¹¹ The owner is entitled, however, to be reimbursed either from the warehouse, from the bond of the local warehouse manager, or from the bond of the

⁸ 237 N. C. 619, 75 S. E. 2d 884 (1953).

⁹ N. C. GEN. STAT. § 106-430 through 106-451.1 (1952).

¹⁰ *Dunagan v. Griffin*, 151 S. W. 2d 250 (Tex. Civ. App. 1941); 56 AM. JUR., *Warehouses* § 62 (1947); 67 C. J., *Warehousemen and Safe Depositaries* § 48 (1934); N. C. GEN. STAT. § 27-45 (1) (1953); UNIFORM SALES ACT § 33(a); UNIFORM WAREHOUSE RECEIPTS ACT § 41(a).

¹¹ N. C. GEN. STAT. § 106-442 (1952).

state warehouse superintendent depending upon who was at fault or if no fault be shown then from a guarantee fund set up under the act and held in the state treasury. Judgment in favor of the bona fide purchaser of the receipts was affirmed and the case was remanded for determination from which source the plaintiff original owner should be reimbursed. Without this special North Carolina statute, the bona fide purchaser would have had no rights against the original owner.

WARRANTIES

Implied Warranties

In *Draughon v. Maddox*¹² the Court held that in the sale of a cow on a public market to a retail dealer for immediate slaughter there was an implied warranty that it was fit for human consumption. The Court relied on two earlier North Carolina cases in which it was held that there was an implied warranty that the article sold was suitable for the purpose intended¹³ and that there was an implied warranty in the sale of food for human consumption that it was wholesome and fit for that purpose.¹⁴

TAXATION¹

SALES TAX

The sales tax article of the Revenue Act of North Carolina levies a tax upon the sale of tangible personal property in this state as a license or privilege tax for engaging in the business of a wholesale or retail merchant.² In addition to a one dollar license fee for such merchants³ the statute prescribes an annual tax of three percent of total gross sales of the retailer⁴ and an annual tax of ten dollars plus 1/20 of one percent of total gross sales of the wholesaler.⁵ In order to cover the possible loophole occasioned by those sales of wholesale merchants to persons who are not retail merchants or persons who do not purchase for resale, the statute provides that:

The sale of any article of merchandise by any "wholesale merchant" to anyone other than to a licensed retail merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this

¹² 237 N. C. 742, 75 S. E. 2d 917 (1953); 32 N. C. L. Rev. 351 (1954).

¹³ *McConnell v. Jones*, 228 N. C. 218, 44 S. E. 2d 876 (1947).

¹⁴ *Davis v. Radford*, 233 N. C. 283, 63 S. E. 2d 822 (1951).

¹ Taxation decisions involving the taxing power of counties and municipalities are discussed in the section on Municipal Corporations under the subtopic "Taxation and Finance."

² N. C. GEN. STAT. § 105-165 (1950).

³ N. C. GEN. STAT. § 105-168 (1950).

⁴ N. C. GEN. STAT. § 105-168(b) (1950).

⁵ N. C. GEN. STAT. § 105-168(a) (1950).

article, the sale of any articles of commerce by any "wholesale merchant" to anyone not taxable under this article as a "retail merchant" . . . shall be taxable by the wholesale merchant at the rate of tax provided in this article upon the retail sale of merchandise.⁶

This provision was considered in *Phillips v. Shaw, Comm'r of Revenue*⁷ in connection with a transaction where the petitioner, a licensed North Carolina wholesaler, sold used cars to retail merchants of South Carolina for the purpose of resale out of this state. The contract of purchase and sale, as well as delivery, took place in North Carolina. In denying refund of the three percent retail rate on these sales which was paid by the wholesaler under protest, the court held that the "loop-hole" provision was clearly broad enough to cover such transactions since the South Carolina purchasers, although retailers purchasing for resale, were not taxable under the North Carolina sales tax.⁸

TORTS

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE

It is reversible error in North Carolina to instruct the jury that "negligence is a failure to perform some duty imposed by law, a want of due care," without explaining to the jury the standard of the ordinary prudent man under like circumstances.¹

Foreseeability of injury is stated to be a requisite of proximate cause in North Carolina. The Court in *Davis v. Light Co.*² carried this requirement to great lengths in holding that defendant power company was under no duty to foresee that a house mover might throw a measuring tape over uninsulated wires carrying a dangerous current seven-teen or eighteen feet above a heavily traveled highway. This decision is particularly questionable in light of the Court's view in *Hart v. Curry*³ that defendant does not have to foresee the precise injury, but it is sufficient that in the exercise of ordinary care he could foresee that some injury would result from his act or omission.

The Court in continuing to take a strict view of wanton and willful

⁶ N. C. GEN. STAT. § 105-168(b) (1950).

⁷ 238 N. C. 518, 78 S. E. 2d 314 (1953).

⁸ In *Buchan v. Shaw, Commissioner of Revenue*, 238 N. C. 522, 78 S. E. 2d 317 (1953) a judgment under the Declaratory Judgment Act was sought adjudicating plaintiff wholesaler's tax liability on sales of a similar nature. The Court in sustaining a demurrer stated that plaintiff's only remedy is payment under protest as provided by N. C. GEN. STAT. § 105-267 (1950).

¹ *Mikeal v. Pendleton*, 237 N. C. 690, 75 S. E. 2d 756 (1953).

² 238 N. C. 106, 76 S. E. 2d 378 (1953).

³ 238 N. C. 448, 78 S. E. 2d 170 (1953).

negligence closely approaches the elements of an intentional rather than a negligent act:

To constitute wilful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and wilful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly, or intentionally indifferent to the results.⁴

North Carolina applies the doctrine of sudden emergency, i.e., one confronted with a sudden emergency is not required to exercise the degree of care of an ordinary prudent man under ordinary conditions, but under similar *emergency* conditions. The doctrine applies though the defendant through his conduct created or helped create the emergency, provided such conduct was not itself negligent.⁵ The emergency does not have to be created by the negligence of another; weather conditions, for example, will suffice.⁶

In *Alford v. Washington*⁷ two cars collided at an intersection, striking poles carrying electric wires which fell on one of the cars. Plaintiff's intestate, coming upon the scene, was electrocuted when trying to rescue the occupants of that car, and suit was brought against one of the drivers on the allegation that he negligently caused the collision, and against the municipality for maintaining unguarded poles carrying uninsulated wires at an intersection in close proximity to the street. Both defendants demurred.

The Court sustained the overruling of defendant driver's demurrer saying that under the rescue doctrine the rescuer will not be charged with contributory negligence as a matter of law as long as his attempt is neither reckless nor rash. However, the Court affirmed defendant municipality's demurrer holding that even if it were negligent, its original negligence was insulated by the intervening negligent act of a responsible third party which the municipality had no duty to foresee.

Turning to the closely related field of contributory negligence, it

⁴ *Wagoner v. R. R.*, 238 N. C. 162, 168, 77 S. E. 2d 701 (1953).

⁵ *R. R. v. Trucking Co.*, 238 N. C. 422, 78 S. E. 2d 159 (1953).

⁶ *Goode v. Barton*, 238 N. C. 492, 78 S. E. 2d 398 (1953).

⁷ 238 N. C. 694, 78 S. E. 2d 915 (1953).

is reversible error in North Carolina to instruct the jury that contributory negligence is some act or omission by the plaintiff which constitutes *the* proximate cause of the injury. It is well settled that contributory negligence does not have to be the sole proximate cause of the injury; rather by its very definition it can be *a* proximate cause, or one of the proximate causes contributing to the injury.⁸

Also, wanton or wilful negligence by the defendant in North Carolina precludes the defense of plaintiff's contributory negligence.⁹

The case of *Beaman v. Southern Ry.*¹⁰ presents an excellent example of a borderline case on the question of contributory negligence as a matter of law, preventing the issue from being submitted to the jury and warranting an involuntary nonsuit. Plaintiff stopped his automobile before a crossing with which he was thoroughly familiar. It was a clear day, and having listened and looked to his right and left, he proceeded forward. After going seven to nine feet his right wheel crossed the first rail and he then saw a train bearing down to his left from 125 to 175 feet away. The train sounded a warning and though the plaintiff accelerated his car he was unable to avoid being struck. Plaintiff testified that he had only looked straight ahead while moving forward after stopping, and evidence showed that had he looked to the left again he would have been able to see the train at approximately 300 feet away. A divided Court held that these facts were sufficient to justify a compulsory nonsuit.

In *Summerlin v. Atlantic Coast Line R. R.*¹¹ the Court continued to adhere to its position that the failure of an approaching train to give timely warning at a public crossing does *not* relieve a motorist of his duty to exercise due care at the crossing, though the motorist has a right to expect such notice.

*Hunt v. Wooten*¹² presents a most interesting case. The plaintiff disregarded the common maxim of kiss and tell and chose instead the "common law" maxim of kiss and sue. Although the defendant pleaded contributory negligence, he was not entitled to have submitted to the jury an issue of contributory negligence based on the fact that his car ran off the road and hit a fire hydrant because plaintiff was voluntarily kissing him at the time as he did not specifically plead the act of kissing in his answer. The Court stated that under G. S. § 1-139 he was required to set out with particularity the acts or omissions relied upon as constituting contributory negligence. The majority held that the

⁸ *Goodwin v. Cotton Co.*, 238 N. C. 627, 78 S. E. 2d 772 (1953).

⁹ *Wagoner v. R. R.*, *supra*.

¹⁰ 238 N. C. 418, 78 S. E. 2d 182 (1953).

¹¹ 238 N. C. 438, 78 S. E. 2d 162 (1953).

¹² 238 N. C. 42, 76 S. E. 2d 326 (1953).

pleaded "animated conversation" did not include kissing, and, thus, proof without allegation was unavailing to the defendant—a strict construction indeed of the pleadings.

AUTOMOBILES

Cases dealing with automobiles may be grouped as follows: Thirteen involved accidents at intersections;¹³ seven collisions resulted from vehicles running into other parked or slowly moving vehicles;¹⁴ seven occurred between vehicles on streets or the open road;¹⁵ five occurred from collisions with trains at public crossings;¹⁶ three involved automobiles striking persons on or by the road;¹⁷ two concerned automobiles running off the road;¹⁸ and one involved a collision between a motorcycle and a truck.¹⁹

North Carolina requires the operator of a motor vehicle to exercise that degree of care which an ordinary prudent man under like circumstances would exercise, which includes the duty to keep the vehicle under control and to maintain a reasonably safe lookout so as to avoid striking persons or vehicles on the highway.²⁰

The large number of intersection accidents illustrates the importance of G. S. § 20-155(a), which provides in substance that when two ve-

¹³ *Hartley v. Smith*, 239 N. C. 170, 79 S. E. 2d 767 (1954); *Gibson v. Whittton*, 239 N. C. 11, 79 S. E. 2d 196 (1953); *Alford v. Washington*, 238 N. C. 694, 78 S. E. 2d 915 (1953); *Edwards v. Vaughn*, 238 N. C. 89, 76 S. E. 2d 359 (1953); *Finch v. Ward*, 238 N. C. 290, 77 S. E. 2d 661 (1953); *Godwin v. Cotton Co.*, 238 N. C. 627, 78 S. E. 2d 772 (1953); *Horton v. Peterson*, 238 N. C. 446, 78 S. E. 2d 181 (1953); *Jernigan v. Jernigan*, 238 N. C. 444, 78 S. E. 2d 179 (1953); *Bennett v. Stephenson*, 237 N. C. 377, 75 S. E. 2d 147 (1953); *Cooks v. Hobbs*, 237 N. C. 490, 75 S. E. 2d 322 (1953); *Freeman v. Preddy*, 237 N. C. 734, 76 S. E. 2d 159 (1953); *Garner v. Pittman*, 237 N. C. 328, 75 S. E. 2d 111 (1953); *Mikeal v. Pendleton*, 237 N. C. 690, 75 S. E. 2d 756 (1953).

¹⁴ *Cozart v. Hudson*, 239 N. C. 279, 78 S. E. 2d 881 (1953); *Bumgardner v. Allison*, 238 N. C. 621, 78 S. E. 2d 752 (1953); *McClamrock v. Packing Co.*, 238 N. C. 648, 78 S. E. 2d 749 (1953); *Simbrel v. Meeler*, 238 N. C. 668, 78 S. E. 2d 766 (1953); *Smith v. Grub*, 238 N. C. 665, 78 S. E. 2d 598 (1953); *Hollifield v. Everhart*, 237 N. C. 313, 74 S. E. 2d 706 (1953); *Hooks v. Hudson*, 237 N. C. 695, 75 S. E. 2d 758 (1953).

¹⁵ *Cotton Co. v. Ford*, 239 N. C. 292, 79 S. E. 2d 389 (1954); *Medlin v. Spurrer & Co.*, 239 N. C. 48, 79 S. E. 2d 209 (1953); *Blanton v. Dairy*, 238 N. C. 382, 77 S. E. 2d 922 (1953); *Insurance Co. v. Cline*, 238 N. C. 133, 76 S. E. 2d 374 (1953); *Foster v. Holt*, 237 N. C. 495, 75 S. E. 2d 319 (1953); *Lyerly v. Griffin*, 237 N. C. 686, 75 S. E. 2d 730 (1953); *Travis v. Duckworth*, 237 N. C. 471, 75 N. C. 309 (1953).

¹⁶ *Beaman v. R. R.*, 238 N. C. 418, 78 S. E. 2d 182 (1953); *R. R. v. Trucking Co.*, 238 N. C. 422, 78 S. E. 2d 159 (1953); *Summerlin v. R. R.*, 238 N. C. 438, 78 S. E. 2d 162 (1953); *Dowdy v. R. R.*, 237 N. C. 519, 75 S. E. 2d 639 (1953); *Stevens v. R. R.*, 237 N. C. 412, 75 S. E. 2d 232 (1953).

¹⁷ *Goodson v. Williams*, 237 N. C. 291, 74 S. E. 2d 762 (1953); *Greene v. Board of Education*, 237 N. C. 336, 75 S. E. 2d 129 (1953); *Simpson v. Curry*, 237 N. C. 260, 74 S. E. 2d 649 (1953).

¹⁸ *Goode v. Barton*, 238 N. C. 492, 78 S. E. 2d 398 (1953); *Hunt v. Wooten*, 238 N. C. 42, 76 S. E. 2d 326 (1953).

¹⁹ *Todd v. Smathers*, 238 N. C. 140, 76 S. E. 2d 459 (1953).

²⁰ *Garner v. Pittman*, 237 N. C. 328, 75 S. E. 2d 111 (1953).

hicles approach an intersection at approximately the same time, the driver on the left shall yield the right of way to the vehicle on the right,²¹ bringing his vehicle to a stop if necessary.²² However, the vehicle on the left is not required to decrease its speed or stop if it reaches the intersection first and its driver can reasonably assume that he can proceed with safety into the junction before the other vehicle operated at a reasonable speed reaches the intersection.²³ Under G. S. § 20-155(b) if the vehicle on the left reaches the intersection first and has already entered it, the driver on the right is under a duty to let this vehicle pass in safety.²⁴ But the mere fact that the driver on the left reaches the intersection a fraction ahead of the vehicle on the right does *not* entitle him to proceed without yielding the right of way.²⁵

In *Green v. Board of Education*²⁶ a school bus struck a child who had just alighted from the bus, the driver having negligently driven away before determining that the children "had crossed the highway in safety" or were "otherwise out of danger." In affirming an award under the State Torts Claim Act the Court reemphasized the high degree of care imposed upon a motorist who sees, or by the exercise of due care should see, that children are on the highway.

North Carolina continues to apply the family purpose doctrine with respect to automobiles, making the driver the agent of the parent. Liability under the doctrine depends upon *use* and *control*, and is not limited to the owner or driver. Thus a father may be liable though the car was purchased by his son who was driving it at the time of the accident, if the father has legal title registered in his name and controls the use of the automobile.²⁷

ASSUMPTION OF RISK

In *Goode v. Barton*²⁸ a guest passenger in a negligently driven automobile was killed. Defendants interposed a plea of assumption of risk but the Court stated that this defense was not available in the absence of contractual relations. A recent note in this *Law Review*²⁹ points out that the terms contributory negligence and assumption of risk are often used interchangeably in North Carolina; but in this case the Court is obviously not so using them. Contributory negligence, if proved, is an available defense.

²¹ *Bennett v. Stephenson*, 237 N. C. 377, 75 S. E. 2d 147 (1953).

²² *Cab Co. v. Saunders*, 223 N. C. 626, 27 S. E. 2d 631 (1943).

²³ *Bennett v. Stephenson*, *supra*, Note 21.

²⁴ *Ibid.*

²⁵ *Freeman v. Preddy*, 237 N. C. 734, 76 S. E. 2d 159 (1953).

²⁶ 237 N. C. 336, 75 N. C. 129 (1953).

²⁷ *Goode v. Barton*, *supra*, Note 18.

²⁸ 238 N. C. 492, 78 S. E. 2d 398 (1953).

²⁹ 32 N. C. L. REV. 366 (1954).

CARRIERS AND SHIPPERS BY RAIL

The decision in *Yandell v. National Fireproofing Corp.*³⁰ is important in that it spells out the duties of carriers and shippers by rail with respect to the employees of consignees who unload railroad cars. The initial carrier, which furnishes the car for moving the freight, owes to these employees the duty to exercise reasonable care in supplying a car which may be unloaded with reasonable safety. The delivering carrier owes the duty to make an inspection of the car to ascertain whether it is reasonably safe for unloading, and to repair or give warning of any dangerous condition discoverable by such an inspection.

As for shippers of freight, the duty owed to these employees is not as specific as that of the carriers. However, the shipper does have the general duty to conduct its business so as not negligently to injure another by any agency which it sets in operation. Therefore, the Court held proper a cross-action by the initial and delivering carriers against a shipper who had accepted, loaded, and sealed an obviously defective car.

CHARITABLE INSTITUTIONS

New law was announced in *Williams v. Randolph Hospital*.³¹ For the first time the Court was squarely faced with the problem of whether a paying patient at a charitable hospital is exempt from the usual North Carolina rule concerning such institutions; i.e., no liability to a beneficiary of the charity for the negligence of its employees if it has exercised due care in their selection and retention. The Court, with Justice Barnhill dissenting, held that the contract of payment did not change the eleemosynary character of the work and, therefore, did not create an exception to the rule, though the Court did recognize that a minority of the jurisdictions apply such a distinction.

The case is of even greater importance in that the Court again affirmed the aforementioned qualified immunity of charitable institutions, but with considerable lack of gusto, saying ". . . the trend of decisions seems to be toward qualifying or abandoning the rule."³² The Court continues to feel that a legislative enactment is required to depart from a doctrine so firmly entrenched by *stare decisis*. Some courts in other jurisdictions have taken a different view, however, as indicated in a recent note in this *Law Review*.³³

³⁰ 239 N. C. 1, 79 S. E. 2d 223 (1953).

³¹ 237 N. C. 387, 75 S. E. 2d 303 (1953).

³² 237 N. C. 387, 390, 75 S. E. 2d 303, 305 (1953).

³³ 32 N. C. L. REV. 129 (1953).

LESSOR AND LESSEE

In referring to a lessee's duty to his lessor, the Court in *Winkler v. Appalachian Amusement Company*³⁴ stated that every lease contains an implied obligation on the part of the lessee, unless excluded by some express covenant or agreement, to exercise reasonable diligence in order that no injury, either wilful or negligent, be done to the property. The lessee is not liable for damage by accidental fires, but liability does accrue if the buildings are damaged through his negligence. The Court construed a provision of the lease exempting the lessee from liability for fire as not relieving the defendant if the fire was caused by his actionable negligence.

FRAUD

In *Cofield v. Griffin*³⁵ defendant falsely represented to plaintiffs that their co-tenants in common had agreed to sell their interests for \$300.00, if plaintiffs would agree to deed to defendant their own shares in the property, which plaintiffs thereafter did for the same amount. Plaintiffs then discovered that their co-tenants had in fact refused to sell to defendant, and brought suit for a rescission of the conveyance based on the fraud of the defendant.

The Court listed the essential elements of fraud in North Carolina as follows: the defendant must (1) make a representation relating to a material past or existing fact; (2) which is false; (3) the defendant knowing it to be false or making it recklessly without any knowledge of its truth and as a positive assertion; (4) with the intention that it should be acted upon by the plaintiff; (5) who does reasonably rely and act upon the representation, and; (6) thereby suffers an injury. Defendant contended that a statement as to what another person intends to do is but an opinion. The Court in a well reasoned decision, however, held that the state of a person's mind at a given moment is a fact, and to misrepresent the present intention of a third person to do a future act is fraudulent, the other elements of the tort being present.

Plaintiffs in *Childress v. Nordman*³⁶ contracted on September 10, 1951, to buy a house, relying upon a representation by a broker's agent that the house was free of termites. Indications of termites were first noticed about six weeks later. In reversing a judgment for the plaintiffs, the Court stated that there was insufficient evidence to show that the representation was false at the time it was made or acted upon, the general rule in North Carolina being that mere proof of the existence of a condition or state of facts at a given time does not raise

³⁴ 238 N. C. 589, 79 S. E. 2d 185 (1953).

³⁵ 238 N. C. 377, 78 S. E. 2d 131 (1953).

³⁶ 238 N. C. 708, 78 S. E. 2d 757 (1953).

an inference or presumption that the same condition or state of facts existed on a former occasion. However, if at any time before the final consummation of the sale, defendants or their agents had learned that the statement had been rendered untrue by a change in conditions, there was a duty to disclose this change.

INDEPENDENT CONTRACTOR

In *Brown v. Texas Co.*³⁷ plaintiff was employed by a firm which contracted to build a sign on defendant's premises. Payment was to be on a lump sum basis, the contractor to furnish material and labor with exclusive right to direct the method and manner of work. These factors constituted plaintiff's employer an independent contractor; as such it, and not the defendant, had the duty to provide plaintiff with a safe place in which to work and proper safeguards against any dangers incident to the work.

The owner-contractee may be liable for injuries sustained by employees of an independent contractor where the work to be done is inherently dangerous, since the contractee will not be allowed to escape liability by simply contracting the work. The principal case, however, did not involve such inherently dangerous work.

INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

In *Bryant v. Barber*³⁸ the Court reaffirmed the general principle that a party may be held liable in damages for inducing another to breach his contract. The plaintiff alleged that he had contracted with various persons to carry them to and from Camp Lejeune and that the defendant had induced these persons to break their contracts and ride on defendant's bus instead. Business competition was held to be an insufficient justification for the intentional interference with established contractual relations. The legal rules applicable to this situation are discussed more fully in a note on the *Bryant* case appearing in this *Law Review*.^{38a}

LAST CLEAR CHANCE

Of three cases³⁹ dealing primarily with the doctrine of last clear chance, all concern railroads in one way or another, and in all three the Court held that the doctrine did not apply to the facts alleged or proved.

In *Lee v. R. R.*⁴⁰ the engineer of a train that was going seventy

³⁷ 237 N. C. 738, 76 S. E. 2d 45 (1953).

³⁸ 237 N. C. 480, 75 S. E. 2d 410 (1953).

^{38a} 32 N. C. L. Rev. 110 (1953).

³⁹ *Wagoner v. R. R.*, 238 N. C. 162, 77 S. E. 2d 701 (1953); *Dowdy v. R. R.*, 237 N. C. 519, 75 S. E. 2d 639 (1953); *Lee v. R. R.*, 237 N. C. 357, 75 S. E. 2d 143 (1953).

⁴⁰ *Lee v. R. R.*, *supra*, Note 39.

miles an hour testified that he blew for a crossing, and seeing an object two hundred yards away blew again and then applied the emergency brakes; that deceased was sitting on the track and made an effort to get up before he was struck. Evidence showed that deceased had been drinking, and a jar of beer was found between the tracks. The Court stated that in order to recover on the theory of last clear chance, the plaintiff must establish (1) that the decedent was killed by the train; (2) that at the time he was killed decedent was on the tracks in an apparently helpless condition; (3) that the engineer saw, or by the exercise of ordinary care in keeping a proper lookout could have seen, the decedent in time to have stopped the train; and (4) that the engineer failed to exercise such care, thereby proximately causing the death.

The Court affirmed a nonsuit, saying the doctrine of last clear chance or discovered peril does not apply where the trespasser is upon the tracks apparently in possession of his normal faculties and the engineer has no knowledge to the contrary. In such a case the engineer is under no duty to stop the train or slacken its speed, for he has the right to assume that the trespasser will leave the track.

The Court added that the doctrine does not mean the last possible chance to avoid the accident, but such chance or interval of time between the discovery of the peril of the injured party, or the time when such peril should have been discovered in the exercise of due care, and the time of the injury as would have enabled a reasonably prudent man under like circumstances to have avoided the injury.

In both *Dowdy v. R. R.*⁴¹ and *Wagoner v. R. R.*⁴² the Court stated that the doctrine does not apply if the plaintiff is guilty of contributory negligence as a matter of law. As the question of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence,⁴³ it would seem that this view attacks the very reason for which the doctrine was originated. Does the Court mean, for example, that if the plaintiff violates a statute which the Court considers negligence *per se*, and thereafter he is totally unconscious or in an absolutely helpless condition, he is barred from invoking the doctrine? In both the aforementioned cases the fact that the injured party was apparently capable of self help at the time of the accident leads to this possible less sweeping explanation of the statement: where the plaintiff's negligence *continues actively up to the time of the injury itself*, and the plaintiff's conduct is so contributorily neg-

⁴¹ *Dowdy v. R. R.*, *supra*, Note 39.

⁴² *Wagoner v. R. R.*, *supra*, Note 39.

⁴³ *Dowdy v. R. R.*, 237 N. C. 519, 75 S. E. 2d 639 (1953); *Redman v. R. R.*, 195 N. C. 764, 143 S. E. 2d 829 (1928).

ligent that reasonable men could not differ as to this conclusion, *then* the doctrine of last clear chance does not apply.

MALICIOUS PROSECUTION

In *Bryant v. Murray*⁴⁴ defendant had instituted a criminal prosecution against plaintiff for larceny. Plaintiff had retaken cut stone delivered to defendant pursuant to a contract after defendant had stopped payment on a check in a dispute over the contract. Plaintiff was eventually acquitted and brought suit for malicious prosecution.

The basic question presented concerned probable cause, i.e., were the facts within defendant's knowledge sufficient to induce a reasonably prudent man to suspect that plaintiff was guilty of larceny? The Court held that neither the facts of the case nor an opinion given defendant by a reputable member of the North Carolina State Bar after a full disclosure of the facts constituted probable cause. The North Carolina rule is that legal advice is only a relevant circumstance to be considered by the court in determining probable cause and by the jury in determining the issue of malice. This is not in accord with the weight of authority in other jurisdictions, where such advice after a full and fair disclosure of the facts does constitute probable cause, the theory being that defendant should be able to rely upon legal advice. Though there was no probable cause found in the instant case, judgment for plaintiff was reversed on other grounds.

In *Moser v. Fulk*⁴⁵ plaintiff had been tried before a justice of the peace for public drunkenness upon a warrant and affidavit which did not allege that plaintiff's conduct was a public nuisance, nor that his drunkenness was within a certain township as required by G. S. § 14-335(8). In affirming a nonsuit the Court held that the tort of malicious prosecution would not lie where the warrant or indictment was void on its face, as the gist of the action is unjustifiable institution of criminal prosecution, or in some cases of civil action, involving in either instance the use of *proper* legal process maliciously and without probable cause. Therefore, if no crime is charged, as in the above case, the tort action for damages must necessarily fail.

PHYSICIANS AND SURGEONS

The case of *Nance v. Hitch*⁴⁶ involved an injury to plaintiff's heel from X-ray treatment administered by a dermatologist in removing a wart. Under the usual North Carolina rule a physician or surgeon in treating a patient implies ". . . (1) that he possesses the requisite degree of learning, skill and ability necessary to the practice of his

⁴⁴ 239 N. C. 18, 79 S. E. 2d 243 (1953).

⁴⁵ 237 N. C. 302, 74 S. E. 2d 729 (1953).

⁴⁶ 238 N. C. 1, 76 S. E. 2d 461 (1953).

profession, and which others similarly situated ordinarily possess; (2) that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the patient's case; and (3) that he will exert his best judgment in the treatment and care of the case entrusted to him."⁴⁷

The North Carolina Supreme Court has previously held that dentists are subject to the same rules of liability as physicians and surgeons,⁴⁸ and in the principal case held for the first time that dermatologists in the use of X-ray machines are likewise subject to this same standard.

In *Hawkins v. McCain*⁴⁹ defendant physician prescribed an arsenic solution for a skin disorder of the plaintiff, who was also suffering from a malignant and debilitating disease. Plaintiff applied the prescription for a short time and thereafter became seriously ill. The Court held proper a refusal to allow nonexperts to testify as to the effects upon plaintiff beyond plaintiff's physical appearance. Where the want of skill or lack of care by the physician or surgeon is so gross as to be within the common knowledge and understanding of the layman expert testimony is not necessary. But where, as here, questions involving plaintiff's condition and treatment require particular knowledge and training in a specialized field expert testimony is necessary, for non-expert testimony would be nothing more than conjecture. In the above case defendant's motion for nonsuit was affirmed because of the failure to establish actionable negligence through expert testimony.

RES IPSA LOQUITUR

In *Young v. Anchor Co.*⁵⁰ plaintiff suffered permanent injuries from a fall alleged to have been caused by a jerk, stop, and sudden movement forward by defendant's escalator. The Court found that these facts warranted the application of the doctrine of *res ipsa loquitur*, affirming its past position ". . . that where a thing which causes an injury is shown to be under the management of the defendant, and the occurrence is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care."⁵¹

Judgment for plaintiff was reversed, however, on the grounds of an erroneous impression in the minds of the jury created by the trial court's instructions to the effect that if the escalator was found to have

⁴⁷ *Nash v. Royster*, 189 N. C. 408, 413, 127 S. E. 356, 359 (1925).

⁴⁸ *Smith v. McClung*, 201 N. C. 648, 161 S. E. 91 (1931).

⁴⁹ 239 N. C. 160, 79 S. E. 2d 493 (1954).

⁵⁰ 239 N. C. 288, 79 S. E. 2d 785 (1954).

⁵¹ *Jones v. Bland*, 182 N. C. 70, 74, 108 S. E. 344, 347 (1921).

jerked, stopped, and started again, thereby proximately causing the plaintiff's injuries, a verdict for the plaintiff would be warranted.

In actuality the essential import of the doctrine is that on the facts proved the plaintiff has made out a prima facie case base on an inference of defendant's negligence. The use of the phrase "prima facie" is, perhaps, confusing. This does not mean that the burden of proof shifts, nor that the plaintiff's case of negligence will stand unless overcome by defendant's evidence. Rather the effect of the doctrine is an inference of negligence sufficient to avoid a nonsuit, calling upon the defendant to offer an explanation if he sees fit. Thus the jury is left free to determine according to the greater weight of the evidence the issue of defendant's alleged negligence, which in the principal case would be the failure to maintain a safe escalator. That the escalator stopped and started again is only sufficient to get the case to the jury; the plaintiff must still prove the defendant's alleged negligence to entitle him to a verdict. This is the "inference rule," and has been consistently followed in North Carolina.

In *Smith v. Gulf Oil Corp.*⁵² defendant laid underground gas pipes which were found to be leaking two years later after repeated complaints by plaintiff that one of his gas pumps was not operating correctly. Plaintiff alleged that defendant was negligent in installing the pipes and in failing to make a proper inspection afterwards. As defendant had contracted to install all the equipment and plaintiff to operate and maintain it in good condition and repair, the Court found that the pipes were not under the exclusive control of the defendant after installation and that an inference of defendant's negligence as to the installation or the inspection of the pipes would be unwarranted.

Similarly, the doctrine of *res ipsa loquitur* is inapplicable where the evidence shows that in X-ray treatment a burn might occur even though proper care was exercised.⁵³ Also, mere unfavorable reactions from the use of medical prescriptions is insufficient to invoke the doctrine where the treatment is approved by the medical profession and proper dosages are prescribed.⁵⁴

STATE TORT CLAIMS ACT

This 1951 Act⁵⁵ authorizes the North Carolina Industrial Commission to hear and determine tort claims against state departments and agencies. Should a state employee negligently injure another while acting within the scope of his employment, with no contributory negligence by the party injured, the Commission is entitled to award damages

⁵² 239 N. C. 360, 79 S. E. 2d 880 (1954).

⁵³ *Nance v. Hitch*, 238 N. C. 1, 76 S. E. 2d 461 (1953).

⁵⁴ *Hawkins v. McCain*, 239 N. C. 160, 79 S. E. 2d 493 (1954).

⁵⁵ N. C. GEN. STAT. §§ 143-291 to 300 (1952).

not exceeding \$8000.00, subject to appeal on matters of law from the full Commission to the superior courts and then to the North Carolina Supreme Court. The Court in *Lyon and Sons v. State Board of Education*⁵⁶ held that the right of plaintiff's insurer to subrogation existed under the Act. The subrogation aspects of the case are fully discussed in a recent note in this *Law Review*.⁵⁷

TRIAL PRACTICE

Numerous "Trial Practice" exceptions were before the Supreme Court during the past year. The overwhelming majority of these, however, were relatively routine, *i.e.*, motions for nonsuit and other objections to the trial judge's rulings and for this reason they have been omitted from this coverage.

APPEAL

Appeal in Forma Pauperis

In a civil action for damages for slander, a verdict was returned in favor of the defendant and from judgment thereon, plaintiff attempted to appeal *in forma pauperis*. In dismissing the appeal, the Court noted in *Dodson v. Johnson*¹ that there was nothing in the record to show that plaintiff had ever made a request for the appeal to be passed on and granted by the clerk of the superior court, or that either the judge or the clerk had signed an order allowing plaintiff to appeal as a pauper. The court held the requirements of G. S. § 1-288 relating to appeals *in forma pauperis* to the Supreme Court to be mandatory and jurisdictional, and "unless the statute is complied with, the appeal is not in this court, and we take no cognizance of the case except to dismiss it from the docket."

JURY

Ineligible Juror

An exception in *Young v. Mica Company*² presented to the North Carolina Court for the first time the question whether the presence on the jury of a person who had forfeited his citizenship by reason of conviction of a criminal offense vitiated the verdict.

The trial judge, in overruling the defendant's motion to set aside the verdict, found that the person was a regular juror drawn from the panel and passed by the defendant, but the defendant did not know the juror had forfeited his citizenship by service of a prison term. In

⁵⁶ 238 N. C. 24, 76 S. E. 2d 553 (1953).

⁵⁷ 32 N. C. L. REV. 242 (1954).

¹ 237 N. C. 275, 74 S. E. 2d 652 (1953).

² 237 N. C. 644, 75 S. E. 2d 795 (1953).

affirming, the Court conceded that the facts shown would have been ground for challenge for cause (G. S. § 9-1), but stated such disqualification does not *ipso facto* vitiate the verdict, nor do such facts entitle the defendant to have the verdict set aside as a matter of law or right.

In the absence of a showing that the juror on the *voir dire* examination falsely denied or concealed matters which would have established his disqualification, the motion first made after the verdict, was addressed to the discretion of the trial judge, and in such a case, in the absence of the showing of prejudice amounting to abuse of discretion, the ruling of the trial judge is not reviewable.

This decision is in accord with the great weight of authority from other jurisdictions.

JUDGE'S CHARGE

In a criminal prosecution for drunken driving the jury had difficulty in arriving at a verdict. After some deliberation, the foreman asked the court if it would be within the jury's right to ask for mercy in rendering the verdict. In answer the court told the jury:

Your responsibility is to answer whether or not you find the defendant guilty or not guilty. The matter of the judgment to be pronounced upon the verdict is entirely the responsibility of the judge, and is not part of your responsibility at all; in arriving at your verdict, you arrive at a verdict of guilty or not guilty according as you find the facts from the evidence and apply the law as given you by the court. . . .

Thereafter the jury returned a verdict of guilty and the judge rendered judgment. On appeal, the charge above was assigned as error. In affirming, the Court in *State v. Davis*,³ stated that had the judge authorized the jury to recommend mercy it would doubtless have been understood as an intimation that if they brought in such a verdict the court would be lenient. This would have afforded ground for the claim that the court had improperly influenced the verdict. "Hence, when the judge declined to authorize a verdict in the form suggested, or to authorize more than a verdict of guilty or not guilty, his actions should not be regarded as prejudicial to the defendant or held in error."

SERVICE OF PROCESS

Non-Resident Motorist Statute

An unusual application of the process provisions of the non-resident motorist statute was attempted in a recent case arising out of an auto-

³ 238 N. C. 252, 77 S. E. 2d 630 (1953).

mobile collision. At the time the original summons was issued and returned unserved, defendant, a resident of North Carolina, was serving in the United States Navy outside the state. An attempt was then made to serve him under the provisions of G. S. §1-105 and G. S. § 1-106, Non-Resident Motorist Statutes, and actual notice was delivered to the defendant by registered mail. A guardian *ad litem* was thereafter appointed who appeared specially and moved for dismissal. The trial court held the attempted service void and ordered the action dismissed as to him. Then plaintiff had what purported to be an *alias* summons issued and served on the guardian *ad litem*. At trial the court held, "that this case has been and is dismissed as to the defendant." This was cited as error. In affirming,⁴ the Supreme Court held the method of serving process on a non-resident as provided in G. S. § 1-105 and G. S. § 1-106 to be ineffective to obtain service of process on a citizen and resident of this state while such resident is residing temporarily outside the state or in the armed forces stationed in another state or in a foreign country. It follows then, stated the Court, that when the trial judge dismissed this action as to the defendant, he had not been served with legal process.

RULES OF PRACTICE IN THE SUPREME COURT

Appellant's appeal was due to be docketed in the Spring Term of the Supreme Court but actually was docketed after the Fall Term had commenced. "Neither the agreement of the parties," stated the court, "nor the allowance of additional time by the judge for perfecting the appeal will excuse the delay. Rule 5, Rules of Practice in the Supreme Court, 221 N. C. 546, is mandatory and cannot be abrogated by consent or otherwise. Failure to docket as thus required results in the loss of the right to appeal and necessitates dismissal."⁵

Where the appellant is unable to perfect his appeal within the allotted time, however, application for writ of certiorari is available to protect his right of appeal.⁶ In *State v. Clarence Evans*,⁷ where certiorari had been granted, defendant had notice that his brief was to be filed by noon 14 April, 1953. It was not filed until 20 April, 1953. On 28 April, 1953, the Attorney General moved pursuant to Rule 28 of the Rules of Practice in the Supreme Court that the appeal and case be dismissed for that appellant's brief was filed too late. In affirming the judgment below, and dismissing the appeal, the Court said: "We have held in a number of cases that the rules of this court, governing appeals

⁴ *Foster v. Holt and Holt*, 237 N. C. 495, 75 S. E. 2d 319 (1953).

⁵ *In re Suggs*, 238 N. C. 413, 78 S. E. 2d 157 (1953). *Accord*, *Home Insurance Company v. Stafford*, 238 N. C. 678, 78 S. E. 2d 607 (1953).

⁶ *Home Insurance Company v. Stafford*, 238 N. C. 678, 78 S. E. 2d 607 (1953).

⁷ 237 N. C. 758, 75 S. E. 2d 913 (1953).

are mandatory and not directory . . . The court has not only found it necessary to adopt them, but equally necessary to enforce them and enforce them uniformly."⁸

TRUSTS

CONSTRUCTIVE TRUSTS

Batchelor v. Mitchell,¹ on demurrer to a complaint, found a cause of action to impose a constructive trust in the following circumstances: A widow was seized of certain land in common with her two children after her husband's death intestate. The land was subject to a deed of trust securing a loan, and, at the insistence of her parents, she defaulted in a payment at a time when sufficient funds were available to meet it, repurchased and took title in her own name after the creditor had bought in the tract, and subsequently conveyed a portion to her mother, who had knowledge of the children's interests. The widow died, and each child upon attaining majority, and allegedly under coercion, signed a deed conveying that portion to the grandmother. This action was brought against the grandfather, who was a subsequent devisee of the land, his grantee, and the holder of a timber deed from the grantee, it being alleged that all these parties took with knowledge of the children's interests. Furthermore, \$50,000 was sought by way of an accounting against the grandfather, and \$30,000 against the holder of the timber deed. It is significant that the trial court sustained the demurrer and that, of the five constructive and resulting trust cases cited by the Supreme Court, four involved the reversal of nonsuits, and one the reversal of a directed verdict, which had been entered in superior court against the parties seeking to establish the trust relationship. Perhaps the trial judges are not sufficiently alert to the remedy in sharp practice cases that the constructive trust device affords.²

ADMINISTRATION

Edgecombe Bank and Trust Co. v. Barrett,³ on an administrator's request for instructions, facilitated "tracing" by beneficiaries of a trust

⁸ *Accord*: *State v. Graham*, 239 N. C. 119, 79 S. E. 2d 258; *State v. Turberville*, 239 N. C. 25, 79 S. E. 2d 359; *State v. Porter*, 238 N. C. 735, 78 S. E. 2d 910 (1953). Also, Rule No. 19 (4) requiring that the evidence be set out in narrative form in the record on appeal to the Supreme Court is mandatory and the failure to comply with the rule requires the dismissal of the appeal. The court will enforce this rule *ex mero moto*. *Anderson v. Heating Company*, 238 N. C. 138, 76 S. E. 2d 458 (1953).

¹ 238 N. C. 351, 78 S. E. 2d 240 (1953).

² Compare *Strickland v. Bingham*, 227 N. C. 221, 41 S. E. 2d 756 (1947), (broker's alleged disloyalty) where the Supreme Court sustained a nonsuit on the ground that the fiduciary relationship had ceased before the broker bought for himself.

³ 238 N. C. 579, 78 S. E. 2d 730 (1953).

against those taking under the trustee's will. The deceased mother was trustee of a fund which at her death was to go to her issue and their heirs. Without objection from them, she had moved to another part of the state and made various and profitable reinvestments. It was difficult to tell with precision what part of the property held by her at her death was her own and what was held subject to the interests of the remaindermen, although it appeared that only one house clearly belonged to her in her own right. The Court sent the case back for a new trial, holding that the beneficiaries were not estopped, that they were entitled to the real estate and stocks found to have been purchased with the trust funds, and that the court should make findings and dispositions as to the bank deposits, notes and bonds, and the increments from the investments, on the principle that "equity will impress the trust character upon the entire mass and treat it as trust property or funds except insofar as the trustee may be able to distinguish what is his." The opinion contains an excellent summary of the general principles of "tracing."

WILLS AND ADMINISTRATION

CONSTRUCTION

This section may well be prefaced with the reminder by the Supreme Court that where there has been no construction of a will in the court below, the Supreme Court will not, on appeal, construe the will and declare the rights of parties thereunder.¹

During the year, the Court rehearsed or restated its oft-repeated rules for the construction of wills: (1) "It is axiomatic that the intent of the testator is the polar star that must guide the courts in the interpretation of a will."² (2) "The intent of a testator is to be ascertained, if possible from a consideration of his will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy."³ To these two canons of construc-

¹ *Bizzell v. Bizzell*, 237 N. C. 535, 75 S. E. 2d 536 (1953), *citing*, *Wachovia Bank and Trust Co. v. Waddell*, 237 N. C. 342, 75 S. E. 2d 151 (1953); *Woodard v. Clark*, 234 N. C. 215, 66 S. E. 2d 888 (1951).

² *Wachovia Bank and Trust Co. v. Green*, 238 N. C. 339, 342, 78 S. E. 2d 174 (1953); *Clayton v. Burch*, 239 N. C. 386, 80 S. E. 2d 29 (1953); *Mewborn v. Mewborn*, 239 N. C. 284, 79 S. E. 2d 398 (1953); *Gatling v. Gatling*, 239 N. C. 215, 79 S. E. 2d 466 (1953); *Marks v. Thomas*, 238 N. C. 544, 78 S. E. 2d 340 (1953); *Branch Banking and Trust Co. v. Whitfield*, 238 N. C. 69, 76 S. E. 2d 334 (1953); *Bradford v. Johnson*, 237 N. C. 572, 75 S. E. 2d 632 (1953); *Wachovia Bank and Trust Co. v. Waddell*, 237 N. C. 342, 75 S. E. 2d 151 (1953).

³ *Mewborn v. Mewborn*, 239 N. C. 284, 286, 79 S. E. 2d 398 (1953); *Gatling v. Gatling*, 239 N. C. 215, 79 S. E. 2d 466 (1953); *Wachovia Bank and Trust Co. v. Green*, 238 N. C. 339, 78 S. E. 2d 174 (1953); *Cansler v. McLaughlin*, 238 N. C. 197, 77 S. E. 2d 618 (1953); *Branch Banking and Trust Co. v. Whitfield*, 238 N. C. 69, 76 S. E. 2d 334 (1953).

tion, the Court added other rules of interpretation to determine rights of parties under wills.

In *Bradford v. Johnson*, the Court stated that it was permissible in determining the intent of the testator "to consider the will in the light of the testator's knowledge of certain facts and circumstances existing at the time of or after the execution of the will."⁴ This rule was employed in holding that, by a provision for the distribution of the corpus of a testamentary trust to "the children of his deceased children," the testator intended that a grandchild adopted some four years after the will was executed and three years before the death of the testator should share in the distribution of the corpus, but that any grandchild adopted after the death of the testator should not share.⁵ The Court also held that the adoption statutes which determine the share of adopted children in property going by intestate succession⁶ have no applicability here, and that the word "issue" when used in a will is generally construed as a word of limitation meaning "lawfully begotten heirs of the body" or as a child born of the marriage of its parents, so that an adopted child is not included.⁷

Similar rules of construction were used by the Court in *Wachovia Bank and Trust Co. v. Green*⁸ to interpret a testamentary trust which directed income to be paid to a nephew and niece and named children of the niece with the right of "hereafter born" children of either to share in the income and for the "issue" of either to have his share of the income at his death. By another item of the will, the corpus was to be distributed at the death of the last survivor of the niece or nephew to their "children" then surviving, the issue of any deceased child to receive, *per stirpes*, the share which their parent would have received, if living.

At the time of the testator's death, the nephew had completed adoption of two children and was in the process of adopting a third. The Court held: (1) that the adopted children could not share in the income as the testator intended to limit it to beneficiaries of his blood; (2) that the three adopted children would probably be living at the

⁴ 237 N. C. 572, 578, 75 S. E. 2d 632, 636 (1953).

⁵ *Ibid.*, 75 S. E. 2d at 636. "It seems to be the general rule that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child, if he so desired, such adopted child will be included in the word children when used to designate a class which is to take under the will."

⁶ N. C. GEN. STAT. § 48-23 (1950) (establishing relationship of parent and child); N. C. GEN. STAT. § 28-149, Rule 10 (1950) (personal property distribution); N. C. GEN. STAT. § 29-1, Rule 14 (1950) (real property intestate succession).

⁷ *Bradford v. Johnson*, 237 N. C. 572, 581, 75 S. E. 2d 632, 638 (1953).

⁸ 238 N. C. 339, 78 S. E. 2d 174 (1953).

time for distribution of the corpus of the trust, so the cause was remanded for the superior court to determine if the adopted children who might be living at the time of the distribution would be entitled to share in the corpus *at that time*.⁹

In *Gatling v. Gatling*¹⁰ the testator devised all of his real property to his wife in trust for herself for life, remainder to his children or their surviving issue *per stirpes*. He gave his wife the right to encumber or sell any part of the property as was necessary, in her opinion, for her maintenance. By a later item of the will, the testator said: "I direct that the 13 lots . . . shall not be subject to the provision . . . (giving the wife the power to sell or encumber) . . . but . . ." that the lands should go in the final distribution to certain named persons. He also directed that, if any heir should have to sell one of these lots, he should offer it to the member of the family living at the homeplace. The Court construed these words, "I direct," as being imperative, with the result that the wife did *not* have the power to encumber or sell the lots facing the homeplace. In addition, it was determined to be the intent of the testator that, if any land must be sold to pay debts, it was to be lands other than those facing the homeplace.

*Branch Banking and Trust Co. v. Whitfield*¹¹ arose out of a will in which the testator bequeathed items of jewelry to his son and daughter with directions to the executor and trustee to deliver them to the children on their *eighteenth* birthday. The Court, citing authority,¹² held that the executor must deliver the personal property to the *minor children* under the express terms of the will. The cases cited support the proposition that bequests and legacies must be paid at the time directed by the will but none of the wills construed directed payments

⁹ *Ibid.* at 344, 78 S. E. 2d at 178. "The adoptive parents are entitled to know whether or not these children will share in the distribution of the net assets of the trusts, if they are living when these trusts are terminated." *But cf.* Fuller v. Hedgpeth, 239 N. C. 370, 80 S. E. 2d 18 (1953) (court refused to answer "premature, speculative questions of interpretation"); *Branch Banking and Trust Co. v. Whitfield*, 238 N. C. 69, 73, 76 S. E. 2d 334, 337 (1953) (where the court refused to give the executor directions for a possible future event, because "... there is no real existing controversy between the parties on that point . . .").

¹⁰ 239 N. C. 215, 79 S. E. 2d 466 (1953).

¹¹ 238 N. C. 69, 76 S. E. 2d 334 (1953).

¹² 69 C. J., WILLS, § 2633 (1934), *citing*, *In re Yates' Estate*, 170 Cal. 254, 149 P. 555 (1915) (will directs specific legacies to be held in trust and turned over to named beneficiaries at age twenty-five); *In re Mereto's Estate*, 311 Pa. 374, 166 A. 893 (1933) (where testatrix directed specific legacies to be paid to one beneficiary at age fifty-five and to another at age thirty-five); *Jones' Estate*, 19 Pa. Dist. and Co. 100 (1933) (where the testatrix bequeathed \$5,000 to be paid to a beneficiary at age twenty-five). See also 4 PAGE, WILLS (Lifetime Edition) § 1589 (1941), *citing*, *In re Deneken*, 13 Rep. 294, 72 Law Times Reports 220 (1895). This case seems to be the only authority directly in point. The testator left 1,000 pounds to be paid in equal shares to the children of his brother "when they reach the age of eighteen years." The Court held that the shares of two children who had reached eighteen should be paid to them.

to minors.¹³ The Court also cited authority holding that directions to pay to a minor were not final in the absence of a provision in the will that the infant's receipt shall be a sufficient discharge,¹⁴ but chose not to follow this view.

The objective of the courts in carrying out the intent of the testator to the letter is admirable, but this case causes one to wonder how far the Court will go in ordering executors to deliver specific bequests and legacies to minors before reversing its field to protect testators from their own bad judgment if obvious need for such protection should arise.

DOCTRINE OF ELECTION

The case of *Rouse v. Rouse*¹⁵ came before the Court twice in 1953. The plaintiff, widow of the decedent whose estate the principal defendant was administering, had loaned her husband \$1,000 of her own separate estate. He had invested it in their combination residence and store which he devised with his other real estate for life to the plaintiff. He also bequeathed all his personal estate to the plaintiff except one piano. She brought this action to have the \$1,000 debt declared a specific lien on the real property of the estate, all of which she holds for life under the will. The Court twice held that the plaintiff had, by accepting the rents and profits, elected to take under the will, and that she was not entitled to have the realty sold to pay her claim.¹⁶ In the second appeal, the Court makes the observation that the personal property of the decedent is primarily liable for his debts, so, absent anything else, the plaintiff would ordinarily be entitled to force a sale of the piano, the only item not bequeathed to her, in satisfaction of the debt. But the Court adds:

Her husband bequeathed to her all his personal estate except

¹³ *Shelton v. King*, 229 U. S. 90 (1912) (at age twenty-five); *Jackson v. Langley*, 234 N. C. 243, 66 S. E. 2d 899 (1951); *Coddington v. Stone*, 217 N. C. 714, 9 S. E. 2d 420 (1940) (when the youngest of three children should reach age twenty-one); *Halliburton v. Phifer*, 185 N. C. 366, 117 S. E. 296 (1923) (when the younger of two sons reaches twenty-five); *Hill v. Jones*, 123 N. C. 200, 31 S. E. 474 (1898) (when the youngest child reaches twenty-one); *Varner v. Johnston*, 112 N. C. 570, 17 S. E. 483 (1893) (slave to be sold and proceeds paid to class of legatees when a named member reaches eighteen; no direction by court to pay proceeds to minor legatee); *Gibbons v. Dunn*, 7 N. C. 548 (1819) (a slave bequeathed to married daughters when a son of testator reached sixteen or at the death of his widow).

¹⁴ *Re Robertson*, 17 Ont. L. 568; 13 Ont. W. R. 208; *Re Noyes*, 17 Ont. W. N. 302.

¹⁵ 238 N. C. 568, 75 S. E. 2d 300 (1953); 237 N. C. 492, 75 S. E. 2d 300 (1953).

¹⁶ 237 N. C. 492, 494, 75 S. E. 2d 300, 301 (1953). "The doctrine of election rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction; he cannot accept and reject the same writing." (citing cases).

one piano, and she accepted the gift. If she is seeking an opportunity to sell the one piano not bequeathed to her, it might well be said that the case comes within the maxim *de minimis non curat lex*.¹⁷

The doctrine of election arose again in *Lovett v. Stone*.¹⁸ The complicated facts are to the effect that *A* had a fee in two-thirds and *B* had a fee in one-third of a twenty acre tract, which was originally part of a fifty acre tract. The testator, who died seized of the rest of the fifty acre tract and who had originally owned and knew the status of the title to the twenty acres, professed to will: (1) All of the fifty acre tract to *A* for life, remainder to his children; (2) a different tract of land to *B* for life, remainder to his children if *B* would deed his interest in the twenty acre tract to *A*; otherwise, the will directed that *B* should forfeit any interest under the will. The Court held it to be the intention of this testator that the doctrine of election applied to the devises to *A* and *B*. *A* had to relinquish the fee in his part of the twenty acres in order to take under the will; he manifested his election to do this and to take the entire tract for life with a remainder in his heirs by his act of occupying the whole fifty acre tract. *B* elected by occupying the tract devised to him and by conveying his interest in the twenty acre tract to *A*.

EXECUTORS AND ADMINISTRATORS

In the case of *Dills v. Cornwell*,¹⁹ the executors of an estate had to pay a claim of \$8,000 to a plaintiff who claimed in implied contract for serving the deceased for some three years or more as housekeeper and nurse. The main evidence offered was a \$10,000 check drawn by the decedent to the plaintiff and dated two weeks before his death.

In *Wachovia Bank and Trust Co. v. Waddell*,²⁰ which had been before the Supreme Court twice before,²¹ the Court construed a provision in the will for compensation of the executor-trustee of the will

¹⁷ BLACK'S LAW DICTIONARY, 482 (4th ed. 1951) ("The law does not concern itself about trifles.") Query as to whether this may be taken as a judicial declaration that a piano is a "trifle"?

¹⁸ 239 N. C. 206, 212, 79 S. E. 2d 479, 484 (1953). "Election is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both, the principle being that one shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if legal and well founded, which would defeat or in any way prevent the full effect and operation of every part of the will." 69 C. J., WILLS, § 2330 (1934). "This statement of the doctrine of election finds full sanction in our decisions." (citing numerous North Carolina cases).

¹⁹ 238 N. C. 435, 78 S. E. 2d 167 (1953).

²⁰ 237 N. C. 342, 75 S. E. 2d 151 (1953).

²¹ *Wachovia Bank and Trust Co. v. Waddell*, 234 N. C. 454, 67 S. E. 2d 651 (1951); *Wachovia Bank and Trust Co. v. Waddell*, 234 N. C. 34, 65 S. E. 2d 317 (1951).

and testamentary trusts. The will read: "My Executor and Trustee is not to receive more than (2½%), two and one-half per cent on receipts, nor more than (2½%), two and one-half per cent on disbursements." Citing *Lightner v. Boone*,²² the Court said that the testator could stipulate in the will how much the executor was to be paid and it would be binding on all parties. Absent such stipulation, the clerk, observing the statutory maximum of five per cent,²³ must fix compensation. Here, the Court said, the will does not stipulate that the compensation is to be two and one-half per cent but only substitutes this figure for the statutory maximum. The *clerk*, not the executor, must fix the compensation of the executor under the terms of the will at not more than two and one-half per cent. The clerk must also determine for this purpose what meaning the testator intended to give to the word "receipts" in the will.²⁴

Regarding the rights and duties of personal representatives, the Court, in a case involving covenants,²⁵ stated that only the executor or administrator succeeds to the rights of a covenantee on his personal covenants after his death.²⁶ There have been two North Carolina cases dealing with the problem of what parties may enforce or claim the benefit of personal covenants.²⁷ Neither of them is in point with *Maples v. Horton*.²⁸

In *McIntyre v. Josey*²⁹ the Court held that a *collector* of the estate of a deceased tort-feasor may be sued in his representative capacity for injuries caused to the plaintiff's truck and cargo by the actionable negligence of the decedent. The collector demurred to the complaint on the theory that he is only authorized by statute to "commence and

²² 221 N. C. 78, 19 S. E. 2d 144 (1953).

²³ N. C. GEN. STAT. § 28-170 (Supp. 1953).

²⁴ See *In re Ledbetter*, 235 N. C. 642, 70 S. E. 2d 667 (1952); *Battery Park Bank v. Western Carolina Bank*, 126 N. C. 531, 36 S. E. 39 (1900) (for some idea of the meaning of "receipts" in the statute).

²⁵ *Maples v. Horton*, 239 N. C. 394, 80 S. E. 2d 38 (1953).

²⁶ 14 AM. JUR., *Covenants, Conditions and Restrictions*, §§ 39, 43 (1938).

²⁷ *Smith v. Ingram*, 130 N. C. 100, 40 S. E. 984 (1902), *rehearing den.*, 132 N. C. 959, 44 S. E. 643 (1903); *Nesbit v. Brown*, 16 N. C. (1 Dev. Eq.) 30 (1826) (assignee of covenantee may recover from personal representative of covenantor for breach of personal covenant). Compare with this latter case the language of the Court in *Maples v. Horton*, note 25 *supra*, where the Court quoted from 14 AM. JUR., *Covenants, Conditions and Restrictions*, § 39 (1938): "One cannot at common law maintain any action upon a personal covenant merely by force of the fact that he is the successor in title of the owner with whom such covenant was made." Query as to whether this may be construed as a complete adoption by the Court of this language which seems to be *contra* to the holding of *Nesbit v. Brown*, *supra*, or whether the Court will later limit the use of the language only to cases similar to *Maples v. Horton*, note 25 *supra*, where the party seeking to enforce the covenant is a devisee of the covenantee rather than the grantee of the covenantee as was the case in *Nesbit v. Brown*, *supra*.

²⁸ 239 N. C. 394, 80 S. E. 2d 38 (1953).

²⁹ 239 N. C. 109, 79 S. E. 2d 202 (1953).

maintain or defend suits"³⁰ for "the collection and the preservation of the property"³¹ of the estate. The Court held that the demurrer was properly overruled because of the express wording in G. S. § 28-172 to the effect that a cause of action survives the death of the person in whose favor or against whom it has accrued and survives "to and against the executor, administrator or collector of his estate."³²

Finally, without apology for calling attention to what would seem to be the obvious, it might be well to remind attorneys of the usefulness of the statutory controversy without action³³ and the Declaratory Judgment Act³⁴ in getting the stamp of court approval on actions or intended actions by the executor or personal representative of the deceased in cases where the proper mode of proceeding is doubtful, as was done in twelve cases³⁵ in 1953.

PARTNERSHIP SURVIVORSHIP AGREEMENTS

In *Silverthorne v. Mayo*³⁶ the Court had before it a partnership agreement reading:

AGREEMENT TO BUY AND SELL: That if he is the first to die, he agrees to sell and convey to the survivor, and the survivor agrees to buy from the one that dies first, his heirs or assigns, all of the right, title and interest, which is one-half interest, shall

³⁰ N. C. GEN. STAT. § 28-27 (1950).

³¹ N. C. GEN. STAT. § 28-25 (1950).

³² N. C. GEN. STAT. § 28-172 (1950); *Shields v. Lawrence*, 72 N. C. 43 (1875) (same question answered where the defendant died while the action against him was pending and he was replaced as defendant by the collector.)

³³ N. C. GEN. STAT. § 1-250 (1953). "Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall hear and determine the case, and render judgment thereon as if an action were pending."

³⁴ N. C. GEN. STAT. § 1-253 (1953). "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

³⁵ *Clayton v. Burch*, 239 N. C. 386, 80 S. E. 2d 29 (1953); *Fuller v. Hedgpeth*, 239 N. C. 370, 80 S. E. 2d 18 (1953); *Mewborn v. Mewborn*, 239 N. C. 284, 79 S. E. 2d 398 (1953); *Gatling v. Gatling*, 239 N. C. 215, 79 S. E. 2d 466 (1953); *Marks v. Thomas*, 238 N. C. 544, 78 S. E. 2d 340 (1953); *Wachovia Bank and Trust Co. v. Green*, 238 N. C. 339, 78 S. E. 2d 174 (1953); *Silverthorne v. Mayo*, 238 N. C. 274, 77 S. E. 2d 678 (1953); *Cansler v. McLaughlin*, 238 N. C. 197, 77 S. E. 2d 618 (1953); *Branch Banking and Trust Co. v. Whitfield*, 238 N. C. 69, 76 S. E. 2d 334 (1953); *Blackwood v. Blackwood*, 237 N. C. 726, 76 S. E. 2d 122 (1953); *Bradford v. Johnson*, 237 N. C. 572, 75 S. E. 2d 632 (1953); *Wachovia Bank and Trust Co. v. Waddell*, 237 N. C. 342, 75 S. E. 2d 151 (1953).

³⁶ 238 N. C. 274, 77 S. E. 2d 678 (1953).

have in and to the assets, name and good will of said partnership, as of the date of said death, by paying to the widow of R. S. Silverthorne the sum of \$8,500, which is to be payable \$1,000 cash per year from the stock of merchandise, or longer if necessary, and the said widow is also to receive \$1,500 in bonds now in name of said partnership; and if . . .³⁷

The rest of the paragraph constituted the reciprocal arrangement to buy if the other partner should die first. The question before the Court was whether the surviving partner should pay the sums due under the agreement to the administrator of the estate of R. S. Silverthorne, the deceased partner, or to the estate of his wife who survived him but has since died. The Court rejected the contention by the plaintiff, the surviving partner, that this agreement was in the nature of a testamentary disposition and therefore void because it had not been executed in accordance with the requirements of the law governing the valid execution of wills.³⁸ The Court viewed the agreement as a binding contract with the wife of the deceased partner named as a third party beneficiary and cited authority holding such agreements to be executory contracts and not testamentary dispositions.³⁹

³⁷ *Ibid.* at 275, 77 S. E. 2d at 679.

³⁸ N. C. GEN. STAT. §§ 31-1 through 31-4 (Supp. 1953).

³⁹ *Fawcett v. Fawcett*, 191 N. C. 679, 132 S. E. 796 (1926) (agreement between two persons that the survivor should buy the stock of the first to die; payment to be made to the *estate* of the deceased). This is apparently the only North Carolina case in point. See also, 40 AM. JUR., *Partnership*, § 312 (1942); Note, 1 A. L. R. 2d 1197 (1948) (citing cases from thirty-six states in support of the view taken by the North Carolina court).