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FOURTH ANNUAL SURVEY OF NORTH CAROLINA CASE LAW*

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

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

Most of the research for and writing of this article was accomplished by selected members of the Student Board of Editors of the *Law Review,* 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 and the sections for which they are responsible are:

James A. Alspaugh (Future Interests, Real Property, and Wills and Administration); Frederick A. Babson, Jr. (Agency and Workmen's Compensation, Contracts, and Insurance); James P. Crews (Criminal Law and Procedure); Robin L. Hinson (Civil Procedure (Pleadings and Parties)); Harriet D. Holt (Administrative Law, Business Associations, Credit Transactions, and Sales); Billy F. Maready (Torts); Lewis H. Parham, Jr. (Domestic Relations, Equity, Municipal Corporations, and Trusts); Thomas P. Walker (Constitutional Law, Damages, and Evidence).

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

ADMINISTRATIVE LAW†

JURISDICTION

It is fundamental that an administrative tribunal must act within its jurisdiction.

* The period covered embraces the decisions of the North Carolina Supreme Court reported in 242 N. C. 533 through 244 N. C. 398.

† For other cases involving administrative law, see AGENCY AND WORKMEN'S COMPENSATION.

In *North Carolina ex rel. Util. Comm'n. v. Youngblood Truck Lines, Inc.*[1] irregular route trucking company *A* had petitioned for authority to interchange freight with trucking company *B*. The Utilities Commission dismissed the petition because it had no jurisdiction since *B* was not a party to the petition and there was no allegation that *B* desired to enter or had entered into any agreement with the petitioner. The Court affirmed the dismissal pursuant to G. S. § 62-121.28 (2)[2] and further held that neither the Commission nor the court below should have considered and dealt with matters relating to the merits of the proceeding.

In another case,[3] the Industrial Commission had granted an award for payment of compensation in accordance with an agreement between an employer and an injured "employee." Over a year later the "employee" moved to have the agreement set aside because the requisite employer-employee relationship was lacking. The Commission granted the motion and dismissed the case on the basis that it lacked jurisdiction. The Court ordered the proceeding remanded to the Industrial Commission with instructions that an order be entered setting aside its former approval of the agreement and dismissing the proceeding for lack of jurisdiction. This last was necessary because the Commission had set aside the agreement, not merely its approval, and had ordered a refund.

RATE FIXING AND VALUATION

A case, not squarely bearing on the question of jurisdiction, but somewhat related thereto, is *North Carolina ex rel. Util. Comm'n v. North Carolina.*[4] In that case the Commission based a fifteen per cent increase for basic freight rates and charges of intrastate railway carriers upon the findings made in an Interstate Commerce Commission hearing, in which the Utilities Commission had "participated," and on the fact that discrimination would result if the intrastate rates were not raised since the ICC had granted a fifteen per cent increase. The lower court reversed the Utilities Commission's order because it failed to comply with G. S. § 62-124,[5] which prescribes the conditions for the determination of increased rates. The Court further made it clear that the commission is

[1] 243 N. C. 442, 91 S. E. 2d 212 (1956).

[2] The statute provides that "common carrier[s] by motor vehicle . . . shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle, *and with the approval of the Commission,* may do so with irregular route common carriers by motor vehicle. . . ." [Emphasis added.]

[3] Hart v. Thomasville Motors, Inc., 244 N. C. 84, 92 S. E. 2d 673 (1956).

[4] 243 N. C. 12, 89 S. E. 2d 727 (1956).

[5] The statute provides: "In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier . . . the Commission shall take into consideration . . . the value of the property of such carrier . . . used for the public . . . or the fair value of the service rendered in determining the value of the property. . . ."

not a policy making body for the state; therefore, a long line of its decisions could establish *its* policy, but not the policy of the state.

The problem of the proper valuation of public utility properties used to serve the public arose in another connection. In *North Carolina ex rel. Util. Comm'n v. Greensboro*[6] the city appealed from an order of the Commission raising the bus fare five cents, on the ground that the Commission considered only the transportation service properties of the utility company and the return thereon. This was claimed to be contrary to the city's franchise to the company, which provided that the franchise for electric and bus services was granted as a unit. Nevertheless, the Court found that the valuation had been made in accordance with G. S. § 62-124. The service charge for transportation is correlative to the value of the properties used to furnish that service.

In *North Carolina ex rel. Util. Comm'n. v. Municipal Corp.*[7] the Court sustained an order of the Commission for the increase of rates for electric current. The protesting municipalities appealed on several grounds, which amounted to allegations of discrimination in the rates charged the municipalities for electricity for resale. The Court held that there were factors justifying making this rate different from certain other rates, and that there was no discrimination. Accordingly, the Court sustained the new rate pursuant to G. S. §§ 62-26.10 and 62-123.[8] During the period when the increases were being considered the Commission had held a conference with the officials of the electric company without notifying counsel for protestants. The Court said that this was "unfortunate," but held that there had been no prejudice.[9]

AUTHORIZATION FOR SALE OF SECURITIES

In *North Carolina ex rel. Util. Comm'n v. North Carolina Tel. and Tel. Co.*[10] the Court found that the Commission had in accordance with G. S. §§ 62-82 and 62-83[11] correctly required that the petitioner telephone company offer its unissued common stock for sale at $125.00 per share instead of the originally proposed price of $100.00.

[6] 244 N. C. 247, 93 S. E. 2d 151 (1956).
[7] 243 N. C. 193, 90 S. E. 2d 519 (1955).
[8] G. S. § 62-26.10 provides for the review of Commission action by the court; it states the scope of the review and specifically sets out six grounds for reversal or modification of the Commission's order if there has been prejudice. The statute further states that "the rates fixed . . . shall be prima facie just and reasonable." G. S. § 62-123 provides likewise that "rates . . . established by the Commission shall be deemed just and reasonable. . . ."
[9] In the conference a rider was approved which was found to be beneficial to the protestants, and, additionally, the electric company offered to withdraw it.
[10] 243 N. C. 46, 89 S. E. 2d 802 (1955).
[11] G. S. § 62-82 provides that there shall be no issue of securities of a utility company until and after investigation and approval by the Commission. G. S. § 62-83 provides that the Commission may grant or deny an application for approval, or may, if necessary, modify the conditions under which securities may be sold.

ADMINISTRATIVE PROCEDURE

In *Burton v. Reidsville*[12] the Court commented that although it cannot interfere arbitrarily with the authority of administrative officers, it may review the officers' acts to "determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law."[13]

In *Burlington City Bd. of Educ. v. Allen*[14] the Court held under G. S. § 115-125 that an individual whose land is to be appropriated by a board of education cannot appeal to the Superior Court until the final report of the appraisers, assigned by the Clerk of the Court to appraise property, has been returned.

CERTIORARI AND MANDAMUS

Several cases concerned the proper use of the writs of certiorari and mandamus. In *City of Sanford v. Southern Oil Co.*[15] defendant sought certiorari to review a special assessment of his property made to pay for improvements to adjacent streets. At the time, his appeal from the final assessment of the Board of Aldermen had not been perfected in accordance with G. S. § 168-89. The lower court dismissed the petition, and the Court affirmed because a writ of certiorari cannot ordinarily be granted where procedure for appeal has been provided by statute.

Certiorari may be used to correct errors of law where no statutory means for appeal exists to review the proceedings and determinations of lower tribunals.[16] It may also be used where a statutory means for appeal does exist, provided (1) the party seeking review was unable to perfect it within the statutory period, (2) this fact was due to no fault of his own, and (3) the grounds for review are meritorious.[17] In addition, the writ of certiorari may be used as an ancillary writ in a mandamus action where the petitioner seeks to have the records of an inferior court brought up for use in the trial before the higher court.[18]

In *Wilson Realty Co. v. City and County Planning Bd.*[19] the Court held that the lower court had proceeded incorrectly in considering an application for a writ of mandamus. The lower court had reviewed a decision of the Planning Board of the City of Winston-Salem under the assumption that an application for mandamus invokes the court's appellate capacity to review errors of the Board. The Court pointed out

[12] 243 N. C. 405, 90 S. E. 2d 700 (1956).
[13] *Id.* at 407, 90 S. E. 2d at 702.
[14] 243 N. C. 520, 91 S. E. 2d 180 (1956).
[15] 244 N. C. 388, 93 S. E. 2d 560 (1956).
[16] Wilson Realty Co. v. City and County Planning Bd., 243 N. C. 648, 92 S. E. 2d 82 (1956).
[17] City of Sanford v. Southern Oil Co., 244 N. C. 388, 93 S. E. 2d 560 (1956).
[18] *Ibid.*; Wilson Realty Co. v. City and County Planning Bd., 243 N. C. 648, 92 S. E. 2d 82 (1956).
[19] 243 N. C. 648, 92 S. E. 2d 82 (1956).

that a writ of certiorari is designed to review the proceedings of the lower tribunals and to correct errors therein, whereas mandamus compels performance of a clear legal duty, and is an exercise of original, not appellate, jurisdiction.

AGENCY AND WORKMEN'S COMPENSATION

AGENCY

Bank as Agent for Collection

In *First-Citizens Bank & Trust Co. v. Raynor*,[1] defendant Raynor and his wife had a joint checking account with plantiff bank pursuant to an agreement that the bank was "only . . . depositor's collecting agent" for all items deposited. The Credit Union, a co-defendant, mailed to Raynor its check, drawn on another bank, for $800.00, payable to the order of Raynor. His wife received the check and, without his knowledge or consent, wrote "for deposit to the account of the within named payee" on the back, and deposited it with plaintiff without signing his or her name.[2] The deposit slip also contained a statement to the effect that the bank was only the "depositor's collecting agent." The joint account showed a balance of $17.35, when the check was deposited, but the wife at that time drew a check for $800.00, which the bank paid. Learning of this, Raynor notified the Credit Union to stop payment, which it did, and the check was dishonored on presentment.

In affirming judgment of nonsuit in plaintiff's action to recover the $800.00, the Court pointed out that, by statute,[3] in order to constitute the transferee of a negotiable instrument, made payable to order, a holder in due course, there must be an indorsement by the payee; and that the drawer of a check may stop payment at any time before it is transferred to a holder in due course. Plaintiff was held not to be a purchaser, but merely an agent for collection,[4] and, at that, an agent for Raynor's wife, not Raynor, since he had not authorized his wife to deposit the check. The Court added: ". . . she is the one who is alone responsible to plaintiff for its money paid to her."[5]

[1] 243 N. C. 417, 90 S. E. 2d 894 (1956).

[2] Although the report of the case stated that Raynor's wife wrote the words on the back of the check, it is possible that they were stamped on the back by a bank teller, since stamps containing an identical statement are commonly used by banks. Moreover, if the teller had directed her to write anything on the back of the check, it seems likely that he would have directed her to sign her husband's name "by" her, or at least to sign her own name.

[3] G. S. § 25-35 (1953).

[4] Of course, an agent for collection, if properly such, may obtain a lien on the paper by issuing cash therefor.

[5] 243 N. C. 417, 421, 90 S. E. 2d 894, 897 (1956).

Effect on Master of Judgment Against Servant

In *Bullock v. Crouch*,[6] plaintiff alleged that he was entitled to judgment against defendant for the amount of damages determined by a Virginia court in a previous action by plaintiff against defendant's servant, the unsatisfied Virginia judgment having been transferred of record to the North Carolina court. The Court held that for the prior judgment to have binding effect upon defendant, he must have been a party to the action or in privity with the defendant therein. The Court cited an earlier decision[7] where it was held that the master, when sued by a plaintiff who has obtained an unpaid judgment against the servant, is free to prove less damages if he can, while the plaintiff cannot obtain a larger recovery than that awarded in the action against the servant.

McFarlane v. North Carolina Wildlife Resources Comm'n.,[8] was an action under the Tort Claims Act[9] for damages for injuries resulting from negligence of defendant's employee acting within the scope of his employment. Plaintiff had, however, already collected $9,715.00 in settlement of an action against the employee. The Tort Claims Act limited recovery against the State thereunder to $8,000.00.[10] Noting that plaintiff had already recovered more than the maximum for which defendant-employer could be liable, the Court affirmed dismissal,[11] stating, ". . . when the injured person sues the servant and recovers, he may not thereafter recover against the master a sum greater than the verdict against the employee."[12]

Dual Capacity of Servant: Imputability of Negligence

Dosher v. Hunt[13] presented the interesting situation of a defendant-servant having two masters[14] at once, with his negligence being imputable to one but not to the other. Plaintiff was passenger in her own car, being driven by defendant Hunt with plaintiff's consent or at her direction, thereby creating one master-servant relationship. There was also evidence that the defendant Hunt was in the general employment of the

[6] 243 N. C. 40, 89 S. E. 2d 749 (1955).
[7] Pinnix v. Griffin, 221 N. C. 348, 20 S. E. 2d 366 (1942).
[8] 244 N. C. 385, 93 S. E. 2d 557 (1956).
[9] G. S. § 143-291 (1951).
[10] A 1955 amendment increased the amount of damages that can be awarded to $10,000.00.
[11] The action had been "dismissed" by the Industrial Commission, which hears claims under the Tort Claims Act.
[12] 244 N. C. 385, 387, 93 S. E. 2d 557, 560 (1956). The Court obviously had in mind an *unsatisfied* judgment against the employee, because "if the servant satisfies the judgment against him[self], or obtains a verdict in his favor, no action will lie against the master." Bullock v. Crouch, *supra*, note 6, at p. 42, which the Court in the instant case cited to support its statement.
[13] 243 N. C. 247, 90 S. E. 2d 374 (1955).
[14] Strictly speaking, there was one master-servant relationship and one principal-agent relationship, the relation between defendant corporation and defendant Hunt being of a principal-agent nature.

defendant corporation at the time of the collision with another car, allegedly due to Hunt's negligence, which had resulted in injuries to plaintiff.

In reversing a judgment of nonsuit as to the individual defendant, the Court held that the doctrine of imputed negligence has no application in an action by the master against his servant to recover for injuries suffered by the master as a result of the servant's actionable negligence. But in affirming judgment of nonsuit as to the corporate defendant, the Court held that, since plaintiff had the right to control and direct the operation of her car, in her suit against a third party, the driver's negligence was imputable to her.

WORKMEN'S COMPENSATION

Conclusiveness of Commission's Fact-Finding

In *Moore v. Superior Stone Co.*,[15] plaintiff was injured when 300 dynamite caps exploded. The Industrial Commission found that at the time of the explosion, plaintiff was alone in the "doghouse" for the purpose of eating his lunch, and "out of curiosity or for reasons unknown, wired the blasting machine . . . and in his attempt to set off a single dynamite cap ignorantly and accidentally detonated the 300 dynamite caps beside the doghouse resulting in a terrific explosion and in the injuries which he sustained. . . ."[16] The Commission concluded that plaintiff's injury did not "arise out of the employment," and compensation was denied.[17] This conclusion was rejected by the Superior Court. In reversing the lower court, the Court stated that there was "sufficient circumstantial evidence" to sustain the Commission's conclusion, and, therefore, "the court below was without authority to reverse."[18] It was further noted that the burden rests upon the claimant to show that his injuries arose out of his employment, and that implicit in the Commission's conclusion was a finding that plaintiff had failed to carry the burden.[19]

[15] 242 N. C. 647, 89 S. E. 2d 253 (1955).

[16] *Id.* at 648, 89 S. E. 2d at 254.

[17] The condition antecedent to compensation is the occurrence of any injury (1) by accident (2) arising out of, and (3) in the course of employment. Wilson v. Mooresville, 222 N. C. 283, 22 S. E. 2d 907 (1942). Whether an accident arose out of the employment is not exclusively a question of fact. It is a mixed question of law and fact, but there must be some causal relation between the employment and the injury. Matthews v. Carolina Standard Corp., 232 N. C. 229, 60 S. E. 2d 93 (1950).

[18] In another recent case, Watson v. Harris Clay Co., 242 N. C. 763, 89 S. E. 2d 465 (1955), the Court stated: "When there is any competent evidence to support a finding of fact by the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary."

[19] See Henry v. Lawrence Leather Co., 231 N. C. 477, 57 S. E. 2d 760 (1950), for well-established rules of procedure regarding workmen's compensation cases.

Insurance Solicitor Not Employee

In *Hawes v. Accident Ass'n*,[20] plaintiff's intestate had been district manager, paid solely on commission basis, of the Durham agencies of the two defendant insurance companies. He was killed, July 11, 1952, en-route to Winston-Salem in his own auto to confer with defendants' state manager. However, eight days earlier, as a result of alleged shortages in his accounts, he had delivered to defendants a signed statement that, "I . . . agree not to solicit any business for Mutual or United Benefit [defendants] . . . after July 6, 1952, . . . at which time my licenses are cancelled."[21] Despite this, he had continued to solicit and sell insurance for defendants throughout the ensuing week prior to his death and had obtained fifteen solicitations, which were found in a brief case in his car following the accident. Defendants later issued policies on these fifteen solicitations. The Court affirmed the Industrial Commission's denial of compensation based upon the non-existence of the relationship of employee and employer, adding: "It would seem that when the deceased signed the statement that he agreed not to solicit . . . after 6 July . . . he had severed all relations with the companies."[22]

There was no mention of ratification in connection with defendants' issuance of the fifteen policies.[23] Indeed, had there been held to be ratification of a sort restoring the *status quo ante* July 6, 1952, the Court would doubtlessly have reached the same conclusion. For in affirming the Commission's conclusion, the Court, without mentioning the term "independent contractor," cited seven cases,[24] in each of which there had been a finding of that relationship.[25] Of these cases, only one (a North

[20] 243 N. C. 62, 89 S. E. 2d 739 (1955).

[21] *Id.* at 63, 89 S. E. 2d at 740. [22] *Id.* at 64, 89 S. E. 2d at 741.

[23] In Dempsey v. Chambers, 154 Mass. 330, 28 N. E. 279 (1891), plaintiff ordered coal from defendant. One McCullock, who was not at the time in the employ of defendant, delivered the coal without defendant's knowledge, and while making delivery broke plaintiff's plate glass window. With full knowledge of the accident and of the delivery by McCullock, defendant billed plaintiff for the coal. This was held to be ratification of McCullock's delivery, making defendant liable for the broken glass. Holmes, J., stated: "The ratification goes to the relation, and establishes it *ab initio*."

"The ratification of an unauthorized act is equivalent to a prior authority to perform it." Wittlin v. Giacalone, 171 F. 2d 147 (1949). But for cases *contra*, see Jones v. Mutual Creamery Co., 81 Utah 223, 17 P. 2d 256, 85 A. L. R. 908 (1932); J. C. Penney Co. v. Gravelle, 62 Nev. 439, 155 P. 2d 477 (1945).

[24] Cited by the Court were: McGraw v. Mills, Inc., 233 N. C. 524, 64 S. E. 2d 658 (1951) (building painter); Perley v. Paving Co., 228 N. C. 479, 46 S. E. 2d 298 (1948) (licensed contract hauler); Hayes v. Elon College, 224 N. C. 11, 29 S. E. 2d 137 (1944) (electricians); Beach v. McLean, 219 N. C. 521, 14 S. E. 2d 515 (1941) (contractor to dismantle and move machinery); Bryson v. Lumber Co., 204 N. C. 664, 169 S. E. 276 (1933) (same); Mutual Life Ins. Co. v. State, 71 N. D. 78, 298 N. W. 773 (1941) (to recover money paid under protest to Workmen's Compensation Bureau as assessments upon commissions paid by plaintiff to agents); Income Life Ins. Co. v. Mitchell, 168 Tenn. 471, 79 S. W. 2d 572 (1935) (insurance premium collector killed by an irate customer).

[25] The Workmen's. Compensation Act covers only employees according to the common law concept; thus it does not apply to independent contractors. See Hayes v. Elon College, 224 N. C. 11, 29 S. E. 2d 137 (1944).

Dakota case)[26] involved insurance solicitors; although another (a Tennessee case)[27] dealt with an insurance premium collector. Research discloses no prior North Carolina decisions involving insurance solicitors;[28] therefore, the instant case apparently stands, albeit subtly, for the proposition that an insurance solicitor is without the coverage of the Act in North Carolina.[29]

Occupational Disease

The Court divided three ways in interpreting G. S. § 97-57,[30] in *Mayberry v. Oakboro Granite and Marble Co.*[31] The employee had been disabled by the occupational disease, silicosis. His last injurious exposure to silica dust had been on February 19, and defendant employer's insurance by defendant carrier expired on the preceding January 31, leaving the employer with no insurance. The Commission ordered the carrier to pay the entire compensation. In splitting three ways,[32] the only proposition on which four members of the Court agreed was that the carrier should pay at least a *pro rata* part of the award.

[26] Mutual Life Ins. Co. v. State, 71 N. D. 78, 298 N. W. 773 (1941).

[27] Income Life Ins. Co. v. Mitchell, 168 Tenn. 471, 79 S. W. 2d 572 (1935).

[28] Rogers v. Imperial Life Ins. Co., 2 I. C. 335 (1931), involved an insurance collector, but there was no independent contractor question raised, since the collector worked out of defendant's office, reporting to work each work-morning just as an ordinary office employee would do.

[29] For strong argument that insurance solicitors should be regarded as employees, see Buscheck, *Life Insurance Solicitor—Employee or Independent Contractor*, 25 *Geo. L. J.* 894 (1937). Also see MECHEM, OUTLINES OF AGENCY §§ 357, 358, 446-452 (4th ed. 1952).

The contract in the instant case between the solicitor and defendant companies expressly negated an employer-employee relationship, but that, of itself, is not controlling. "The rights of the parties under the contract are not to be determined solely by the names they call each other, but rather by intent and meaning of the terms of the instrument." Kesler Construction Co. v. Dixson Holding Co., 207 N. C. 1, 5, 175 S. E. 843, 845 (1934).

For treatment of traveling employees under workmen's compensation acts, see Note, 23 N. C. L. REV. 159 (1945).

[30] G. S. § 97-57 (1950) states: "In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

"For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious."

[31] 243 N. C. 281, 90 S. E. 2d 511 (1955).

[32] The three interpretations were: (1) The Chief Justice and two Justices were of the opinion that since the carrier was not on the risk on the date when disablement occurred, the employer should pay the full award; (2) two Justices thought that the exposure in February, being less than thirty working days and less than a calendar month, should be disregarded as non-injurious, and that, since the carrier was on the risk during the period of injurious exposure prior to February, the award should be paid in full by the carrier; (3) the remaining two Justices decided that the last thirty working days when the employee was exposed constituted the period of last injurious exposure and the basis of the employer's liability, and that, since the carrier was on the risk during part but not all of this period, the carrier should be liable *pro rata* according to the number of working days in this period it was on the risk.

Request for Review of Award

G. S. § 97-47 requires that a request for review of an award for changed conditions must be made within twelve months of the claimant's last payment of compensation. In *Paris v. Carolina Builders Corp.*,[33] plaintiff had on November 1, 1952, received a draft payable to him as lump sum payment for permanent partial loss of use of his right hand. He cashed it at a local bank and it was paid by the drawee bank on November 7, 1952. Plaintiff's letter requesting a rehearing was received by the Industrial Commission on November 4, 1953. Plaintiff contended that in the absence of an agreement to the contrary, the delivery and acceptance of a check is not payment until the check is paid; but the Court held that when a draft or check is accepted in payment of an obligation and is paid on presentation, payment ordinarily relates back to the time of delivery to the payee.

Unemployment Compensation: "Available for Work"

The Court held[34] a claimant for unemployment compensation "available for work" within the meaning of G. S. § 96-13,[35] where the claimant, a 56-year-old female textile worker with training in no other type of work, became a Seventh-Day Adventist,[36] lost (because of absence) her third-shift job[37] in a textile mill which she had held for thirteen years, and sought only first-shift[38] work in the mills in her area, which, since they operated only five days a week (Monday through Friday), would have left her free on her Sabbath. The Employment Security Commission found that, by eliminating herself from job opportunities on her Sabbath, she voluntarily became not "available for work," mainly on the strength of the fact that ninety-five per cent of all job openings in textile mills in the area were for third-shift workers. In reversing, the Court held that G. S. § 96-13 must be construed with G. S. § 96-14, which provides that a person only has to apply for "suitable work"; and that work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute.

"Widow" and "Dependents" within Meaning of Act

In *Wilson v. Utah Construction Co.*,[39] liability of the employer being admitted, the problem was determining who were the proper dependents. Claiming were: (1) deceased's widow and their three children, and a

[33] 244 N. C. 35, 92 S. E. 2d 405 (1956).
[34] In the Matter of Miller, 243 N. C. 509, 91 S. E. 2d 241 (1956).
[35] The statute, which sets forth the conditions to eligibility for unemployment compensation, makes availability for work one such condition.
[36] A religious denomination which observes the period from sundown Friday to sundown Saturday as Sabbath.
[37] From 11 p.m. till 7 a.m.
[38] From 7 a.m. till 3 p.m.
[39] 243 N. C. 96, 89 S. E. 2d 864 (1955).

child of the widow born out of wedlock, of which the deceased was not the father; and (2) three children of deceased's common law wife, of whom he was not the father, but who were living with and being supported by him at the time of his death, plus a child of the common law wife born after his death. The Industrial Commission allowed compensation to the three children of the common law wife and the widow and three children of deceased, one-seventh each. The Superior Court confined the award to the widow and decedent's three children by her.

The Court (1) affirmed the elimination of the after-born child of the common law wife, because ". . . there is no sufficient evidence in the record tending to show that this child was an acknowledged illegitimate child of the deceased so as to entitle it to compensation";[40] and (2) affirmed exclusion of the other children of the common law wife on the ground that, by statute, "the widow and children 'shall be conclusively presumed to be wholly dependent for support upon the deceased employee.'[41] And they 'shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons.' "[42]

The Court added that the children of the common law wife were further barred by an earlier decision, *Fields v. Hollowell,* 238 N. C. 614, 78 S. E. 2d 740 (1953), which denied compensation to a deceased employee's common law wife, granting it instead to his mother, because "Grave considerations of public policy forbid it. . . . such a claim is conceived in sin, and shapened in iniquity."

This "public policy" test apparently overrides the "actual dependency" test promulgated in G. S. § 97-39, which, after stating that a widow, a widower, "and/or" a child shall be conclusively presumed to be wholly dependent, declares: "In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident. . . ."

BUSINESS ASSOCIATIONS

THE CORPORATE ENTITY

A recent holding concerning the legal existence of the one-man corporation has evoked critical comment.[1] The Court held in a rehearing of *Park Terrace, Inc. v. Phoenix Indemnity Co.*[2] that because the statutes of North Carolina require three or more persons to obtain a certificate of

[40] *Id.* at 98, 89 S. E. 2d at 867.
[41] G. S. § 97-39 (1950).
[42] 243 N. C. 96, 99, 89 S. E. 2d 864, 867, citing G. S. § 97-38 (1) (1955).

[1] See Latty, *The Close Corporation and the New North Carolina Business Corporation Act,* 34 N. C. L. Rev. 432, 441-44 (1956); Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation,* 34 N. C. L. Rev. 471 (1956); Note, 34 N. C. L. Rev. 531 (1956).
[2] 243 N. C. 595, 91 S. E. 2d 584 (1956).

incorporation[3] and to manage the affairs of the corporation,[4] and require that at least more than one perform other corporate functions,[5] a corporation with a single stockholder is a "dormant corporation." Accordingly, where any one individual performs all of the corporate functions, he is the real party in interest, and "will not be permitted to use the corporation of which he is the sole beneficial owner, to cloak his actions as an individual."[6] Therefore, the corporate entity can be disregarded, and any one seeking legal redress against the corporation may look immediately to the "one man."

Elsewhere discussed[7] is *Lexington Insulation Co. v. Davidson County,*[8] in which a corporate plaintiff was refused *quantum meruit* recovery for work performed under a contract concededly illegal because entered into by a public official who was also an officer of the plaintiff and owner of one-third of its stock.

RESIDENCE OF A DOMESTICATED FOREIGN CORPORATION

For discussion of a case dealing with the subject of residence of a domesticated foreign corporation, see *Venue* under TRIAL AND APPELLATE PRACTICE.

PARTNERSHIPS

In *Ewing v. Caldwell,*[9] a demurrer to the complaint was sustained by the Court because the plaintiffs, devisees of the deceased partner of the defendant, failed to join the personal representative of the deceased partner as a party plaintiff in accordance with G. S. §§ 59-76 and -77. These statutes, as construed by the Court, give the personal representative the exclusive right to require an accounting of partnership assets.

CIVIL PROCEDURE (PLEADINGS AND PARTIES)

PARTIES

Real Party in Interest

In *Rand v. Wilson County,*[1] plaintiffs were commissioners appointed by a consent judgment to sell, pay taxes on, and distribute the proceeds of real property. It was held that the commissioners were trustees of an

[3] G. S. § 55-2 (1953).
[4] G. S. § 55-48 (1953) (at last three directors required).
[5] See G. S. §§ 55-5 and -6 (1953).
[6] Park Terrace, Inc. v. Phoenix Indemnity Co., 243 N. C. 595, 597-98, 91 S. E. 2d 584, 587 (1956).
[7] See MUNICIPAL CORPORATIONS, p. 239 *infra.*
[8] 243 N. C. 252, 90 S. E. 2d 496 (1956).
[9] 243 N. C. 18, 88 S. E. 2d 774 (1955).

[1] 243 N. C. 43, 89 S. E. 2d 779 (1955).

express trust within the meaning of G. S. § 1-63 and were authorized, without joining the beneficial owners, to bring the action to recover taxes paid on the property under protest.

Intervention

In an action[2] to recover for work done and to establish and enforce a lien on realty, defendant did not answer, but three other persons, asserting a prior lien, asked for leave to intervene. The Court reversed an order permitting such intervention. It held that the intervenors were proper, but not necessary parties, and that ordinarily permitting their intervention would be discretionary under G. S. § 1-73.[3] However, in this case, thanks to the absence of an answer, the Court found that there was no controversy in which to intervene.[4] Plaintiff was entitled to his default judgment against defendant without delay.

In such a situation there would seem to be no compelling reason why plaintiff could not be given his separate judgment against the defendant, with the action continuing for the purpose of litigating priorities between plaintiff and the intervenors. That question must eventually be settled; and, with the parties already before the court, why require an independent action? However, in the principal case, there had been a foreclosure by the holder of a lien superior to any asserted in this action, and surplus sale proceeds had been deposited with the clerk. The Court observed that, therefore, the appropriate remedy for the intervenors would seem to be under G. S. § 45-21.32.[5]

Capacity to Sue and Be Sued

At common law an unincorporated association cannot sue or be sued as a legal entity, because it has no existence separate and distinct from

[2] Childers v. Powell, 243 N. C. 711, 92 S. E. 2d 65 (1956).

[3] The statute provides that ". . . when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. . . ." Intervention is explicitly permitted when the action is for the recovery of real or personal property and one not a party has an interest in the subject matter. Compare FED. R. CIV. P. 24 (b), which permits intervention when an applicant's claim or defense and the main action have a question of law or fact in common.

[4] If there is literally no controversy, then the part of G. S. § 1-73 quoted in note 3 (and in the Court's opinion) would seem to be inapplicable, with the result that there could be no intervention by a person who would be a necessary party if an answer were filed. In fact, this seems logically to follow if the principal case is sound. The difference between necessary and proper parties is that the former may intervene as of right, the latter only in the court's discretion. There is no difference between them bearing upon whether there is an existing controversy between plaintiff and defendant.

Compare with the principal case: Sanders v. May, 173 N. C. 47, 91 S. E. 526 (1917) (intervention after judgment not permitted); Dawson v. Thigpen, 137 N. C. 462, 49 S. E. 959 (1905) (claim and delivery proceeding in which, after others intervened, plaintiff took a nonsuit and the case was continued to determine the claims of the intervenors).

[5] This statute authorizes a special proceeding to determine title to such surplus funds paid to the clerk.

that of its members.[6] G. S. § 1-97 (6), as interpreted in *Stafford v. Wood*,[7] modifies the rule as to unincorporated labor unions only if the union is doing business in North Carolina in the sense of performing in this state the acts for which it was formed. One ground of defendant union's demurrer in *Youngblood v. Bright*[8] was that the court did not have jurisdiction because the union was not subject to suit as a separate entity. The lower court overruled the demurrer, because prior to demurring the union had made an application for an extension of time. It thus classified the objection raised by the demurrer as one involving lack of jurisdiction over the person, which is waived by a prior general appearance.

The Supreme Court agreed that a prior general appearance had been made and that, under G. S. § 1-134.1, this waived any defect in service of process. But it held that no statute authorized suit against the union unless it was doing business in North Carolina and further held that the general appearance was no waiver of any objection grounded upon this. Thus, in effect, it treated the question as one of jurisdiction over the subject matter. It remanded the case for a determination as to whether the union was doing business in the state, with a direction that the demurrer be treated as a motion to dismiss.[9]

Joinder of Parties and Causes[10]

In two cases the Court held that there was a misjoinder of parties and causes and dismissed the action.

Tart v. Byrne[11] involved a number of causes of action against three defendants, though they were not separately stated as required by Rule 20 (2) of the Supreme Court. Against the two administrators of an estate plaintiffs alleged causes of action for decedent's breach of contract, negligence in breaching contract, defamation, fraud, and suppression of bids at a judicial sale, and asked for an accounting. Against the administrators and the trustee of a deed of trust executed by plaintiffs in connection with business dealings between plaintiffs and decedent, plaintiffs asked to have the deed of trust declared void for want of proper execution and fraud and to have a foreclosure proceeding under the deed of trust set aside.

Perhaps plaintiffs attempted to pack in a little too much; and it may

[6] Hallman v. Union, 219 N. C. 798, 15 S. E. 2d 361 (1941).
[7] 234 N. C. 622, 68 S. E. 2d 268 (1951).
[8] 243 N. C. 599, 91 S. E. 2d 559 (1956).
[9] It should be noted that since the suit was begun before July 1, 1955, G. S. § 1-69.1, providing in part that, "All unincorporated associations . . . may hereafter sue or be sued . . . to the same extent as any legal entity established by law . . . ," had no application.
[10] See Brandis and Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N. C. L. Rev. 405 (1956), for other cases involving joinder which are within the volumes covered by this survey.
[11] 243 N. C. 409, 90 S. E. 2d 692 (1955).

well be true that, technically, some of the causes against the administrators did not affect the trustee. However, as far as appears, the trustee was acting for the benefit of the administrators and presumably any recovery by plaintiffs against the administrators could have been applied to discharge or reduce the indebtedness secured by the deed of trust. According to the complaint, the deed was given as part of the contract which the decedent allegedly breached. Hence, the allegations regarding the deed were not wholly unconnected with the basic claims against the administrators, but were, in a practical sense, ancillary thereto.[12]

In *Orkin Exterminating Co. v. O'Hanlon*[13] plaintiff brought an action against three individual defendants and their corporate employer to enjoin violation of separate contracts not to compete, made at different times by the individual defendants. It was held that all causes did not affect all parties as required by G. S. 1-123.

The situation was complicated by the fact that one contract was not made with the actual plaintiff, but was with a related corporation of similar name. However, the opinion seems to mean that dismissal for misjoinder would follow even if all three contracts had been with the same plaintiff. This seems entirely too narrow, and presents one more illustration that North Carolina has been all too little affected by modern procedural trends. The three individual defendants, allegedly guilty of breaching virtually identical covenants not to compete, were working for a common employer (the corporate defendant). The action was for injunctive relief (no mention of any claim for damages being found in the opinion), and common questions of law and fact were clearly presented.

Since defendants were associated in a common enterprise (though there was no allegation of conspiracy), in at least a broad sense each defendant was affected by the causes against the others—if, indeed, there were separate causes rather than a single equitable cause. To require three law suits in such a situation is to allow technicality to supplant practicality.

In *Veasey v. King*,[14] plaintiffs, after instituting action to recover permanent damages to realty, sold the land. The clerk permitted the new owners to be joined, and they adopted the material allegations of the

[12] Compare the creditors' bill and similar cases discussed in Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. Rev. 1, 19-30 (1946).

[13] 243 N. C. 457, 91 S. E. 2d 222 (1955).

[14] 244 N. C. 216, 92 S. E. 2d 761 (1956). Misjoinder is the ground of demurrer specified in the Supreme Court's statement of the history of the case. The record indicates that the demurrer was on the ground (among others not here relevant) that the purchasers were not real parties in interest. Technically, therefore, it may be said that no joinder question was presented, though the Court proceeded on a contrary assumption. However, the decision seems clearly correct even if it be assumed that only a real party in interest question was presented. When the defendant injected the title issue, the new owners certainly had an interest in that.

complaint. Defendant then demurred for misjoinder of causes and parties. The Court, *per curiam,* affirmed judgment overruling the demurrer, holding that the new owners were at least proper parties, entitled to defend their title against the assault made on it in defendant's answer, even though they could not participate in any award of damages.

This result is both reasonable and commendable. Once the answer put the title in issue, both the original plaintiffs' damages and the additional plaintiffs' ownership depended upon resolution of that issue. Though the Court cited no authority, there is at least a rough analogy to the cases permitting joinder of plaintiffs who seek to recover for damage to their respective separate interests in the same property.[15]

In *Hall v. DeWeld Mica Corp.*,[16] a husband and wife alleged that clouds of dust given off by a mica mine and plant constituted a nuisance and continuing trespass, damaged plaintiffs and their property in a certain sum, caused fear and mental anguish because of the threat to the health of plaintiffs and their children, and resulted in a greater amount of labor in keeping the premises clean. Plaintiffs sought damages and an injunction. In affirming an order overruling defendant's demurrer for misjoinder of parties and causes and for "improper misjoinder" of causes, the Court held that plaintiffs had stated but one cause of action[17] (for trespass) in which they had a joint interest.[18] In this decision, practicality justifiably outweighed technicality.

In an action by a bank on a note secured by a chattel mortgage on defendant's truck, defendant alleged that he paid the premium on an insurance policy, payable to the bank and defendant; that the bank wrote the policy as agent of the insurer; and that the bank wrongfully failed to require payment under the policy when the truck was damaged. The insurance company, brought in as a party on defendant's motion, demurred on the ground of misjoinder of parties and causes. The

[15] See, for example, Peed v. Burleson's, Inc., 242 N. C. 628, 89 S. E. 2d 256 (1955); Wilson v. Motor Lines, 207 N. C. 263, 176 S. E. 750 (1934).

[16] 244 N. C. 182, 93 S. E. 2d 56 (1956).

[17] The other allegations were held to affect only the measure of damages. *Cf.* Snotherly v. Jenrette, 232 N. C. 605, 61 S. E. 2d 708 (1950), where the Court rejected the one-cause-of-action solution. The Court in the principal case pointed out that it was not passing upon the admissibility of evidence to prove the elements of damages alleged. This may cause trouble. Mental anguish is obviously individual and not joint, as the defendant pointed out. Nevertheless, it is to be hoped that plaintiffs will not be restricted in their proof, particularly since, for the whole complex of annoyances, they claimed only a modest $1,200.

[18] The precise nature of plaintiffs' ownership is not stated, though tenancy by the entirety seems inferrable. However, whatever the tenancy, those who share title may join to sue for damages to their respective interests. See note 15. *Cf.* Chambers v. Dalton, 238 N. C. 142, 76 S. E. 2d 162 (1953), where owners of separate properties, alleging damage by virtue of defendant's breaches of similar covenants, were not permitted to join.

Though North Carolina seems not to have decided the question, many courts will permit owners of separate properties to join in seeking an injunction. Krocken v. Westmoreland Planing Mill Co., 274 Pa. 143, 117 A. 669 (1922); CLARK, CODE PLEADING § 57 (2d Ed. 1947).

Court held that there was no misjoinder.[19] The rationale was that the allegations tied the bank and the insurer together in denying defendant the benefit of the insurance, that they presented the insurance transaction as a part of the loan transaction, and that since both the bank and defendant were named insureds, the presence of all parties was necessary[20] to a final determination of the matters in controversy.

The holding represents a liberal, and desirable, approach to the problem of joinder. If there is any technical violence done to the statutes, which seems most doubtful,[21] it seems justified by the eminently practical considerations of speedy disposition of cases and of the possibility, as pointed out by the Court, of inconsistent verdicts in separate actions depriving defendant of all relief. For another case involving joinder, see *Guarantor* under CREDIT TRANSACTIONS.

COUNTERCLAIMS

It has been held in North Carolina that defendant's motion for nonsuit of plaintiff is equivalent to a voluntary nonsuit on his transaction clause counterclaim.[22] The Court, by way of dictum, has again paid homage to the rule.[23]

It is difficult to find any rational basis for such a result. About the only explanation ever given is that defendant "cannot put its adversary out of court and at the same time retain the cause in court."[24] This is nothing more than a restatement of the rule itself.

There are sound reasons for abolishing the rule. While all transaction clause counterclaims are not compulsory in North Carolina, some of them are.[25] The policy behind this is, of course, to dispose of the entire

[19] Wachovia Bank & Trust Co. v. Currin, 244 N. C. 102, 92 S. E. 2d 658 (1956).

[20] There may well be some doubt as to whether the insurer was a necessary, as distinguished from a proper party. However, the appeal was not from the refusal of the lower court, in its discretion, to make the insurer a party. The appeal was from a judgment sustaining a demurrer for misjoinder, filed by the insurer after being made a party.

[21] A dissenting judge took the position that the insurer's only liability was on the policy; that it was a matter of indifference to the insurer whether it owed plaintiff or defendant; and that its liability was not affected by the question as to whether defendant was indebted to the plaintiff. As a practical matter this thesis is highly questionable. Since the policy was apparently payable to plaintiff and defendant, as their interests might appear, the insurer's liability, if any, to defendant, might well depend upon the extent of its liability to plaintiff. That, in turn, would depend upon the existence of the indebtedness. If either plaintiff or defendant had sued the insurer on the policy, the other would certainly have been a proper, and perhaps a necessary party.

[22] Bourne v. Southern Ry., 224 N. C. 444, 31 S. E. 2d 382 (1944). The case is not one in which a trial judge was reversed for allowing a counterclaim to go to the jury after nonsuiting plaintiff. The judge nonsuited plaintiff, but did not continue with the trial. The counterclaim was left ostensibly pending. Subsequently the question arose as to whether the action was still pending and the court held that it was not.

[23] Bradham v. McLean Trucking Co., 243 N. C. 708, 91 S. E. 2d 891 (1956).

[24] Bourne v. Southern Ry., 224 N. C. 444, 446, 31 S. E. 2d 382, 383 (1944).

[25] See, for example, Johnson v. Smith, 215 N. C. 322, 1 S. E. 2d 834 (1939). It may also be pointed out that after a transaction clause counterclaim is interposed,

controversy in a single action. A typical case is that involving an automobile accident, in which, if defendant wishes to claim damages, he can do so only by way of counterclaim. It seems never to have been questioned that plaintiff, without waiving his right to go to the jury, may prevent the counterclaim from going to the jury if defendant's evidence is insufficient. When the evidence of defendant is sufficient and that of plaintiff is insufficient, it seems perfectly clear that, by moving for an involuntary nonsuit, the defendant should be able to keep plaintiff's claim from the jury without waiving his right to have his own claim considered. Even though the motion precedes the introduction of defendant's evidence, he should be entitled to present his evidence in an attempt to demonstrate that he can make out a case. It seems utterly foolish to require a new action when a partially educated jury is already in the box and the parties, attorneys and witnesses are in court.

It has been said by the Court that a counterclaim is designed to secure to a defendant the full relief which a separate action would have provided on the same set of facts.[26] If this is true, then why should defendant be put out of court when he successfully moves to nonsuit plaintiff?

In a recent case,[27] where the question of forcing defendant to take a nonsuit on his counterclaim was not raised, the Court held that defendant's motion for nonsuit should have been allowed. Treating matter in the answer as sufficient to allege a cross action not decided by the trial court, the cause was remanded for trial of the cross action.[28] The decision would seem to make it clear that there is no compelling reason for requiring defendant to bring a separate action to adjudicate his claim.[29]

Following an early federal decision,[30] North Carolina has held that, as applied to national banks, the statutory penalty for usurious interest

plaintiff may not discontinue the action by taking a voluntary nonsuit. Shearer v. Herring, 189 N. C. 460, 127 S. E. 519 (1925); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1645 (2d Ed. 1956).

[26] Bourne v. Board of Financial Control, 207 N. C. 170, 176 S. E. 306 (1934).

[27] Andrews v. Burton, 242 N. C. 93, 86 S. E. 2d 786 (1955), discussed in *Case Survey*, 34 N. C. L. REV. 1, 16 (1955).

[28] In view of the fact that the Court has on occasion defined counterclaim as a cross-action by defendant against plaintiff, Lummus Cotton Gin Co. v. Wise, 200 N. C. 409, 157 S. E. 20 (1931), the *Andrews* case, *supra* note 27, seems to be a clear-cut departure from the rule. *Cf.* G. S. § 1-222, which explicitly authorizes the granting of affirmative relief to a defendant.

[29] One state has expressly abolished the rule by statute, Mo. R. S. A. § 847.103 (1949); New York has adopted the modern rule by decision, Lincoln Nat'l Bank v. John Pierce Co., 228 N. Y. 356, 127 N. E. 253 (1920); and the federal courts allow the counterclaim to persist where it is supported on independent jurisdictional grounds, Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336 (9th Cir. 1953).

[30] Barnet v. National Bank, 98 U. S. 555 (1878). The Federal Rules have been construed as permitting a counterclaim for usurious interest arising out of the same transaction alleged in the complaint. John R. Alley & Co. v. Fed. Nat'l Bank, 124 F. 2d 995 (10th Cir. 1942).

could be recovered only by separate suit and not by counterclaim.[31] In *Commercial Credit Corp. v. Robeson Motors*,[32] a case of first impression, a corporation was suing on a debt. The Court held that the debtor could by counterclaim recover the statutory penalty for usurious interest paid to the lender in connection with separate and independent transactions.

An action to recover a statutory penalty is deemed an action in contract.[33] Since the contract counterclaim was in existence at the commencement of the action, it is not required by G. S. § 1-137 (2) that the counterclaim relate to the contract set forth in the complaint.[34] The Court was careful to point out that plaintiff's action must be in contract in order to allow such a counterclaim under the statute.[35] The decision is in accord with the modern trend of settling all disputes between the parties in one action.

THIRD-PARTY PRACTICE

In *Phillips v. Hassett Mining Co.*,[36] plaintiffs were suing to recover compensation for the wrongful taking of and damage to land caused by mining operations. The original defendant answered and filed a cross complaint for contribution against two other companies engaged in similar operations. These companies were made parties and answered. Plaintiffs replied, asserting that if the additional defendants were made parties, the complaint would be amended to allege the same cause of action against them. One of the additional defendants demurred to the cross action and the other moved for judgment on the pleadings[37] dis-

[31] Bank v. Wysong & Miles Co., 177 N. C. 380, 99 S. E. 199 (1919), overruling Bank v. Ireland, 122 N. C. 571, 29 S. E. 835 (1898).

[32] 243 N. C. 326, 90 S. E. 2d 886 (1955). A rather curious adjunct to the principal case is Commercial Credit Corp. v. Barnes, 243 N. C. 335, 90 S. E. 2d 893 (1955), in which the facts were the same, but in addition to his counterclaim defendant alleged that his claim for relief was the same as that set forth in a pending action (the principal case). The order sustaining plaintiff's demurrer on the ground, among others, that defendant's pleading showed the pendency of another action between the same parties was not challenged on appeal. Under Rule 28, Rules of Practice of the Supreme Court, the exception to the order was taken as abandoned and the order sustaining the demurrer was affirmed.

[33] Commercial Finance Co. v. Holder, 235 N. C. 96, 68 S. E. 2d 794 (1951).

[34] The party against whom an action to recover on a note or other evidence of debt is brought may plead the penalty for usurious interest paid as a counterclaim under G. S. § 24-2, but that statute restricts the counterclaim to interest paid on the obligation on which plaintiff is suing. It is inapplicable to counterclaims with reference to independent transactions. Commercial Finance Co. v. Holder, *supra* note 33.

[35] Counterclaims for usurious interest were held to be improper in Commercial Finance Co. v. Holder, *supra* note 33, where plaintiff was suing in tort for conversion, and in North Carolina Mortgage Corp. v. Wilson, 205 N. C. 493, 171 S. E. 783 (1933), an action to recover possession of land. In some instances plaintiff may sue either in contract or tort. Query: Is it wise to adopt a rule which allows plaintiff to control the propriety of a counterclaim by the selection of one of two possible theories of action?

[36] 244 N. C. 17, 92 S. E. 2d 429 (1956).

[37] In a dictum the Court stated that though the motion for judgment on the pleadings may sometimes be used by defendant, it ordinarily is in essence a demurrer by plaintiff to the answer. (If a reply admits the allegations of an affirmative

missing plaintiffs' action and the cross action. Both motions were granted. The original defendant appealed[38] and the rulings on both motions were reversed.

In dealing with the motion for judgment on the pleadings, the Court held that as the reply did not allege a cause of action against additional defendants (merely stating an intention to do so), they were strangers as to plaintiffs and the original action was not dismissible on any motion made by them. The Court emphasized that the function of the reply is to deny new matter and answer any counterclaim or cross action[39] and that the cause of action is to be alleged in the complaint.[40] The result reached by the Court seems clearly correct because, considering all of the pleadings, judgment thereon against the plaintiffs was not justified. But the reply in effect alleged wrongful acts by the additional defendants. As a practical matter (though the practice is certainly not to be commended) it should make little difference that these allegations were contained in a writing labeled "reply" instead of in a writing labeled "complaint."

PLEADING

Amendment

Orkin Exterminating Co. v. O'Hanlon[41] presents a most peculiar procedural history. A corporation alleged three virtually identical contracts with three different defendants. The contracts were attached to the complaint as exhibits. A reading of the exhibits disclosed that one of the contracts had not been made with plaintiff, but was made with a related corporation of similar name. The lower court permitted amendment of complaint and process to *substitute* the related corporation as *sole* plaintiff. This happy solution resulted in having a plaintiff who was a stranger to two of the contracts instead of one. This alone justified the Supreme Court's conclusion that the amendment should not have been permitted. It would have been better had that been the sole ground assigned for the conclusion; but, in fact, the opinion indicates that, even if all the contracts had been with the substituted plaintiff, the substitution

defense, and its allegations in avoidance are insufficient, the motion should clearly be available to defendant.)

[38] Apparently plaintiffs did not appeal. One assumes that plaintiffs interpreted the judgment below as confined to a dismissal as against the additional defendants—not as a dismissal of the cause against the original defendant.

[39] See Scott v. Bryan, 96 N. C. 289, 3 S. E. 235 (1887), where a cause of action introduced in the reply without objection was treated as an amendment to the complaint. See also McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §§ 1263, 1265 (2d Ed. 1956).

[40] Under FED. R. C. P. 13 (b) a reply may state a counterclaim. Downey v. Palmer, 114 F. 2d 116 (2d Cir. 1940); Warren v. Indian Refining Co., 30 F. Supp. 281 (D. C. N. D. Ind. 1939).

[41] 243 N. C. 457, 91 S. E. 2d 222 (1955), discussed also under *Joinder of Parties and Causes.*

would have been improper. This represents a rather technical approach to the problem of the scope of the amendment power.

In *Wall v. England,*[42] the trial court, upon finding that an amended answer contained matter which had been ordered stricken from the original answer at a prior term, struck the entire amended further answer. The Supreme Court affirmed. The privilege to plead further given at the prior term did not entitle the amending pleader to reiterate verbatim or in substance the matter ordered stricken. One wonders how repleading counsel could conceivably have expected any other result.

Evidentiary and Ultimate Fact Allegations

The distinctions between evidentiary facts, ultimate facts and conclusions of law are often nebulous and the cases involving them often lack value as precedents except in precisely identical contexts. It is possible to do little more than lump them together as examples of what the court has done.

In *East Carolina Lumber Co. v. Pamlico Co.,*[43] the Court held that an allegation that a deed is void for want of legal authority to convey states ultimate facts. In *Billings v. Taylor,*[44] plaintiff alleged that defendant contractor caused great clouds of dust to settle on plaintiff's crop, resulting in damage which defendant could have avoided by the use of available water facilities. It was held that the allegations disclosed ultimate facts sufficient to state a cause of action.[45]

Election of Remedies

The ancient doctrine of election of remedies still operates in North Carolina to trap the unwary.

In *Davis v. Hargett,*[46] plaintiff alleged that defendants, by fraud and duress, had induced him to release a cause of action worth a substantial sum. He asserted that he was electing to affirm the compromise settlement and was bringing the present action to recover damages for the difference between the true worth of the original cause and the consideration received under the settlement. The Court held that when the duress was removed plaintiff had the right either to affirm or to rescind the compromise settlement, the remedies being inconsistent and requiring an election, and that in the present action he had affirmed the settlement and was bound by its terms. Since the agreement had been carried out in exact conformance with its terms, plaintiff could not recover damages.[47]

[42] 243 N. C. 36, 89 S. E. 2d 785 (1955).
[43] 242 N. C. 728, 89 S. E. 2d 381 (1955).
[44] 243 N. C. 57, 89 S. E. 2d 743 (1955).
[45] See also Hinson v. Dawson, 244 N. C. 23, 92 S. E. 2d 393 (1956), discussed under DAMAGES.
[46] 244 N. C. 157, 92 S. E. 2d 782 (1956).
[47] Such cases as Hutchins v. Davis, 230 N. C. 67, 52 S. E. 2d 210 (1949), were distinguished by the Court. There the defrauded purchaser affirmed the contract

In *Surratt v. Chas. E. Lambeth Ins. Agency, Inc.*,[48] plaintiff was suing to recover damages for fraudulent representations. In a previous action involving the same parties, plaintiff had moved to set aside a judgment on substantially the same grounds as alleged in the present suit. The Court held (1) that the principle of *res judicata*[49] barred plaintiff's right to maintain the action, and (2) that, as one complaining of fraud has the right to rescind what has been done or affirm and sue for damages, the motion to set aside the judgment was equivalent to an election to rescind and plaintiff could not maintain an action for damages.

Another decision may imply that an election will be compelled between an action for rescission and an action for breach of warranty.[50] The question was raised by defendant's motion to make more definite and certain on the ground that he was unable to determine whether the suit was for rescission or breach of warranty. The Court deemed it unnecessary to determine the theory of the complaint because plaintiff's counsel stated in the argument on appeal that the action was for rescission.

Verification

In *Bolin v. Bolin*,[51] a divorce action, the granting of defendant's motion to have the complaint verified as required by law was reversed on appeal because the complaint had been verified in substantial compliance with G. S. § 1-145. In granting the motion the trial court was evidently thinking of the requirements of G. S. § 50-8 before it was amended.[52]

Rich v. Norfolk So. Ry.,[53] aptly described by the Court as involving much ado about very little, nevertheless involved a number of technical questions. The complaint was verified. A corporate defendant and individual defendants filed a joint answer which was verified only on behalf of the corporation. Seven months after this answer was filed, plaintiff's attorney, without notice to defendants, moved before the clerk for judgment by default and inquiry against the individuals. The motion was granted, the order not mentioning the answer. Thereafter, upon motion of defendants, the judge vacated the judgment of the clerk and allowed the individuals thirty days within which to verify the answer *nunc pro tunc*. On appeal, the order of the judge was affirmed.

of sale and sued for damages resulting from fraud. The basis of recovery was that the execution of the contract was not in accordance with the real agreement.

[48] 244 N. C. 121, 93 S. E. 2d 72 (1956).

[49] The issue was raised by defendant's motion for judgment on the pleadings and admissions made in a pre-trial hearing. See Leonard, *Pleading and Proving the Defense of Res Judicata in North Carolina*, 34 N. C. L. REV. 458, 468-69 (1956), where the methods of raising the defense are discussed.

[50] Baker v. Fruehauf Trailer Co., 242 N. C. 724, 89 S. E. 2d 388 (1955).

[51] 242 N. C. 642, 89 S. E. 2d 303 (1955).

[52] See *Statute Survey*, 29 N. C. L. REV. 351, 375 (1951).

[53] 244 N. C. 175, 92 S. E. 2d 768 (1956).

The Court first held that verification by the corporate defendant was not verification for the individual defendants under G. S. § 1-145. (It was indicated that verification by an individual could be sufficient for all individuals joining in the answer. Whether verification by an individual could be sufficient verification on behalf of a corporate codefendant was not indicated.) Nevertheless, the answer could not be ignored. A motion to strike the answer, made on notice, was a necessary predicate to the motion for judgment by default and inquiry.[54] Notice of the motion for judgment by default should have been given, even if not preceded or accompanied by a motion to strike the answer. For several well founded reasons the Court found that the judge had jurisdiction to entertain defendants' motion and enter his order.[55] Finally, since the clerk's judgment was irregular and that alone justified the judge's action, it was not necessary to investigate the question of excusable neglect.

Controversy Without Action

When a case is tried on an agreed statement of facts, the statement is in the nature of a special verdict and is equivalent to a request for the judgment which arises as a matter of law on the facts agreed; and the court may not infer or deduce further facts from those stipulated.[56] In *Blowing Rock v. Gregorie,*[57] the trial court heard the case upon admissions in the pleadings and stipulations by the parties. On appeal defendants contended that the trial court erred in failing to pass upon pleas of estoppel and the statute of limitations and upon the failure of plaintiff to make certain allegations. It was held that these questions were not presented to the lower court for decision because they were not admitted in the pleadings or included in the stipulations. The trial court had visited the premises at the request of the parties and had made observa-

[54] The Court has recently raised a question, without giving an answer, as to whether a clerk has jurisdiction to rule on a motion to strike pleadings under G. S. § 1-153. Gallimore v. Highway Commission, 241 N. C. 350, 85 S. E. 2d 392 (1954), discussed in *Case Survey,* 34 N. C. L. REV. 1, 19-20 (1955). In the *Rich* case the Court, in outlining the procedure that should have been followed, merely assumed that the motion to strike might have been made before the clerk, but again failed to give a definitive answer.

[55] The clerk's statutory jurisdiction (G. S. §§ 1-211, 1-212) to enter judgment by default is not exclusive, but concurrent with that of the judge. A motion to vacate the clerk's judgment may be made before the clerk or judge and, when it is made before the judge, his jurisdiction is both original and appellate. Further, the judgment by default and inquiry transferred the cause to the Superior Court for further hearing in term. (The Court also said that the clerk's jurisdiction to enter the judgment exists only when there is no answer, as, upon filing of answer the cause is transferred to the Superior Court for trial at term. G. S. § 1-171. However, the opinion subsequently labels the judgment as irregular, whereas if the clerk was literally without jurisdiction it would, under normal terminology, be labeled as void.)

[56] Hawes v. Accident Ass'n., 243 N. C. 62, 89 S. E. 2d 800 (1955).

[57] 243 N. C. 364, 90 S. E. 2d 898 (1955).

tions which were included in the judgment. This was error, said the Supreme Court, because the court may not infer or deduce further facts from those stipulated;[58] but the error was held to be harmless.

Effect of Denial of Motion for Judgment on the Pleadings.

Defendants presented a novel argument in *Baldwin v. Hinton.*[59] The pleadings raised an issue of fact as to the ownership of a parcel of land. Plaintiffs' motion for judgment on the pleadings was denied and at a later term, without objection, amended pleadings were filed in which plaintiffs alleged ownership of a different tract. Defendants contended that since plaintiffs did not appeal from the order denying the motion for judgment on the pleadings, the order was in effect a ruling, binding on the second judge, that the description of the land in the instruments under which defendants were claiming title was sufficient. The contention was held to be without merit. It is settled that an appeal does not lie from the denial of a motion for judgment on the pleadings;[60] the pleadings had raised an issue of fact to be determined by jury trial or other appropriate procedure; and the controversy under the amended pleadings was a different case, involving a different tract of land.

CONSTITUTIONAL LAW

RAISING CONSTITUTIONAL QUESTIONS

Alternative Grounds For Decision

In *State v. Ennis Jones*[1] there was a criminal prosecution in which the bill of indictment contained two counts. The lower court granted the defendant's motion to quash saying: "The defendant, in support of his motion to quash, contended that the aforesaid ordinance was unconstitutional and the enforcement void. In addition to the aforesaid ground for quashing the Bill of Indictment, it is observed by the court that the offense is alleged in the alternative. . . ."[2] On appeal the Court was unable to ascertain whether the indictment was quashed on the ground that the ordinance was unconstitutional or because of the alternative aspect of the indictment; therefore, the Court applied the well-established

[58] This, of course, is a non-sequitur. Independent observations of the judge can hardly be classified as further facts deduced or inferred from those stipulated. Since counsel for both parties requested the view, it seems clear that the parties consented that the judge's observations should constitute evidence to be considered along with the admissions and stipulations.

On the other hand, the Court concludes from the facts stipulated that the municipality accepted dedication of the street. Is this an inference of fact rather than a conclusion of law? If so, it violates the court's stated rule.

[59] 243 N. C. 113, 90 S. E. 2d 167 (1955).

[60] Howland v. Stitzer, 240 N. C. 689, 84 S. E. 2d 167 (1954).

[1] 242 N. C. 563, 89 S. E. 2d 129 (1955).

[2] *Id.* at 564, 89 S. E. 2d at 130.

rule that it will not pass upon a constitutional question unless raised and passed upon in the court below,[3] nor will it pass on the constitutional question, even when properly presented, if there is another ground upon which the case may be decided.[4] Finding that the indictment was not bad for duplicity, the Court reversed.

Estoppel

Convent of the Sisters of Saint Joseph v. Winston-Salem,[5] involving the doctrine that a party who has accepted benefits under a statute may be estopped to assert its unconstitutionality, is discussed elsewhere.[6]

CONSTITUTIONAL PROTECTIONS TO PERSONS

Right To Counsel

Defendant was indicated for first degree murder; the solicitor in open court announced that the State would ask for no greater verdict than second degree murder. The defendant was a poorly-educated colored woman, unfamiliar with court and jury trial procedure and financially unable to employ counsel. Although, following the verdict, counsel was appointed to perfect the appeal, the defendant was not represented by counsel during the trial. In *State v. Simpson*[7] the Court held this failure to appoint counsel violative of G. S. § 15-4.1[8] which provides that counsel *shall* be appointed when the accused is unable to employ counsel and is bound over to the Superior Court to answer a charge, the punishment for which may be death. It was held immaterial that the State elected to seek a lesser verdict than the first degree charged in the indictment or that the defendant did not request the appointment of counsel.[9]

Self-Incrimination

Upon an application for an order to examine certain officers of defendant corporation and to inspect certain books and records, the Court pointed out that if the individuals sought to be examined should refuse to testify on the ground that their evidence would tend to incriminate them, a constitutional question would be presented but that the individuals, and not the court, must raise the question.[10]

[3] *In re* Parker, 209 N. C. 693, 184 S. E. 532 (1936).
[4] For a discussion of the application of this rule in the United States Supreme Court, see 27 N. C. L. Rev. 221 (1949).
[5] 243 N. C. 316, 90 S. E. 2d 879 (1956).
[6] See Municipal Corporations, p. 240 *infra*.
[7] 243 N. C. 436, 90 S. E. 2d 708 (1956).
[8] This statute implements N. C. Const. art. I, § 11.
[9] See 32 N. C. L. Rev. 331 (1954).
[10] Cates v. Finance Co., 244 N. C. 277, 93 S. E. 2d 145 (1956).

EMINENT DOMAIN

In *Sale v. Highway Commission*,[11] the State Highway and Public Works Commission acquired an easement over plaintiff's land by purchase pursuant to G. S. § 136-19 and agreed to pay plaintiffs a specified sum and to remove plaintiff's warehouse from the right of way and reconstruct it on other property belonging to the plaintiffs. While the property was under the custody and control of the Commission, the warehouse was destroyed by fire. Plaintiff sought compensation for the taking of land. The Commission contended that the proceeding should be nonsuited, because the Commission did not acquire the easement by a taking; that the authority of the property owner to bring an action under G. S. § 136-19 and G. S. § 40-11 is predicated upon the inability of the owner and the Commission to agree upon the purchase price of real estate; and that there is no authority to give any court jurisdiction over an action for the failure of the Commission to comply with the terms of a contract made by it. The Court allowed a nonsuit for variance since the petition alleged the taking of land while the evidence supported a recovery for failure to pay the money compensation and to perform the other obligations according to a contract between the parties.

On the second appeal of *Sale v. Highway Commission*,[12] the Court held that the constitutional prohibition against taking or damaging private property for public use without just compensation[13] is self-executing, is not susceptible of impairment by legislation, and, in the absence of constitutional or statutory remedy in a particular factual situation, may be enforced by an action at common law, as an exception to the principle that the soverign cannot be sued without its consent. The plaintiffs are not remitted to an action against the state under the provisions of Article IV, section 9 of the Constitution of North Carolina, nor, since the consideration was agreed upon, is a special proceeding under G. S. § 136-19 and G. S. § 40-12 *et seq.*, apposite.

The plaintiff, in *Eller v. Board of Education of Buncombe County*,[14] sued the defendant Board of Education for damages for obstructing the flow of outlet for a spring, causing water and mud to accumulate on plaintiff's property, and for maintaining a septic tank constructed so that sewage flowed into the branch, ruining plaintiff's spring, and emitting noxious odors which rendered his home uninhabitable. The Court held that the creation and maintenance of a government project so as to constitute a nuisance substantially impairing the value of private property

[11] 238 N. C. 599, 78 S. E. 2d 724 (1953).
[12] 242 N. C. 612, 89 S. E. 2d 290 (1955).
[13] "While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' within the meaning of Art. I, sec. 17." Eller v. Board of Education, 242 N. C. 584, 586, 89 S. E. 2d 144, 146 (1955).
[14] 242 N. C. 584, 89 S. E. 2d 144 (1955).

is, in the constitutional sense, a taking within the principle of eminent domain.[15] In rejecting defendant's contention that plaintiff's sole remedy was a petition before the clerk under G. S. § 40-12, the Court held that G. S. § 40-12 applied only to instances where the condemnor acquires title and right to specific land.[16]

JURY TRIAL IN CIVIL CASES

In *Better Home Furniture Co. v. Baron,*[17] defendant challenged the validity of a statute providing a procedure for small claims ($1,000.00 or less) in the Superior Court of Forsyth County.[18] The statute eliminates jury trial unless demanded by a party in his first pleading. A plaintiff making no such demand pays advance costs of half the usual costs and gives no prosecution bond. Any other party demanding jury trial must pay the remaining half of the costs and give prosecution bond of $25.00.

In the principal case plaintiff demanded no jury trial and defendant's answer demanded none. Subsequently, new counsel for defendant attempted to demand jury trial and also moved that plaintiff be required to give the regular $200.00 prosecution bond under G. S. § 1-109. He also moved for dismissal for the reason that the special statute was invalid. The Superior Court ruled that defendant had waived jury trial, denied his motions, tried the case without a jury and gave judgment for plaintiff. The Supreme Court affirmed.

The Court found no conflict with the constitutional prohibition against local legislation,[19] or any other constitutional provision, and pointed out that the constitution expressly authorizes the General Assembly to regulate procedure in courts below the Supreme Court.[20] It also found that there was no disregard of any constitutional guarantee of jury trial, pointing out that the Seventh Amendment to the Constitution of the United States does not apply to the states and that while section 19 of Article IV of the North Carolina Constitution provides for jury trial, section 13 of the Article expressly permits waiver of jury trial. The Court recognized that the legislature may not attach unreasonable conditions to the right to jury trial, but found that the instant statute's provisions regarding costs and prosecution bond were not unreasonable.

The decision has state-wide significance because, as pointed out by

[15] N. C. CONST. art. I, § 17: "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."

[16] See 28 N. C. L. REV. 403 (1950).

[17] 243 N. C. 502, 91 S. E. 2d 236 (1956).

[18] 1951 Sess. Laws, c. 1057.

[19] N. C. CONST. art. II, § 29: "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. . . ."

[20] N. C. CONST. art. IV, § 12.

the Court, the 1955 Assembly enacted a general statute with provisions similar to those of the Forsyth statute.[21]

Ingle v. McCurry[22] was an action on a note. The plaintiff's evidence made out a prima facie case but did not establish the defendant's affirmative defense that the action was to recover a deficiency judgment which is precluded by statute.[23] The trial court dismissed the action prior to the introduction of evidence by the defendant, upon its findings of facts in accordance with the allegations of defendant's affirmative defense. The Court held this to be reversible error as depriving the plaintiff of his constitutional right of trial by jury,[24] since there was no agreement of the parties waiving jury trial or consenting that the court should find the facts.[25]

UNION SHOP UNDER RAILWAY LABOR ACT: STATE "RIGHT TO WORK" STATUTE

In *Hudson v. Atlantic Coast Line Railroad*[26] the Court held that since the Railway Labor Act[27] as amended expressly authorizes union shop contracts,[28] such contracts between a union and a railroad are valid and that G. S. § 95-78 (North Carolina's "Right to Work" statute) does not control since Congress has pre-empted[29] the field.[30]

EDUCATION- SCHOOL BONDS

In *Constantian v. Anson County*,[31] the plaintiff sought to enjoin the defendant County from issuing and selling the $750,000 remainder of an authorized $1,250,000 of capital outlay school bonds. He asserted that the authorization was void because it discriminated against children of the white race in violation of the Constitution of North Carolina,[32] since

[21] 1955 Sess. Laws, C. 1337, now G. S. §§ 1-539.3 *et seq.* There are differences in details. The 1955 law is applicable only in counties in which the commissioners adopt it.

[22] 243 N. C. 65, 89 S. E. 2d 745 (1955).

[23] G. S. § 45-21.38 (1950).

[24] N. C. CONST. art. I, § 19: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. . . ."; and art. IV, § 1: ". . . the facts at issue tried by order of court before a jury."

[25] N. C. CONST. art. IV, § 13.

[26] 242 N. C. 650, 89 S. E. 2d 441 (1955).

[27] 64 STAT. 1238, 45 U. S. C., § 152 (eleventh) (1951).

[28] The amended Act permits a union shop agreement requiring, as a condition of continued employment, that all employees shall become members of the labor organization representing their craft or class, within 60 days following the beginning of such employment or the effective date of such agreement, whichever is later.

[29] See 33 N. C. L. REV. 626 (1955).

[30] Ry. Employees' Dep't v. Hanson, 351 U. S. 225 (1956).

[31] 244 N. C. 221, 93 S. E. 2d 163 (1956).

[32] N. C. CONST. art. IX, § 2: "The General Assembly . . . shall provide . . . for a general and uniform system of public schools. . . . And the children of the white race and the children of the colored race shall be taught in separate schools but there shall be no discrimination in favor of, or to the prejudice of, either race." (The last sentence was added in 1875.) Art. IX was amended in 1956 by adding

some of the facilities identified in two of the projects were described as facilities *suitable for colored children.* The Superior Court refused to grant the injunction and the Supreme Court affirmed.

Plaintiff first contended that, even assuming the validity of the bonds when authorized, recent decisions of the Supreme Court of the United States, made subsequent to such authorization, rendered impossible the realization of the purpose for which the bonds were authorized.

The Court said that the constitution contained a mandate that the General Assembly provide for a state public school system[33] and that the county boards of commissioners provide the funds for the buildings and equipment necessary for the maintenance and operation of these schools.[34] The Court stated that the Commissioners were responsible only for providing the school plant facilities as opposed to the operation of the schools, and, when they provided the funds, their responsibility was discharged.

Plaintiff next contended that when the bonds were authorized, the Constitution of North Carolina contained the mandatory requirement that children of the white race and children of the colored race be taught in separate schools[35] and that since the Supreme Court of the United States in *Brown v. Board of Education*[36] has declared that the enforced separation of Negroes and whites in public schools, solely on the basis of race, denies to Negroes the equal protection of the laws, both the bond order and the election were invalidated. The Court said that no provision of the Constitution of the United States requires that the state maintain a system of public schools; this is exclusively a matter of state policy, and nothing in the *Brown* case requires that children of different races be taught in the same school. The Court held that the doctrine declared in the *Brown* case is that no child, whatever his race, may be excluded from attending the school of his choice solely on the basis of race and, if so excluded by a state or a state agency, he may assert his constitutional rights under the equal protection clause of the 14th Amendment to the Constitution of the United States, as interpreted in the *Brown* case.[37]

Continuing, the Court said that only that portion of the 1875

a new § 12 authorizing education expense grants for private education and authorizing suspension of local schools. See Wettach, *North Carolina School Legislation —1956,* 35 N. C. L. REV. 1 (1956).

[33] *Ibid.*

[34] N. C. CONST. art. IX, § 3: "Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." See note 32 *supra* for reference to the 1956 school law amendments.

[35] Note 32 *supra.*

[36] 347 U. S. 483 (1954).

[37] The Court noted that this interpretation was substantially the same as that given the Brown case in Briggs v. Elliott, 132 F. Supp. 776 (1955).

Amendment which purported to make *mandatory* the *enforced* separation of the races in the public schools is violative of the equal protection clause of the 14th Amendment and thus void; otherwise, the mandates of the Constitution of North Carolina[38] remain in full force and effect. These provisions were held to be complete in themselves and capable of enforcement.

The Court concluded by saying that, although they believed that the interpretation now placed on the 14th Amendment by the *Brown* case could not be reconciled with the intent of the framers and ratifiers of the 14th Amendment, the actions of the Congress of the United States and of state legislatures, or the long and consistent judicial interpretations placed on it, the Constitution of the United States takes precedence over the Constitution of North Carolina. "In the interpretation of the Constitution of the United States, the Supreme Court of the United Sates is the final arbiter. Its decision in the *Brown* case is the law of the land and will remain so unless reversed or altered by Constitutional means."[39]

CONTRACTS

BREACH OF CONTRACT

The matter of impossibility of performance of a contract was presented in *Sale v. Highway Commission*,[1] where petitioners sought damages for respondent's failure to perform work it had contracted to do as part of the consideration for a right-of-way agreement,[2] the work being removal of petitioners' warehouse and woodshed from the right-of-way and reconstruction of them on near-by property belonging to petitioners. The petition alleged that while the property was in the custody and control of respondent, the warehouse and woodshed were destroyed by fire through negligence of respondent; damages were sought for the money value of the buildings *located as agreed in the contract.* After disposing of matters of defense involving constitutional law concerning eminent domain,[3] the Court dealt with the contract feature of impossibility of performance, stating: ". . . they [petitioners] can recover such damages, unless the respondent, the burden being upon it, can show that the buildings were destroyed by fire, or otherwise, and it, or its agents, were in the exercise of due care. After proof of the execution of the contract

[38] N. C. CONST. art. IX §§ 2, 3.
[39] Constantian v. Anson County, 244 N. C. 221, 229, 93 S. E. 2d 163, 168 (1956).

[1] 242 N. C. 612, 89 S. E. 2d 290 (1955).
[2] The case was a special proceeding pursuant to G. S. §§ 136-19 and 40-12 *et seq,* which provide for recovery of compensation for right-of-way grants to the Commission.
[3] See CONSTITUTIONAL LAW, p. 202 *supra.*

and breach by the promisor, the burden is on the promisor to show an excuse for the breach."[4]

In *Radio Electronics Co. v. Radio Corp. of America*,[5] plaintiff alleged an oral contract whereby it was granted exclusive distributorship of defendant's products in North Carolina, followed by defendant's cancellation of the contract and grant of the distributorship to another. Pointing out that a contract whereby a person limits his right to do business in the State is, by G. S. § 75-4, made unenforceable unless in writing and signed by the party so contracting, the Court held that the statute applied to "a contract whereby a person, firm, or corporation is made exclusive distributor for the State . . . precluding the manufacturer from doing business in North Carolina otherwise than through [a] single channel. . . ."[6]

ILLEGAL CONTRACTS AND QUANTUM MERUIT

The interesting fact situation of *Tillman v. Talbert*[7] produced an illegal contract question in connection with G. S. § 83-12, which makes it a misdemeanor for any person other than a licensed architect to sell or furnish plans for the construction of a building of a value exceeding $20,000.00.[8] Defendants had contracted with plaintiff, who was not a licensed architect, to furnish them plans for construction of a residence to cost approximately $18,000.00. Plaintiff worked on the plans but never finished those calling for an $18,000.00 residence, because, from time to time, they were changed to comply with requests of defendants. Final plans called for a house exceeding $20,000.00 in cost. Plantiff sued for the unpaid balance of the original contract price, which was four per cent of actual cost of construction. Defendants answered that the contract was illegal, and that, therefore, plaintiff could recover nothing; whereupon, plaintiff amended his complaint to ask for recovery *quantum meruit* for work done upon the plans for construction of a residence to cost about $18,000.00 up to the time the changes in the plans made the contract illegal.

In holding for the plaintiff, the Court said: "A subsequent illegal agreement by the parties cannot affect a previous fair and lawful con-

[4] 242 N. C. 612, 621, 89 S. E. 2d 290, 298 (1955).
[5] 244 N. C. 114, 92 S. E. 2d 664 (1956).
[6] *Id.* at 117, 92 S. E. 2d at 666. G. S. § 75-1 states: "Every contract . . . in restraint of trade or commerce in the State . . . is hereby declared illegal." The Court did not regard the oral contract as alleged as coming within the purview of this section. It said: "The question is not whether the oral contract as alleged herein is void as an unreasonable restraint of trade, but whether it is void and unenforceable by reason of the provisions of G. S. 75-4."
[7] 244 N. C. 270, 93 S. E. 2d 101 (1956). For another case involving an illegal contract see MUNICIPAL CORPORATIONS, p. 239 *infra*.
[8] G. S. § 83-12 prohibits the practice of architecture without a license, but states: ". . . nothing in this chapter shall prevent any person from selling or furnishing plans" for buildings of a value not exceeding $20,000.00.

tract between them in relation to the same subject. . . . The plaintiff made out his case for a recovery on *quantum meruit* without reliance on any work done by him on plans for the construction of a building of the value of more than $20,000.00, which subsequent work will not bar his recovery on a *quantum meruit* for work done under the original valid contract."[9]

LIABILITY EXEMPTION CLAUSES

Hall v. Sinclair Refining Co.,[10] presented the Court occasion to indicate, albeit by dictum, continued approval of its position to the effect that unequal bargaining power between parties to a contract is closely related to the public policy limitation upon the general rule that a person may effectively bargain against liability for his ordinary negligence in the performance of a contractual duty. In the instant case, the contract between plaintiff, owner-operator of a service station, and defendant contained stipulations to the effect that plaintiff would: (1) "indemnify and save harmless" the defendant from any loss or damage caused by any "leakage" resulting from the installation or use of the equipment installed by defendant, whether due to negligence or otherwise, and (2) maintain and repair the equipment at his expense. Plaintiff sought damages for leakage of gasoline from the underground tank and pumping equipment installed by defendant.

In affirming judgment for defendant on the pleadings, the Court stated that a factor in determining the validity of such "exemption clauses" is "the comparable positions which the contracting parties occupy in regard to their bargaining strength, *i. e.*, whether one of the parties has unequal bargaining power so that he must either accept what is offered or forego the advantages of the contractual relation in a situation where it is necessary for him to enter into the contract to obtain something of importance to him which for all practical purposes is not obtainable elsewhere."[11] Then the Court pointed out that it had recognized this test of relative bargaining power in a recent decision,[12] but observed that plaintiff's allegations failed to "raise the question of unequal bargaining power between the parties," adding: "He has failed to bring himself within any of the recognized limitations upon the rule which permits exemption from liability for negligence."[13]

[9] 244 N. C. 270, 272, 93 S. E. 2d 101, 103 (1956).
[10] 242 N. C. 707, 89 S. E. 2d 396 (1955).
[11] *Id.* at 710, 89 S. E. 2d at 398.
[12] Ins. Ass'n v. Parker, 234 N. C. 20, 65 S. E. 2d 341 (1951), where the disparity in bargaining power was between plaintiff car owner looking for a parking place in downtown Charlotte and defendant parking lot owner who displayed a prominent sign reading, "Not responsible for loss by fire or theft." The Court took judicial notice of the increasing perplexities of the parking problem and held defendant liable for theft of plaintiff's car resulting from defendant's negligence.
[13] 242 N. C. 707, 711, 89 S. E. 2d 396, 398 (1955).

PHYSICIAN-PATIENT RELATIONSHIP

In *Kennedy v. Parrott*,[14] the ultimate issue involved the law of torts,[15] but in the course of a rather lengthy opinion, the Court made some pointed comments pertinent to the law of contracts which could conceivably becloud the issue of whether or not a contract exists between physician and patient. Said the Court: "While the law of contracts is applied as between a patient and his physician or surgeon, when a person consults a physician or surgeon, seeking treatment for a physical ailment . . . and the physician or surgeon agrees to accept him as a patient, *it does not create a contract in the sense that term is ordinarily used* . . . The physician . . . prescribes . . . but the patient is under no legal obligation to follow the physician's instructions. Thus it is apt and perhaps more exact to say it creates a status or relation rather than a contract."[16] (Emphasis added.) Although the foregoing observations were *obiter*, and may prove to be of little consequence in subsequent cases, statements by the Court in earlier decisions left no doubt as to the existence of a contract between physician and patient.[17]

RESCISSION

In a somewhat enigmatic *per curiam*,[18] the Court affirmed judgment granting rescission of a contract of purchase and sale of a house where the vendor was "an experienced real estate dealer" and the vendee "a blind, poorly educated woman who 'Brailled' the house" attempting to ascertain its condition but failed to discover that "the house was not

[14] 243 N. C. 355, 90 S. E. 2d 754 (1956).

[15] See TORTS, p. 252 *infra*. The instant case held that the surgeon had authority to remove internal cysts discovered after incision for appendectomy.

[16] 243 N. C. 355, 360, 90 S. E. 2d 754, 757 (1956).

[17] In Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925), where the issue was also one of tort (negligence), the Court stated: "The duty which a physician or surgeon owes to his patient must be measured and determined primarily and in the first instance by the contract of employment." The contract aspect of this case was cited with approval in Childers v. Frye, 201 N. C. 42, 158 S. E. 744 (1931), where the issue was also one of tort.

70 C. J. S., *Physicians and Surgeons* § 37 (1951) states: "The relationship of physician or surgeon and patient is one arising out of a contract, express or implied . . . . The duty owed to a patient is measured and determined primarily by the contract of employment. . . . The physician or surgeon may by special agreement or notice limit the extent and scope of his employment." Citing Nash v. Royster, *supra*, and Childers v. Frye, *supra*.

70 C. J. S., *Physicians and Surgeons* § 38 (1951) states: "An action *ex contractu* will lie for a breach of duty arising out of a contract between a physician and patient."

Quaere whether the following interpretation of the Court's statements in the instant case could fairly be made so as to reconcile them with the previous statements by the Court: There is a contract between a physician or surgeon and his patient, but it is one giving the physician or surgeon extraordinary discretion.

Even so, the statement in the instant case that, "the patient is under no legal obligation to follow the physician's instructions," appears to be an insinuation, at least, of absence of consideration moving to the physician in return for his services. If such implication was intended, it completely overlooks the patient's legal obligation to pay for the physician's services.

[18] Thompson v. Stadiem, 243 N. C. 291, 90 S. E. 2d 518 (1955).

properly underpinned and had not passed city inspection as represented."[19] Presumably the Court meant, "as represented" *by defendant;* otherwise it would be difficult to explain the basis for rescission.[20] But assuming defendant was guilty of at least an innocent misrepresentation, the decision was supported by substantial authority.[21]

CREDIT TRANSACTIONS

GUARANTORS

In *Arcady Farms Milling Co. v. Wallace,*[1] the wives of defendant principal debtors were joined as defendants in a suit on trade acceptance for goods sold, because the wives guaranteed payment on the goods. The wives demurred to the complaint on the grounds that (1) there had been a misjoinder of parties and causes, and (2) married women cannot be guarantors for their husbands unless they comply with G. S. § 52-12,[2] which concerns the validity of contracts made between spouses. The judgment of the lower court overruling the demurrer was sustained by the Court, which said that the causes of action "arise out of the same transactions, or transactions connected with the same subject of action, rest upon the same proof against all defendants, and may be joined for a complete determination of the questions involved."[3] The Court conceded that in an earlier case[4] it had held that a guarantor, unlike a surety, could not be sued as an original promisor on the principal contract with the debtor. However, that holding did not prohibit a cause of action against the guarantor on his separate contract of guaranty. The

[19] *Id.* at 291, 90 S. E. 2d at 519.

[20] 4 WILLISTON, CONTRACTS § 926 (rev. ed. 1936) states that the doctrine of *caveat emptor* is still in full force in the law of real estate: "Still more clearly there can be no warranty of quality or condition implied in the sale of real estate and ordinarily there cannot be in the lease of it."

[21] 5 WILLISTON, CONTRACTS § 1500 (rev. ed. 1936) states: "It is not necessary, in order that a contract may be rescinded for fraud or misrepresentation, that the party making the misrepresentation should have known it was false. Innocent misrepresentation is sufficient, for though the representation may have been made innocently, it would be unjust to allow one who has made false representations, even innocently, to retain the fruits of a bargain induced by such representations." Accord, RESTATEMENT, CONTRACTS § 470 (1) (1932); RESTATEMENT, RESTITUTION § 28 (b) (1945).

And see Whitehurst v. Ins. Co., 149 N. C. 273, 62 S. E. 1067 (1908), where an insurance agent's false statements to an illiterate blind man were held sufficient for actionable fraud, though made without knowledge of their falsity.

[1] 242 N. C. 686, 89 S. E. 2d 413 (1955).

[2] The statute provides in part: "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 [certain formal requirements are met]."

[3] 242 N. C. 686, 690, 89 S. E. 2d 413, 416 (1955).

[4] Wachovia Bank and Trust Co. v. Clifton, 203 N. C. 483, 166 S. E. 334 (1932).

Court said that the causes were not independent. It should be noted that the guaranty here was to pay if the principal debtor failed to pay upon maturity. In this situation joinder should certainly be permitted. It should, in fact, be permitted in any situation in which the obligation of the guarantor matures prior to the bringing of the action.

On the second ground for demurrer, G. S. § 52-12 was held not applicable because the wives contracted with plaintiff creditors rather than with their husbands.

CONTRACT OF INDEMNITY

In *Fidelity & Cas. Co. v. Angle, Inc.*[5] the plaintiff had paid an obligation on which it was surety, and brought this action on a contract indemnifying the surety. The defendant indemnitor demurred on two grounds. The first was that the contract was not binding on the defendant because it had not been executed by the plaintiff. The Court, in accordance with the weight of authority,[6] held that an indemnitee need not sign the contract, since the object of the indemnitee's signature on the contract is merely to show mutuality of agreement. Such mutuality existed here because the plaintiff did become surety for the debtor in accordance with the indemnity contract. The second ground was that the extent of the plaintiff's loss as surety had not been determined when the action was brought. The Court construed the indemnity contract to determine whether it was one to indemnify against loss only or against liability.[7] Holding that the contract was broad enough to indemnify against liability, the Court reversed the lower court, which had sustained the demurrer.

DEEDS OF TRUST

Foreclosure

Where a lien is filed on real property prior to a federal tax lien, the government has one year after foreclosure by the prior lienor in which to redeem the property.[8] A North Carolina statute[9] allows the equitable owner of mortgaged property to enjoin foreclosure upon a showing that "the amount bid or the price offered" is insufficient and will cause irreparable damage to the owner. In *Roberson v. Boone*[10] a temporary restraining order was granted on the ground that the federal government's right of redemption would prevent the land's being sold on foreclosure at its true value. The Court, in a per curiam decision, sustained

[5] 243 N. C. 570, 91 S. E. 2d 575 (1956).
[6] See 17 C. J. S., *Contracts* § 62 (1939); 42 C. J. S., *Indemnity* § 4 (1944).
[7] See 27 AM. JUR., *Indemnity* § 20 (1940).
[8] 62 STAT. 972 (1948), as amended, 28 U. S. C. § 2410 (c) (1952).
[9] G. S. § 45-21.34 (1950).
[10] 242 N. C. 598, 89 S. E. 2d 158 (1955).

the dissolution of the order because it could find no legal or equitable ground for continuing the order.[11]

In *Roberson v. Pruden*[12] a former debtor was able to compel his former creditor to reconvey property foreclosed and bid in under a deed of trust securing a promissory note. To require the reconveyance, plaintiff sued on the theory of a parol trust. The Court did not discuss the former debtor-creditor relationship, but devoted its opinion to the application of the parol trust theory to the facts of the case. That aspect of the case is discussed elsewhere in this *Survey*.[13]

SUFFICIENT RECORD NOTICE FOR LIENS

Three cases involving liens on property turned on the sufficiency of record notice. The first case, *Dula v. Parsons*,[14] involved a judgment lien. There the plaintiff judgment creditor made a motion to set aside a homestead allotted to the son out of certain property that the judgment debtor had conveyed to his son. The son contended that the debtor had conveyed the property to the son before the docketing of the judgment, though the docketing preceded registration of the deed. The deed had been referred to in two deeds of trust registered prior to the judgment lien. The Court held, in accordance with G. S. § 1-234, that a docketed judgment is "a lien on the real property situated in the county where the same is docketed. . . ."[15] In the absence of actual registration, the deed from the debtor to the son could not defeat the lien of the judgment.[16] The reference in the recorded deeds of trust to the unrecorded deed was no substitute for registration.

The second case[17] was concerned with whether G. S. § 161-22,[18] which prescribes the methods for the indexing of the recordation of liens, deeds, and mortgages, had been complied with sufficiently to give notice of a mortgage on certain tobacco. The names of the mortgagor and mortgagee had been properly transcribed in the grantee and grantor indexes, but the references to the book and page on which the mortgage had been recorded were incorrect in the grantor index. The trial court held as a matter of law that the chattel mortgage on the crop had not been properly recorded. The Court reversed the trial court's decision on the

[11] Some states give mortgagors a redemption power, following foreclosure, of a year or more. See 31 AM. JUR., *Judicial Sales* §§ 222-33 (1940).

[12] 242 N. C. 632, 89 S. E. 2d 250 (1955).

[13] See TRUSTS, p. 264 *infra*.

[14] 243 N. C. 32, 89 S. E. 2d 797 (1955).

[15] G. S. § 1-234 (1953).

[16] G. S. § 47-18 (1950) provides in part: "No conveyance of land . . . shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or leasor, but from the registration thereof within the county where the land lies. . . ."

[17] Johnson Cotton Co. v. Hobgood, 243 N. C. 227, 90 S. E. 2d 541 (1955).

[18] The statute provides that no instrument shall be deemed properly registered unless properly indexed and cross-indexed.

ground that there had been sufficient notice "to attract attention or stimulate inquiry."[19] Therefore, the defendant was "affected with knowledge of all the inquiry would have disclosed."[20]

The Court in *Saunders v. Woodhouse*[21] found that a laborer's and materialman's lien complied with G. S. § 44-38.[22] The material and labor had been furnished prior to the registration of a deed of trust, but the deed of trust was recorded two months before the lien was filed. However, it was held that the lien took precedence under the familiar rule that such a lien which has been properly filed relates back and covers the materials furnished and the labor done within the preceding six months. The fact that the lien had been filed in the same docket with the old age assistance liens did not affect the validity of its registration because the docket book was labeled "Lien Docket 1" and complied with the requirements of G. S. § 2-42[23] as a lien docket.

CRIMINAL LAW AND PROCEDURE

CRIMINAL LAW

Homicide

The Court was concerned in several cases with the rules governing involuntary manslaughter as a result of culpable negligence. Possibly the most controversial case decided by the Court during the past year is *State v. Kluckhohn*.[1] There was evidence that defendant was "dry-firing" his pistol in his hotel room when it fired, killing a woman in the street. Defendant contended that he was putting away his gun after having cleaned and supposedly unloaded it when it went off accidentally. It was error to charge the jury that a violation of G. S. § 14-34[2] proximately resulting in death would constitute manslaughter, for "dry-firing" does not imply the pointing of a gun at a person. An instruction that for an accidental killing to be an excusable homicide the act must have been lawful, done in a lawful and careful manner, and done without

[19] 243 N. C. 227, 230, 90 S. E. 2d 541, 544 (1955).
[20] *Ibid.*
[21] 243 N. C. 608, 91 S. E. 2d 701 (1956).
[22] The statute provides that liens may be filed for materials furnished and labor performed, but does not specify any special filing procedure for the clerk to follow.
[23] This section lists a "lien docket" among the books a clerk is required to keep. G. S. § 108-30.1 (1952 and Supp. 1956) specifically provides that the old age assistance lien will be filed in the regular lien docket.

[1] 243 N. C. 306, 90 S. E. 2d 768 (1956). There was a dissent by two justices for the reason that defendant's own evidence made out a case against him of "a culpably heedless use of a deadly weapon resulting in the death of deceased which entitled the State to a peremptory instruction, so that any error in the charge was harmless." *Id.* at 315, 90 S. E. 2d at 775.
[2] G. S. § 14-34 (1953). "If any person shall point any gun or pistol *at any person* . . . whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault. . . ." (Emphasis added.)

any unlawful intent is erroneous because the jury would be free to convict on a finding of ordinary negligence. The Court, citing *State v. Cope*,[3] said:

> "A departure [from the conduct referred to in the charge] to be criminal would have to consist of an intentional, willful, or wanton violation of a statute or ordinance enacted for the protection of human life or limb which resulted in injury or death. Such a violation of a statute would constitute culpable negligence."[4]

In *State v. Phelps*[5] the evidence showed that defendant's car was traveling at a speed of 75 to 80 miles per hour with its left wheels on or over the center line and that defendant was not keeping a proper look-out. Defendant's conviction of manslaughter was affirmed. The Court reasserted the proposition that the violation of a statute regulating automobiles is a violation of a statute designed to protect human life[6] and again quoted the *Cope* case[7] in saying that the "intentional, willful or wanton" violation of such a statute, resulting in death, makes the wrongdoer guilty of manslaughter. However, in *State v. Mundy*[8] the Court held that there can be manslaughter through the use of an automobile on the highways without violation of a motor vehicle law. The defendant, who had gone to sleep while driving, was charged with speeding, reckless driving, and manslaughter; he had been acquitted of the speeding and reckless driving charges but had been convicted of manslaughter.

Arson

In *State v. Long*[9] defendant burned part of a house unfit for human habitation. He was indicted for and convicted of willfully and feloniously setting fire to and burning an unoccupied dwelling house. In an opinion giving a general coverage of the law of arson in North Carolina it was held that defendant could not be convicted of common law arson because the essential elements of malicious burning, and inhabitation of the building were lacking from the indictment. The case was tried on the theory that the indictment charged a violation of G. S. § 14-67,[10] the trial judge so stating in his charge and the judgment being imposed

[3] 204 N. C. 28, 167 S. E. 456 (1933).
[4] 243 N. C. 306, 313, 90 S. E. 2d 768, 773 (1956).
[5] 242 N. C. 540, 89 S. E. 2d 132 (1955).
[6] See State v. Swinney, 231 N. C. 506, 57 S. E. 2d 647 (1950).
[7] 204 N. C. 28, 167 S. E. 456 (1933). This much-cited case was referred to again in State v. Wall, 243 N. C. 238, 90 S. E. 2d 383 (1955), as containing applicable principles of law in drawing the line between actionable negligence and culpable negligence.
[8] 243 N. C. 149, 90 S. E. 2d 312 (1955). For a discussion of the auxiliary problem in the case of the legal consequences of falling asleep while driving see Note, 35 N. C. L. REV. 123 (1956).
[9] 243 N. C. 393, 90 S. E. 2d 739 (1956).
[10] "If any person shall willfully *attempt* to burn any . . . uninhabited house . . . the property of another, he shall be guilty of a felony." (Emphasis added.)

thereunder. The Court held that defendant could not be convicted under this statute, for it is concerned with attempts, not completed acts. Furthermore, since the house was not fit for human habitation, defendant could not be convicted under G. S. § 14-144,[11] the Court holding that "uninhabited house" implies one fit for habitation. The incongruity of penalizing the attempt to do an act (G. S. § 14-67) more heavily than the actual commission of the same act (G. S. § 14-144) was noted by the Court to be a fit subject for legislation.

Intoxicating Liquor

In *State v. Ritchie*[12] defendant was charged in three separate courts with unlawful possession, transportation, and possession for the purpose of sale of tax-paid liquor. A nonsuit was allowed as to the unlawful transportation count, but the jury returned a verdict of guilty of both unlawful possession and unlawful possession for the purpose of sale. Since possession of tax-paid liquor in the home when lawfully brought there is not unlawful unless for the purpose of sale, the conviction on the possession count was reversed. However, it was said in a dictum in another case that there may be separate judgments on counts of unlawful possession and unlawful transportation of intoxicating liquor, although the same act constituted both offenses.[13]

In *State v. Tillery*[14] the only evidence that the whiskey which defendant transported and possessed was non-tax-paid was that it was "bootleg" whiskey. The Court refused to take judicial notice that such whiskey is non-tax-paid.[15]

Self-Defense

In *State v. Tyson*[16] defendant teased a girl accompanied by two male companions at a "juke joint." This resulted in an exchange of blows between defendant and the girl. Later, when defendant drew back his hand as if to strike the girl, the deceased, one of her companions, knocked defendant down with a piece of wood. Defendant then drew a pistol and killed the deceased. The Court, in upholding a charge to the effect

[11] "If any person . . . shall unlawfully and willfully burn . . . any . . . uninhabited house . . . every person so offending shall be guilty of a misdemeanor."
This statute and G S. § 14-67 are in different articles and subchapters of Chapter 14 of the General Statutes.

[12] 243 N. C. 182, 90 S. E. 2d 301 (1955).

[13] State v. Stonestreet, 243 N. C. 28, 89 S. E. 2d 734 (1955). The Court relied on State v. Chavis, 232 N. C. 83, 59 S. E. 2d 348 (1950), the basis of both decisions being that unlawful possession and transportation of intoxicating liquor are neither degrees of nor major and minor parts of the same offense and thus the penalty for one is not merged into the penalty for the other on a conviction of both.

[14] 243 N. C. 706, 92 S. E. 2d 64 (1956).

[15] See State v. Wolf, 230 N. C. 267, 52 S. E. 2d 920 (1949), where the Court would not take judicial notice that "white liquor" was non-tax-paid.

[16] 242 N. C. 574, 89 S. E. 2d 138 (1955).

that defendant could not take advantage of a plea of self-defense unless he was without fault in the matter, said:

> "Defendant knew, or ought to have known, that any insult directed at, or any assault made upon, the woman would provoke the resentment and the possible assault of her male companion. Hence, there was sufficient evidence to justify the jury in finding that defendant was not without fault."[17]

In this the doctrine that a person may not justify a homicide on the grounds of self-defense when he has provoked the attack seems to be extended beyond limits previously recognized in North Carolina and other common law jurisdictions.[18]

Entrapment

The defendant's evidence was that the payee of a check assured defendant drawer that the check would not be presented for payment until defendant had sufficient funds to pay it. In a prosecution for issuing a worthless check the defense was entrapment by the payee. The Court states the rule that where a crime is such regardless of the consent of the victim, the defense of entrapment consists of inducement by officers or agents of the state only, and not private citizens. The Court held that since the issuance of a worthless check is a crime regardless of the consent of anyone, entrapment was not present.[19]

CRIMINAL PROCEDURE

Search and Seizure

In two cases the Court granted new trials because of admission of evidence obtained through the use of search warrants not shown to be valid. In *State v. McMilliam*[20] defendant, before pleading to the indictment, moved to suppress the State's evidence on the ground that it was obtained either by no search warrant or by an invalid one. The trial judge reserved ruling on the motion until the State had presented the challenged evidence and rested its case. The Court held that on a motion to suppress the State's evidence a ruling must be made before the evidence in introduced and that when the validity of a search warrant is at issue, the State must produce the search warrant or prove it is lost

[17] *Id.* at 577, 89 S. E. 2d at 140.

[18] See 26 AM. JUR., *Homicide* §§ 130, 131 (1940); Annot., 45 L. R. A. 687 (1899). In North Carolina the following cases represent the kinds of provocation heretofore recognized as depriving defendant of the defense of self-defense: State v. Brittain, 89 N. C. 481 (1883) (defendant attacked deceased); State v. Hardee, 192 N. C. 533, 135 S. E. 345 (1926) (defendant attacked the wife of deceased); State v. Kennedy, 169 N. C. 326, 85 S. E. 42 (1915) (defendant used words calculated to bring on a combat).

[19] State v. Jackson, 243 N. C. 216, 90 S. E. 2d 507 (1955). For a discussion of entrapment in North Carolina, see Note, 34 N. C. L. REV. 536 (1956).

[20] 243 N. C. 771, 92 S. E. 2d 202 (1956).

and introduce evidence as to its contents and regularity. In *State v. White*[21] a police officer failed to sign under oath the affidavit supporting the issuance of the search warrant although he testified under oath to the information necessary for the validity of the warrant. The Court cited G. S. § 15-27 in holding that the evidence was improperly admitted.

In *State v. McPeak*[22] it was held that a guest or passenger in a car has no legal right to object to a search of the car, because the constitutional guarantee of freedom from unlawful search and seizure is a personal one and can be asserted only by the one whose rights are invaded, in this case the owner of the car.

Sufficiency of Warrant and Indictment

In several cases the Court struck down warrants or indictments on the ground that they did not sufficiently charge a criminal offense, in that: the defendant would not be informed of the exact crime so as to be able to prepare a defense, a conviction or acquittal would not be a bar to a subsequent prosecution for the same offense, or the trial court would not be able on conviction to pronounce sentence according to law.[23] Warrants or indictments were held to be insufficient which: failed to state the duty the officer was undertaking, in an indictment for resisting arrest;[24] insufficiently described the article stolen, in an indictment for larceny;[25] did not state where a car was parked, other than on a public street in Greensboro, in a warrant for failing to put money in a parking meter;[26] failed to set out the false statements defendant supposedly procured and failed to state that defendant knew them to be false or that he did not know whether they were true, in an indictment for subornation of perjury;[27] did not state in what respect defendant aided and abetted in prostitution, in a warrant for that crime.[28]

These last two cases also involved the problem of charging the violation of a statute in the words of the statute. In *State v. Lucas*[29] the Court held that "since 'the commission of the crime of perjury is the basic element in the crime of subornation of perjury' "[30] the part of the

[21] 244 N. C. 73, 92 S. E. 2d 404 (1956).
[22] 243 N. C. 243, 90 S. E. 2d 501 (1955).
[23] See *Case Surveys,* 32 N. C. L. REV. 379, 436 (1954), 34 N. C. L. REV. 1, 43 (1956).
[24] State v. Stonestreet, 243 N. C. 28, 89 S. E. 2d 734 (1955).
[25] State v. Strickland, 243 N. C. 100, 89 S. E. 2d 781 (1955). The indictment was for larceny and receiving a "quantity of meat of the value of $1500, of the goods, chattels and moneys of one R & S Packing Company." The kind of meat should have been stated.
[26] State v. Burton, 243 N. C. 277, 90 S. E. 2d 390 (1955).
[27] State v. Lucas, 244 N. C. 53, 92 S. E. 2d 401 (1956).
[28] State v. Cox, 244 N. C. 57, 92 S. E. 2d 413 (1956), State v. Powell, 244 N. C. 121, 92 S. E. 2d 681 (1956).
[29] 244 N. C. 53, 92 S. E. 2d 401 (1956).
[30] *Id.* at 56, 92 S. E. 2d at 403 (1956).

perjury statute[31] setting out the form to be used for indictments in such cases should be read into the subornation of perjury statute.[32] The fact that a warrant or indictment is drawn in statutory language does not necessarily mean, however, that it is sufficient. Although under the general rule it is sufficient, *State v. Cox*[33] held that when "the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements,"[34] using the statutory language is not enough.[35]

In *Harrell v. Scheidt*[36] the question was whether it was necessary to charge and prove a defendant guilty of a second offense of drunken driving in order for the Commissioner to take his license away for three years.[37] The Court held that in order to impose the heavier punishment for a second offense as set out in G. S. § 20-179, the prior conviction must be alleged in the indictment or warrant. But, since the revocation of licenses by the Commissioner is not part of the punishment for the crime, a license may be taken away for three years under G. S. § 20-19 (d) without the prior conviction having been alleged.

Two cases involved quashing of indictments or warrants because of disjunctive or alternative allegations of the charges against defendants. The general rule is that where the statute gives more than one way in which a crime may be committed it is bad pleading to charge commission in the alternative or disjunctive, because it leaves defendant uncertain as to the crime charged. In *State v. Jones,*[38] involving a county health ordinance concerning the installation of septic tanks, it was held that there was no prejudice to defendant in charging that he did "build or install" a septic tank, for the quoted words are used synonymously. To the same effect is *State v. Jackson,*[39] involving a warrant charging that defendant issued a check knowing that neither defendant, nor defendant trading under a trade name, nor the designated firm had sufficient funds to pay the check.[40] This case implies, and a dictum in the *Jones* case states, that the general rule as given above applies only when the statute

[31] G. S. § 15-145 (1953).
[32] G. S. § 15-146 (1953).
[33] 244 N. C. 57, 92 S. E. 2d 413 (1956).
[34] *Id.* at 60, 92 S. E. 2d at 415 (1956).
[35] Possibly the aspect of this case more important for our purposes lies not in the reiteration of this settled proposition, but rather in the fact that it overruled *Sate v. Johnson,* 220 N. C. 773, 18 S. E. 2d 358 (1942), on the very question of whether an allegation in the language of G. S. § 14-204 (1953), on repression of prostitution, is sufficient.
For a discussion of the general question of sufficiency of alleging in the statutory language see Note, 35 N. C. L. REV. 118 (1956).
[36] 243 N. C. 735, 92 S. E. 2d 182 (1956).
[37] Applicable sections of the General Statutes are: § 20-138 (offense of drunken driving), § 20-179 (punishment), § 20-17 (revocation of license on conviction), § 20-19 (d) (revocation for 3 years on a second conviction).
[38] 242 N. C. 563, 89 S. E. 2d 129 (1955).
[39] 243 N. C. 216, 90 S. E. 2d 507 (1955).
[40] G. S. § 14-107 (1953).

prohibits conduct. When the statute commands, the allegations may be in the disjunctive.

Nolo Contendere

In *State v. Barbour*[41] defendant entered a plea of *nolo contendere* to a charge of assault. The trial court accepted the plea and rendered judgment *on the verdict.* The case was reversed, the Court saying that a plea of *nolo contendere* is equivalent to a plea of guilty for the purpose of entering judgment on the particular case, and nothing remains but the imposition by the court of a judgment, and that it is incorrect for the court to say that defendant was guilty or not guilty of any part of the indictment or to render judgment "on the verdict" for there is none, the purpose of any inquiry by the judge being only to determine the extent of punishment to impose.[42]

Former Jeopardy

Defendant was tried in a domestic relations court on a warrant originally charging failure to provide expenses incidental to the pregnancy of the mother of his illegitimate child and amended after it was issued to charge failure to provide support for the child. On his appeal to the Superior Court nonsuit was allowed. When defendant was later tried anew on a new warrant for non-support, a plea of former jeopardy was allowed by the domestic relations court. Appeal was taken by the State, and defendant was convicted in the Superior Court.[43] The Court held that G. S. § 15-179 does not allow the state to appeal from a judgment allowing a plea of former jeopardy.[44] Thus all proceedings after the allowance of the plea of former jeopardy by the domestic relations court were void for lack of jurisdiction. The Court noted, however, that it is not necessary that prosecution of defendant end, for there had been no negative adjudication of paternity, and the offense of non-support is a continuing one under G. S. § 49-2.

Trial

In *State v. Clonch*[45] the defendant gave evidence which tended to show that he was guilty of the crime charged. The trial court instructed the jury that if they believed the evidence of the defendant they would return a verdict of guilty. The Court granted a new trial, calling this instruction "too unequivocal" saying that ordinarily the judge may charge that if the jury finds the facts as the evidence tends to show be-

[41] 243 N. C. 265, 90 S. E. 2d 388 (1955).
[42] See Lane-Reticker, *Nolo Contendere in North Carolina,* 34 N. C. L. Rev. 280 (1956).
[43] State v. Ferguson, 243 N. C. 766, 92 S. E. 2d 197 (1956).
[44] See State v. Wilson, 234 N. C. 562, 67 S. E. 2d 748 (1951).
[45] 242 N. C. 760, 89 S. E. 2d 469 (1955).

yond a reasonable doubt to return a verdict of guilty, but otherwise not guilty.

Two cases involved the necessity for instructions as to the weight to be given testimony of accomplices. Many jurisdictions have statutes prohibiting conviction solely on the uncorroborated testimony of an accomplice.[46] The rest of the states, including North Carolina, while permitting conviction based on the uncorroborated testimony of an accomplice, have rules regarding instructions to the jury on the weight to be given such testimony.[47] *State v. Stevens*[48] reiterates the well-established principle of North Carolina law that the trial judge is not required to give such instructions in the absence of a special request.[49] Thus it is incumbent upon the defendant to ask for instructions on specific factors in the weighing of evidence. The usual instruction requested is to the effect that a conviction may be based on the unsuppported testimony of accomplices but that it is dangerous or unsafe to do so and that the jury should scrutinize such testimony with caution and be sure of guilt beyond a reasonable doubt before bringing in a verdict of guilty. In *State v. Hooker*,[50] where the only evidence the state offered was the testimony of persons who admitted their complicity, the Court held it error not to give the requested instructions: 1) that the witnesses were accomplices according to their own testimony and 2) that there was no other evidence pointing to defendant's guilt.

In two murder cases[51] the trial judge instructed the jury that a verdict of guilty of murder in the first degree with a recommendation of life imprisonment might be returned. In neither case was such recommendation made. New trials were granted in both cases because there was no instruction that upon the recommendation of life imprisonment the imposition of a life sentence is mandatory, as required by G. S. § 14-17. The Court felt that in the absence of the required instruction it was possible that the jury might have taken too lightly their power of life or death.

Sentencing Problems

In the case of *In re Swink*[52] petitioner had been sentenced by one court in two cases, #203 and #204, tried at the same time and recorded on

[46] 20 AM. JUR., *Evidence*, § 1235 (1939).
[47] 53 AM. JUR., *Trial*, § 740 (1945); Annot., 15 ANN. CAS. 698, 702 (1910).
[48] 244 N. C. 40, 92 S. E. 2d 409 (1956).
[49] This seems to place North Carolina in the minority of those states not having a prohibitory statute, the majority requiring instructions regardless of request. See Annot., 15 ANN. CAS. 698, 702 (1910).
[50] 243 N. C. 29, 90 S. E. 2d 690 (1956).
[51] State v. Carter, 243 N. C. 106, 89 S. E. 2d 789 (1955), followed in State v. Adams, 243 N. C. 290, 90 S. E. 2d 383 (1955).
[52] 243 N. C. 86, 89 S. E. 2d 792 (1955). The case actually involved conviction and sentence in addition to those mentioned in the text, but those seem to state the problem.

the minutes of the court in immediate succession. The judgment of the court in case #204 was that he be imprisoned in the county jail for two years *to begin at expiration* of sentence in #203. Petitioner had also been sentenced by two other courts, the first sentence being to confinement in the county jail, "Sentence to begin at expiration of existing sentences."[53] In the second case the sentence, also to the county jail, was "to begin at expiration of existing sentence."[54]

On *certiorari* to review an order entered after a *habeas corpus* hearing, the Court held that the designation by reference to case #203 in the first sentence satisfied the requirement that in order for a sentence to run consecutively the judgment in the later case must designate with certainty when the second sentence is to begin. But the Court stated that the second and third sentences failed to designate with certainty when they were to commence, since their provisions in regard to existing sentences imposed in other courts have no meaning apart from what may be disclosed by investigations and evidence *dehors* the record and are, therefore, void for uncertainty.[55] However, the Court noted that the general rule that sentences run concurrently as a matter of law unless the judgment sufficiently specifies a contrary intent is applicable only to sentences imposed to the same place of confinement.[56] Where, as here, the sentences are to different places of confinement, they must by their very nature be served consecutively.[57] The Court said, "It appears that the rule . . . has been changed by Ch. 57, Session Laws of 1955."[58] Since its subsequent enactment caused the statute to have no bearing on the judgments, nothing further was said concerning it. It is unfortunate that the Court did not see fit to interpret this statute, for it is not clear whether all it does is give the trial judge authority to make sentences to different places run concurrently or whether it makes these sentences run concurrently as a matter of law unless affirmatively stated to the contrary.[59]

Two problems of importance concerning activation of suspended sentences were considered.[60] There must be hearing *de novo* in the

[53] *Id.* at 88, 89 S. E. 2d at 794.

[54] *Id.* at 89, 89 S. E. 2d at 794. The commitments executed by the clerks changed the language to refer to the end of specific prior sentences, one of which was in another county. The Court disregarded the commitments as not in conformity with the judgments.

[55] See *In re* Parker, 225 N. C. 369, 35 S. E. 2d 169 (1945).

[56] State v. Stonestreet, 243 N. C. 28, 89 S. E. 2d 734 (1955).

[57] *In re* Smith, 235 N. C. 169, 69 S. E. 2d 174 (1952).

[58] G. S. § 15-6.2 (Supp. 1955). "When by a judgment of a court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement."

[59] For a discussion of this statute, see Note, 35 N. C. L. REV. 112 (1956).

[60] See Note, 31 N. C. L. REV. 195 (1953) for an excellent discussion of suspended sentences in North Carolina.

Superior Court when defendant appeals from the activation of a sentence imposed by a lower court.[61] A finding by the Superior Court on appeal that there was evidence to support the findings and order of activation of the inferior court is not a hearing *de novo*.[62] In *State v. Davis*,[63] after holding that when there is more than one condition to a suspended sentence the lower court must specify which one was violated when activating the sentence (this to enable the defendant to test the validity of a condition he believes to be illegal or void), the Court intimated that for a prohibitory condition to be valid it must proscribe unlawful conduct.[64] While it is true that when a sentence is suspended on the good behavior of defendant, the term "good behavior" means conduct not punishable by law,[65] no North Carolina case has been discovered as authority for the proposition that the acts in breach of the condition must "raise an inference that . . . defendant . . . was . . . violating the law in some respect."[66] In the light of the reformative value of the suspended sentence it is hoped that the Court will not harden this dictum into a firm holding but will invalidate only those conditions which are excessive in duration,[67] or are illegal or unreasonable.[68]

DAMAGES

EASEMENTS

Carolina Power and Light Co. v. Clark[1] was a special proceeding to obtain an easement, limited to the construction, operation and maintenance of the petitioner's power transmission line, with the right to enter upon the land for inspection, repairs and alterations and to keep

[61] G. S. § 15-200.1 (1953).
[62] State v. Thompson, 244 N. C. 282, 93 S. E. 2d 158 (1956).
[63] 243 N. C. 754, 92 S. E. 2d 177 (1956).
[64] "In the absence of some unusual or peculiar circumstance, it is not unlawful or unreasonable to allow people to congregate or remain in one's home after the hours of darkness. Therefore, in our opinion, a finding that the defendant had violated the second condition in the judgment suspending the sentence, would not be sufficient to justify putting the prison sentence into effect unless it was shown by the evidence or found as a fact that the defendant allowed people to congregate or remain in her home with such frequency and in such numbers as to raise an inference that she was engaged in fortune telling or aiding in prostitution, or violating the law in some other respect." State v. Davis, 243 N. C. 754, 756, 92 S. E. 2d 177, 178 (1956).
[65] State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922).
[66] State v. Davis, 243 N. C. 754, 756, 92 S. E. 2d 177, 178 (1956). Contrast this language with that used by the Court in State v. Smith, 233 N. C. 68, 62 S. E. 2d 495 (1950), where the condition of suspension of a larceny sentence was that defendant not drive a car on the highways, and in State v. Shepherd, 187 N. C. 609, 122 S. E. 467 (1924), where the condition of suspension of a sentence for violation of the prohibition law was that defendant totally abstain from the use of intoxicants. See also G. S. § 15-199 (1953).
[67] G. S. § 15-200 (1953).
[68] See Note, 31 N. C. L. REV. 195, 199 (1953).

[1] 243 N. C. 577, 91 S. E. 2d 569 (1956).

the right of way clear of all structures, except ordinary fences, trees, etc. The easement sought by the petitioner expressly stated "that the defendants shall have the full power and right to use the lands over which said right of way and easement shall be condemned for all purposes not inconsistent with the rights to be acquired therein and the use thereof by the petitioner."[2] The defendants offered testimony to show that their land was adapted for a dam site, that such a dam had been planned and equipment for its construction secured, and that the easement would destroy its availability for a dam site, thus decreasing the present value of the land. The trial court excluded testimony to show the high cost of constructing such a dam, offered by the petitioner to combat the evidence of the defendants tending to establish the availability of the property for a dam site.

In holding the exclusion of this evidence to be error, the Court said: "In fixing values on property in condemnation proceedings for any and all uses or purposes to which the property is reasonably adapted and might, with reasonable probability, be applied, but has never been applied, its availability for future uses must be such as enters into and affects its market value, and regard must be had to the existing business or wants of the community, or such as may be reasonably expected in the immediate future to affect present market value. The test is what is the fair value of the property in the market. The uses to be considered must be so reasonably probable as to have an effect on the present market value. Purely imaginative or speculative value should not be considered."[3]

The petitioner also contended that the trial court had erred in its charge as to the measure of damages in that court had instructed the jury that they might award the full market value of the land covered by the easement although there was reserved to the defendants the full power and right to use the lands for all purposes not inconsistent with the easement rights. In sustaining this objection, the Court held that the trial court had ignored the nature and extent of the easement to be acquired by the petitioner according to its express stipulations and had charged the law as if the petitioner were endeavoring to acquire the fee to the premises in question to the exclusion of the individual defendants.[4]

PUNITIVE DAMAGES

In *Hinson v. Dawson*[5] the plaintiff alleged that the defendant driver suddenly and without warning made a left turn in the path of the car in which plaintiff's intestate was riding. He also alleged, upon information

[2] *Id.* at 582, 91 S. E. 2d at 572. [3] *Id.* at 580, 91 S. E. 2d at 570.
[4] McCORMICK, DAMAGES, 131 (1935). See also Carolina Central Gas Co. v. Hyder, 241 N. C. 639, 86 S. E. 2d 458 (1955).
[5] 244 N. C. 23, 92 S. E. 2d 393 (1956).

and belief, that (1) the defendant's driver had defective vision and was incapable of seeing and apprehending the dangers of the operation of a motor vehicle, (2) the defendant knew the driver had such defective vision and (3) the defendant's conduct in allowing his driver to drive constituted wanton conduct. Plaintiff also alleged that "in view of the financial worth of the defendants . . . punitive damages should be in some very substantial amount," and sought such damages in the amount of $10,000.

The Court held that in the absence of allegations that the conduct is malicious or willful, there is no basis for the submission of an issue of punitive damages unless the facts alleged justify the allegation (by way of conclusion) that the conduct is wanton. It noted that references to "gross" negligence as a basis for the recovery of punitive damages may be found in North Carolina decisions,[6] but concluded that those decisions used that term in the sense of wanton conduct. It then defined conduct as wanton ". . . when in conscious and intentional disregard of and indifference to the rights and saftey of others,"[7] and concluded that in this case the plaintiff had the right, in relation to the facts alleged, to assert that the defendant's conduct was wanton and thereon base a claim for punitive damages.

An earlier North Carolina case, *Taylor v. Bakery*,[8] held that allegations of the financial worth of the defendant were admissible. The Court expressly overruled the *Taylor* case as authority for that proposition and concluded that, although *evidence* of the financial worth of a defendant is competent for the jury when an issue as to punitive damages is warranted and submitted, *allegations* of the financial worth of a defendant "should be stricken as an allegation of evidence rather than of a substantive, ultimate fact."[9] Such an allegation is patently prejudicial if the plaintiff's evidence proves insufficient to warrant punitive damages and should not be brought to the attention of the jury until the trial judge determines that the evidence warrants the submission of such an issue.

DOMESTIC RELATIONS

ADOPTIONS

In re Adoption of Hoose[1] was a case in which the parents, because of the mother's illness, had consented to the adoption of their child by the

[6] *E.g.*, Horton v. Carolina Coach Co., 216 N. C. 567, 5 S. E. 2d 828 (1939).
[7] 244 N. C. 23, 28, 92 S. E. 2d 393, 397 (1956).
[8] 234 N. C. 660, 68 S. E. 2d 313 (1951).
[9] 244 N. C. 23, 29, 92 S E 2d 393 397 (1956) The existence of a strong argument to this effect was recognized in Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N. C. L. REV. 249, 250 (1953).

[1] 243 N. C. 589, 91 S. E. 2d 535 (1956).

petitioners. Two months later, after the petitioners had begun adoption proceedings, the parents intervened and withdrew their consent. In cases of direct placements, G. S. § 48-11 provides for revocation by the consenting parents within six months after consent is given. Consent being an essential element to an order of adoption unless the child has been abandoned,[2] the Court had to determine whether the original consent given by the parents constituted constructive abandonment under G. S. § 48-5.

Quoting G. S. § 48-2 (3), which defines an abandoned child as "any child under the age of eighteen years who has been wilfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child," the Court held that the record conclusively refuted any claim that this child had been so abandoned.

Wilfullness was said to be as much an element of abandonment within the meaning of the adoption statutes as it is in our criminal statutes.[3]

CUSTODY

Dellinger v. Bollinger[4] presented a question of first impression in this state. The putative father of a illegitimate child brought a special proceeding under G. S. § 50-13 to have the child removed from an environment detrimental to his welfare, and to have custody awarded to petitioner. The defendant demurred, contending that a putative father was not a parent within the meaning of the statute and, therefore, not entitled to institute this proceeding.[5] The Court determined that the putative father, required by our bastardy laws to support his illegitimate child, had a sufficient interest to request that the court award him custody of the child.

Holmes v. Holmes[6] was a case involving a contest for the custody of a child between one of the parents and the grandparents. The lower court found that it was in the best interest of the child that he remain in the custody of the grandparents, entering an order to that effect. This order was approved on appeal, even though there was no finding that the parent was an unfit custodian. In approving this order the Court seems to be slipping further away[7] from the position taken in the case of *In re Cranford*[8] that in the absence of a showing of unfitness, the natural right of a parent to the custody of his child is paramount.

[2] See G. S. §§ 48-6 through -11 (1950 and Supp. 1955).
[3] G. S. §§ 14-322 and -326 (1953).
[4] 242 N. C. 696, 89 S. E. 2d 592 (1955).
[5] If the putative father were held not to have the interest of a parent, he would apparently have to bring the action before a juvenile court. See G. S. § 110-21 (3) (1952).
[6] 243 N. C. 171, 90 S. E. 2d 382 (1955).
[7] See *Case Survey*, 33 N. C. L. Rev. 157, 194 (1955).
[8] 231 N. C. 91, 56 S. E. 2d 35 (1949).

Two cases presenting conflict of laws have been previously discussed in this law review.[9] *Weddington v. Weddington*[10] involved an award of custody by a court of this state at a time when the child was not within the state; *Richer v. Harmon*[11] involved a decree of another state awarding custody of a child then present in that state but subsequently removed to this state. In the former case the Court held that the decree was not enforceable, and in the latter case the Court held that our courts could take jurisdiction to determine if facts transpiring since the entry of the foreign decree justified a different award of custody.

SEPARATION AGREEMENTS

In *Jones v. Lewis*[12] the husband and wife separated and entered into a formal deed of separation whereby the wife conveyed certain lands to the husband. The deed was in all respects regular and in conformity with the laws of this state. Thereafter, the parties spent a night together. The wife contended that this subsequent cohabitation constituted a reconciliation which abrogated the separation agreement, entitling her to a reconveyance of the lands. The Court held that the reconciliation did terminate the separation agreement insofar as it remained executory, but that it did not revoke or invalidate a duly executed deed of conveyance. This holding appears to be consistent with the rule generally followed in other states.[13]

ALIMONY AND DIVORCE

In *Rayfield v. Rayfield*[14] a wife who had been awarded alimony in a suit for divorce from bed and board, and who had subsequently obtained an absolute divorce on the grounds of two years' separation, made a motion in the cause asking for an increase in the alimony payments. The Court held that the prior alimony award survived the absolute divorce and that an increase was proper under the circumstances of this case. An award of alimony may be modified at any time, it was stated, upon a showing of changed conditions, with the proper procedure being a motion in the cause. It should be noted, however, that the result will be different for wives whose absolute divorce decrees are rendered after January 1, 1956. G. S. § 50-11 was amended in 1955 to provide that an award of alimony will not survive an absolute divorce later obtained by the wife on the ground of two years' separation.

[9] Note, 35 N. C. L. REV. 83 (1956).
[10] 243 N. C. 702, 92 S. E. 2d 71 (1956).
[11] 243 N. C. 373, 90 S. E. 2d 744 (1956).
[12] 243 N. C. 259, 90 S. E. 2d 547 (1955).
[13] Simpson v. Weatherman, 216 Ark. 684, 227 S. W. 2d 148 (1950); Miller v. West Palm Beach Atlantic Nat. Bank, 142 Fla. 22, 194 So. 230 (1940); Haggarty v. Union Guardian Trust Co., 258 Mich. 133, 242 N. W. 211 (1932); *In re* Estate of Shafer, 77 Ohio App. 105, 65 N. E. 2d 902 (1944).
[14] 242 N. C. 691, 89 S. E. 2d 399 (1955).

In another case[15] concerning alimony, the lower court held a husband in contempt of court for failure to make payments under an order for alimony pendente lite. The facts disclosed that the wife had initiated an action for alimony without divorce in 1949, and had been awarded alimony pendente lite. The husband never filed an answer in that action and there had never been a final determination of that case. In 1951, the husband obtained an absolute divorce in another court. He continued making the alimony pendente lite payments for a time following his absolute divroce, but was $966.50 in arrears at the time of the hearing on the contempt citation. The husband contended on appeal that his absolute divorce had terminated his obligation to make the payments, but the Court rejected this argument on the authority of G. S. § 50-11 and its interpretation in *Howell v. Howell.*[16] It held that the husband's divorce did not of itself terminate the prior order, and that he was liable for accrued alimony to date. However, the Court did point out that the husband could terminate the order by bringing the wife's suit for alimony without divorce to a final determination. This would apparently be accomplished by final judgment following the filing of an answer setting up the defense of absolute divorce.

Although it upheld the lower court's finding of liability on the alimony order, the Court reversed because the record did not support the finding that the failure to pay was deliberate and wilful. It was thus not necessary for the Court to discuss the terms of the contempt order, which were that the husband be confined in jail until the alimony be paid or until he might be lawfully released. This sentence of confinement for an unlimited period is appropriate only when an offense is a civil contempt, the punishment being "as for contempt" under our statute.[17] The unlimited sentence was consistent with what is thought to be the better view on this point,[18] but inconsistent with the most recent case which held such a contempt to be criminal in nature.[19] Imprisonment for criminal contempt cannot exceed thirty days.[20]

Mabry v. Mabry[21] was a case of first impression in this state. The wife filed a divorce petition under G. S. § 50-5 (6) grounded on five years' separation by reason of the incurable insanity of the husband. The only question involved was whether the husband had been confined in a mental institution for five consecutive years as required by the statute. The evidence disclosed that he had been released on probation on two occasions, once for a period of ten days and again for a period of six

[15] Yow v. Yow, 243 N. C. 79, 89 S. E. 2d 867 (1955).
[16] 206 N. C. 672, 174 S. E. 921 (1934).
[17] G. S. § 5-8 (1953).
[18] See Note, 34 N. C. L. Rev. 221 (1956).
[19] Basnight v. Basnight, 242 N. C. 645, 89 S. E. 2d 259 (1955).
[20] G. S. §§ 5-1 and 5-4 (1953).
[21] 243 N. C. 126, 90 S. E. 2d 221 (1955).

months. The Court held that the two periods of probation did not constitute an interruption of the confinement inasmuch as the husband remained in constructive custody of the institution during those periods.[22]

EQUITY

There were four equity cases of significance, two of injunction and two relating to specific performance.

The Court in *Causby v. High Penn Oil Co.*[1] permitted an interlocutory injunction against an anticipated industrial nuisance. Unlike *Wilcher v. Sharpe,*[2] where similar relief was denied against the erection and operation of a new feed mill on the ground that the nuisance was merely apprehended, the nuisance in *Causby* was found to be seriously threatened and the balance of hardship to be in plaintiff's favor. The defendant was rebuilding a plant for the refining of used motor oil. Before its destruction by fire, the original plant had been found to be a nuisance and its operation as such had been enjoined.[3] Now, in *Causby,* the court found that the new plant would probably be operated in the same manner as the old. This case should be compared with *Pake v. Morris*[4] where injunction on the ground of nuisance was denied against a fish-scrap factory, then being rebuilt after a fire. In that case, however, there had been no litigation over the original plant, and the jury at final hearing found that it had not been operated as a nuisance.

In *Blowing Rock v. Gregorie,*[5] on a point of first impression in North Carolina, the Court affirmed a judgment granting the municipality, after final hearing, a mandatory injunction to compel the removal of an obstruction in a street. Heretofore, such relief had been granted only to individual citizens affected.[6] The Maryland case[7] principally relied upon is an excellent application of the public nuisance concept to street obstruction, and of the traditional power of equity, at the suit of the government, to enjoin the public nuisance, even though the offensive use of land also constitutes a crime; and this without any statute authorizing injunction. That goes beyond *Elizabeth City v. Aydlett,*[8] where the court

[22] For another domestic relations case, involving collateral attack on a divorce decree, see TRIAL AND APPELLATE PRACTICE, p. 263 *infra;* to be commented on in a later issue of the LAW REVIEW.

[1] 244 N. C. 235, 93 S. E. 2d 79 (1956).
[2] 236 N. C. 308, 72 S. E. 2d 662 (1952).
[3] Morgan v. High Penn Oil Co., 238 N. C. 185, 77 S. E. 2d 682 (1953).
[4] 230 N. C. 424, 53 S. E. 2d 300 (1949).
[5] 243 N. C. 364, 90 S. E. 2d 898 (1956).
[6] Scott v. Shackelford, 241 N. C. 738, 86 S. E. 2d 453 (1955); Brooks v. Muirhead, 223 N. C. 227, 25 S. E. 2d 889 (1943).
[7] Adams v. Town of Trappe, 204 Md. 165, 102 A. 2d 830 (1954).
[8] 198 N. C. 585, 152 S. E. 681 (1930); *cf.* Elizabeth City v. Aydlett, 200 N. C. 58, 156 S. E. 163 (1930).

overlooked the public nuisance concept and denied the city an injunction against a filling station that violated a zoning ordinance, the violation being a criminal offense, because no statute authorized injunction. In *Blowing Rock,* however, it did not appear that the street obstruction was a criminal offense. The decision, in its use of the public nuisance concept, is in line with earlier cases of government injunctions against a drainage obstruction[9] and an offensive mill pond.[10]

In *Shuford v. Asheville Oil Co.*,[11] in the course of denying enforcement of building restrictions in a deed (because of the covenantee's acquiescence in other violations and because of changes in the character of the neighborhood), the Court dealt with another point of first impression in North Carolina. It held that a zoning ordinance, although it could not supersede or nullify the building restrictions, may "be considered with other competent evidence in determining whether or not there has been a fundamental change in the restricted subdivision . . . or in the neighborhood. . . ."[12] The restrictive covenants originally limited the use to residential purposes. The ordinance rezoned the area for business purposes. The decision is in accord with the few cases that have appeared elsewhere.[13]

In *Reynolds v. Early*[14] the trial court decreed specific performance of a contract to convey land, incorporating a direction that the decree was to operate as a transfer of title under G. S. § 1-227[15] in the event defendants failed to execute a deed as theretofore required in the decree. This direction was enough to render unnecessary a consideration of the conflict in the cases[16] as to whether a decree must so provide. The decree specifically provided for payment as a condition of the order to defendants to execute the deed, but it did not mention payment in the paragraph providing for the decree to operate as a transfer of title and to be registered as such. The Supreme Court modified this paragraph by specifically requiring deposit of the price with the Clerk, for the benefit of defendants, within a specified time.

[9] Town of Roper v. Leary, 171 N. C. 35, 87 S. E. 945 (1916).
[10] Attorney General v. Hunter, 16 N. C. 12 (1826).
[11] 243 N. C. 636, 91 S. E. 2d 903 (1956).
[12] *Id.* at 648, 91 S. E. 2d at 912.
[13] Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S. W. 2d 1024 (1939); Hayslett v. Shell Oil Corp., 39 Ohio App. 164, 175 N. E. 888 (1930); see Needle v. Clifton Realty Corp., 195 Md. 553, 73 A. 2d 895 (1950).
[14] 243 N. C. 623, 91 S. E. 2d 598 (1956).
[15] This statute provides that when a court orders legal title of property to be conveyed by one party in a suit to another, it may also, in its discretion, declare in the decree that the effect of the decree itself shall be the same as a conveyance of the legal title.
[16] Morris v. White, 96 N. C. 91, 2 S. E. 254 (1887) (decree must expressly provide that it "shall be regarded as a deed of conveyance"); Evans v. Brendle, 173 N. C. 149, 152, 91 S. E. 723, 724 (1917) (dictum) ("doubtful" if decree effective as transfer without such provision). *Contra,* Skinner v. Terry, 134 N. C. 305, 46 S. E. 517 (1904).

EVIDENCE

OPINION TESTIMONY AND "INVADING THE PROVINCE OF THE JURY"

Although there are sound bases for admitting or excluding the opinion testimony of laymen, our Court still explains its exclusion of such opinion evidence on the ground that it "relates to the ultimate fact to be determined by the jury" and "invades the prerogative of the jury." Thus in *Wood v. Ins. Co.*[1] the issue was whether the damage to certain property had been caused by rain or wind. The trial court permitted four laymen who had examined the premises after the damage was occasioned to testify that in their opinion from the conditions they observed the damage had been caused by wind. The Supreme Court held the admission of this opinion testimony was reversible error because it related to the ultimate fact to be determined by the jury and invaded the jury's prerogative.

The Court referred to Section 124 of *Stansbury on Evidence* but unfortunately did not proceed further to Section 126 where Professor Stansbury vigorously attacks the above manner of reasoning and shows that not only does a witness frequently give testimony on the ultimate fact to be determined by the jury but also that he can never invade the jury's province or usurp its functions for no jury is bound by the opinion of the witness. As a matter of fact our Court has repeatedly admitted the opinion testimony of laymen on the ultimate issue. The true test is set out in *State v. Kincaid.*[2] Briefly stated, the opinion testimony of a layman is not to be admitted if he can so fully describe the situation that the jury is placed in as good a position as the witness to draw a conclusion, and, conversely, "opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences."[3]

Another case in which our Court has correctly reasoned on the admission of opinion testimony as to the cause of damage to plaintiff's land, even though that was the ultimate issue to be determined by the jury, is *Teseneer v. Henrietta Mills Co.*[4] where the plaintiff was permitted to testify that the dam of the defendant caused the injury to plaintiff's land. Such testimony, said the Court, "did not invade the province of the jury."[5]

[1] 243 N. C. 158, 90 S. E. 2d 310 (1955).
[2] 183 N. C. 709, 110 S. E. 612 (1922) and see cases cited in STANSBURY, EVIDENCE § 125 (1946).
[3] STANBURY, EVIDENCE § 125 (1946).
[4] 209 N. C. 615, 184 S. E. 535 (1936).
[5] *Id.* at 622, 184 S. E. 2d at 539 (1936). The Court recognized the general rule excluding opinions but stated there was a well recognized exception which admits the opinion evidence "of common observers testifying (to) the results of their

IMPEACHMENT

In *State v. Rowell*[6] the defendant was charged with involuntary manslaughter in connection with the death of one Ivey from injuries sustained in a collision between a pick-up truck operated by the defendant, in which Ivey was a passenger, and a truck operated by Wiley Goings. Goings testified for the prosecution and, while under cross-examination, was asked if he was now being sued by the estate of Ivey for wrongful death. The trial court sustained the objection by the State to this question. The witness, in the absence of the jury, was permitted to answer that he was. On appeal the Court held this evidence admissible, following the general rule that cross-examination of an opposing witness for the purpose of showing bias or interest is a substantial legal right, which the trial court cannot abrogate or abridge. The Attorney General argued that *State v. Hart*,[7] cited and followed by the Court, was not applicable because in that case the witness was suing for the recovery of damages whereas in this case the witness was being sued for damages. The Court held this to be a "difference without a distinction in principle."[8]

In *In re Gamble*[9] a nephew brought proceedings to have his aged uncle declared incompetent and to have a trustee appointed for him. The uncle had recently executed deeds giving away all his real property, subject to a life estate reserved to himself. On cross-examination the nephew testified that he was only trying to protect his uncle's interest and that he had no intention in bringing the action to protect his own interest as a possible legatee or devisee under his uncle's will. The nephew also declared that he did not know the contents of the will which his uncle had deposited with the Clerk of the Superior Court.

The attorney for the uncle attempted to offer in evidence the contents of the will to show bias and interest on the part of the nephew. The trial court refused to allow counsel to examine the contents of the will left in a sealed envelope with the Clerk. The uncle did not remember the will or its contents.

The Court reaffirmed the general rule that, ordinarily, the answer of a witness on cross-examination concerning collateral matters for the purpose of impeachment is conclusive, and may not be contradicted by other evidence, but recognized that the witness' answers to question which tend to impeach his *impartiality* by showing bias, interest, etc. are not conclusive and may be contradicted by other evidence.[10]

observations made at the time in regard to common appearances, facts, and conditions which cannot be reproduced and made palpable to the jury."

[6] 244 N. C. 280, 93 S. E. 2d 201 (1956).
[7] 239 N. C. 709, 80 S. E. 2d 901 (1954).
[8] 244 N. C. 280, 282, 93 S. E. 2d 201, 202 (1956).
[9] 244 N. C. 149, 93 S. E. 2d 66 (1956).
[10] 2 WIGMORE, EVIDENCE § 948 (1940).

The general rule that exclusion of evidence is not reviewable on appeal unless the record discloses what the excluded evidence would have been[11] was held inapplicable here because of the impossibility of introducing such evidence. The trial court had denied access to the sealed envelope and counsel could not show the contents orally by the uncle. The Court noted that if the contents of the will had been made known to the jury, petitioner's evidence might well have been discounted if it had appeared that he was a sole or principal heir under the will. "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he cannot state to the court what facts a reasonable cross-examination might develop."[12] Judgment for petitioner was set aside and a new trial was ordered.

REPUTATION

Nance v. Fike[13] was an action for damages based on alleged assault and battery. A witness for the defendants was allowed to testify on direct examination that the general reputation of the defendants for peacefulness and quietness was good and that the general reputation of the plaintiff for "high-temperedness, turbulence and violence" was bad. On redirect examination the witness disclosed that he had based this general reputation on hearsay statements concerning particular incidents. Other witnesses offered similar testimony. The Court held that since each party had testified, it was competent to show either party's general reputation as bearing on his credibility as a witness but only testimony as to general reputation for such traits was admissible and hearsay evidence as to particular incidents was incompetent. Since the case of *State v. Turpin*,[14] where there is a homicide and evidence to show that it was in self defense, the defendant may offer evidence tending to show the bad general reputation of the deceased as a violent and dangerous fighting man and the defendant's knowledge thereof. Once such evidence is offered, the State may offer evidence in rebuttal tending to show the general reputation of the deceased as a man of peace and quiet. This rule has often been applied to homicide cases, but, since *State v. Kimbrell*,[15] it has been held inapplicable to assault cases. In the *Nance* case our Court saw no sufficient reason for the distinction between homicide and assault cases and said that *State v. Kimbrell* "may be considered withdrawn as authority for the proposition stated."[16] Thus the same rule will apply in cases of civil and criminal assault, thereby creating an exception to the general rule that testimony as to the general reputation of

[11] See 33 N. C. L. REV. 476 (1955).
[12] 244 N. C. 149, 155, 93 S. E. 2d 66, 70 (1956).
[13] 244 N. C. 368, 93 S. E. 2d 443 (1956).
[14] 77 N. C. 473 (1877).
[15] 151 N. C. 702, 66 S. E. 614 (1909).
[16] 244 N. C. 368, 373, 93 S. E. 2d 443, 446 (1956).

a party is not admissible in a civil action as substantive evidence.[17] It should be noted that the Court restricted the admission of evidence of the assailant's general reputation to his reputation as a "violent and dangerous fighting man," saying that the use of such words as "quarrelsome," "troublemaking," "high-temperedness," "disorder," and "disturbances" tend to divert rather than aid the jury in determining the issue.

RELEVANCE OF PRIOR INSANITY

At the same term of court in which the defendant was arraigned for murder he was adjudged insane and ordered committed to an institution. Following his release, the case was reopened and at the trial defendant offered in evidence the adjudication of insanity. The trial court sustained the State's objection to its admission. The State offered no evidence that the defendant had recovered or had been restored to sanity. The Court held[18] that in criminal cases, when insanity is relied on as a defense, an adjudication of insanity made prior to the alleged offense or subsequent thereto is admissible in evidence for the consideration of the jury on the issue as to whether the defendant was insane when the offense was committed, provided the time of the adjudication bears such relation to the person's condition of mind at the time of the crime as to be worthy of consideration. However, an adjudication of insanity is not conclusive but is merely evidence tending to show the mental condition of the defendant at the precise time of the act in issue. North Carolina has previously recognized this rule in civil cases[19] and, by this decision, makes the same rule applicable in criminal cases, thereby aligning us with the majority rule.[20]

CUSTOMARY SAFETY DEVICES

In *Southern Ry. v. Akers Motor Lines*[21] the plaintiff sought to recover damages sustained in a train-truck collision at a rural railroad crossing near the City of Henderson. The plaintiff was permitted to introduce evidence of protective devices maintained at other crossings in Henderson. Since the collision occurred at a rural crossing, the Court held the admission of this evidence error. The Court said "where evidence of conditions is offered to prove a habit or custom under such conditions, the circumstances of the conditions must not be so dissimilar that the evidence is without probative value,"[22] and that ". . . 'it is obvious that there must be such a similarity or unity of

[17] See STANSBURY, EVIDENCE, § 103-104 (1946).
[18] State v. Duncan, 244 N. C. 375, 93 S. E. 2d 421 (1956).
[19] 222 N. C. 274, 22 S. E. 2d 553 (1942).
[20] 5 WIGMORE, EVIDENCE § 1671 (1940).
[21] 242 N. C. 676, 89 S. E. 2d 392 (1955).
[22] *Id.* at 680, 89 S. E. 2d at 395, citing STANSBURY, EVIDENCE § 89 (1946).

conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons *under similar circumstances.*'"[23] Other conditions or events may be used to show the requisite standard of care but there must be a more substantial similarity of conditions and circumstances than existed in this case. The Court noted that the offered evidence related to intersections within the City of Henderson where the noise is more intense, traffic more congested and trains move more frequently, whereas the accident occurred in a rural portion of the county at an intersection where only one train passes daily.

CONFESSIONS

In *State v. Isom*[24] the defendant was intoxicated at the time he made a confession tending to incriminate him. The Court applied the general rule that intoxication of an accused person does not render inadmissible his confession; however, the extent of the intoxication is relevant and the weight to be accorded a confession made under such circumstances is exclusively for the determination by the jury.

DEAD MAN'S STATUTE (G. S. § 8-51) AND WAIVER

The plaintiffs, claiming under a deceased person, examined the attorney for the deceased in respect to the execution and delivery of deeds to the land in controversy and the consideration given therefor. They also adversely examined the defendant Ricard for the purpose of obtaining evidence for use in the trial as provided in G. S. §§ 1-568.1 to 1-568.16, and, at a former trial, called the defendant as an adverse witness and examined her in detail about her relations with the deceased. In *Hayes v. Ricard*[25] the Court held that an examination of the attorney by the plaintiffs constituted (1) a waiver of the rule that communications between an attorney and his client are privileged and (2) a waiver of G. S. § 8-51 (North Carolina's Dead Man's Statute) in respect to communications or transactions with the decedent. In addition, following such an examination, the other party is entitled to a cross-examination of the attorney as to matters on which he has testified.[26]

A pre-trial examination of the defendant for the purpose of obtaining evidence for use in the trial is also a waiver of the protection afforded by G. S. § 8-51 to the extent that either party may use it upon the trial.

Since the plaintiffs at a former trial examined the defendant in detail about her relations with the deceased, this also constituted a waiver of G. S. § 8-51 and opened the door for the defendant to testify in another

[23] 242 N. C. 676, 681, 89 S. E. 2d 392, 395 (1955) quoting 2 WIGMORE, EVIDENCE § 379 (1940) (emphasis supplied by the Court).
[24] 243 N. C. 164, 90 S. E. 2d 237 (1955).
[25] 244 N. C. 313, 93 S. E. 2d 540 (1956).
[26] 8 WIGMORE, EVIDENCE § 2327 (1940).

trial in respect to the matters about which the plaintiffs had previously examined her.[27]

FUTURE INTERESTS

CLASS GIFTS

In *Edwards v. Butler*,[1] *J* conveyed land to his wife, *L*, for life, and then to his children. *L* died leaving husband, *J*, and four children surviving. One of these four children was born after the execution of the deed. *J* later remarried and had several more children. All children of both marriages claimed an interest in the property. The lower court held that only the children living at the time of the execution of the deed took an interest. Reversing, the Supreme Court held that all the children born of the first wife took, because the critical date for closing the class was the death of the life tenant,[2] and not the execution of the deed. None of the children of *J* by his second wife took any interest because they were not in being when the class closed and the roll was called.

EXECUTORY DEVISE

In *Stanley v. Foster*,[3] testator devised lands to his son, *T*, with a provision that if *T* died leaving no children, the land should go to testator's three named grandchildren, and if a grandchild died without leaving children, her part should go to "them that is living." *T* died leaving no children. All grandchildren were still living and were over seventy years old. Two of the grandchildren had no children, but the third grandchild had five children, who were the plaintiffs in this action. The plaintiffs claimed that the three grandchildren had only a life estate and that, because they were over seventy years old and the possibility of their having issue was extinct, the living great grandchildren had the fee. The court held that in contemplation of law the possibility of having issue is commensurate with life.[4] Each of the grandchildren had a fee in the land defeasible by dying without leaving issue. The great grandchildren could not assert any interest in the property during the lives of the grandchildren.

RULE IN SHELLEY'S CASE

The Court decided two cases in the past year involving the Rule in Shelley's Case.[5] In *Hammer v. Brantley*,[6] the will read "to be hers

[27] See, *e.g.*, Norris v. Stewart, 105 N. C. 455, 10 S. E. 912 (1890).

[1] 244 N. C. 205, 92 S. E. 2d 922 (1956).
[2] See Mackie v. Mackie, 230 N. C. 152, 52 S. E. 2d 352 (1949).
[3] 244 N. C. 201, 92 S. E. 2d 925 (1956).
[4] See McPherson v. First & Citizens National Bank, 240 N. C. 1, 81 S. E. 2d 386 (1954).
[5] See SIMES AND SMITH, FUTURE INTERESTS, § 1541 (2d ed. 1956).
[6] 244 N. C. 71, 92 S. E. 2d 424 (1956).

[the plaintiff's] for her life time and at her death to her bodily heirs in fee simple forever." The Court held that the plaintiff had a fee simple estate. When a devise is to a person for life with remainder over after his death to "his heirs" or "his bodily heirs" or the "heirs of his body," the Rule in Shelley's Case requires such words to be construed as words of limitation and not words of purchase.[7] Therefore, the devisee (or the grantee) takes a fee simple or a fee tail estate depending upon the words used. In the instant case, the words "bodily heirs" created a fee tail estate and G. S. § 41-1 converted it into a fee simple estate.[8] Apparently the super-added words "in fee simple forever" did not change the construction of "bodily heirs" from words of limitation to words of purchase. This is in line with previous North Carolina holdings.[9] But see *Whitson v. Barnett*,[10] where the deed read "to Roy and bodily heirs, and their heirs and assigns" and on the facts the Court held that "bodily heirs" meant children and the Rule in Shelley's Case did not apply.

When the limitation is to one for life and after his death to his children or issue, the Rule in Shelley's Case does not apply, unless it appears that such words are used in the sense of heirs generally.[11] In *Griffin v. Springer*,[12] defendant claimed that the plaintiffs could not convey a fee simple title to the land in question. The granting clause of the deed to the plaintiffs read: To *B* "a life estate, at his death to be divided to the parties of the third part [*M* and *N*, plaintiffs] equally, and to the children of the said . . . [*M* and *N*] . . . respectively, at their death." (*B* died in 1939.) The Supreme Court held that "children" was not used in the sense of heirs generally, and that the Rule in Shelley's Case did not apply; therefore, *M* and *N* had life estates. The four children of *M* had a vested remainder in *M*'s undivided interest subject to open and let in any after born children of *M*. Since *N* had no children, the remainder to her children was contingent, but would vest upon *N* having a child. Since *M* and *N* only had life estates, they could not convey a fee simple interest. The words "respectively at their death" helped decide the case. The Court interpreted them to mean that the future interest of the children of *M* must vest during *M*'s life and that of the children of *N* must vest during *N*'s life. "Respectively at their death," therefore, did not mean that the children of *M* and *N* must survive their parents. It merely denoted the falling in of possession and did not fix the time of vesting, which occurred for the children of

[7] See Whitson v. Barnett, 237 N. C. 483, 75 S. E. 2d 391 (1953).
[8] See Jones v. Whichard, 163 N. C. 241, 79 S. E. 503 (1913).
[9] See Block, *The Rule in Shelley's Case*, 20 N. C. L. Rev. 49, 72 (1941).
[10] 237 N. C. 483, 75 S. E. 2d 391 (1953).
[11] Faison v. Odom, 144 N. C. 107, 56 S. E. 793 (1907).
[12] 244 N. C. 95, 92 S. E. 2d 682 (1956).

M when they were born and would occur for the children of *N* when they were born.[13]

VESTED REMAINDERS

In *Blanchard v. Ward*,[14] the conveyance read to *A* for life and then to his children if any, but if there is no issue, then over. *A*'s only son died in childhood, and *A* was seeking to sell the land. The Court held that the remainder in the children of *A* was contigent until *A*'s son was born. Then it became vested subject to open.[15] When the son died his vested remainder descended to his heirs, who were his father and mother, *A* and *R*, as tenants in common.[16] Therefore, since *A* then had a life estate and an undivided interest as tenant in common in the vested remainder inherited from his son, there was a merger *pro tanto*, and his life estate terminated by the merger into the fee. But the interest of *A*'s wife, *R*, was still subject to the life estate in *A*, and this life estate was sufficient to support the contingent remainder of any child that might thereafter be born to *A* and *R*. Thus, in an action for specific performance, it was held that *A* and *R* could not convey a fee simple indefeasible title to the defendant. The Court deemed it unnecessary to determine if *A*'s interest which had merged would also open up for contingent remaindermen, if children were later born.

Does this case mean that if the wife had had no interest, the contingent remainder of unborn children would be destroyed by the merger of *A*'s life estate and his vested remainder? If so, it would seem to mean that North Carolina still recognizes the doctrine of destructibility of contingent remainders by merger. Compare *Winslow v. Speight*,[17] where the Court refused to let a contingent remainder be destroyed by merger.[18]

REMAINDERS IN PERSONAL PROPERTY

In *Ridge v. Bright*,[19] the executor of an estate brought a declaratory judgment proceeding to determine whether certain stock was an asset of the estate or belonged to a defendant under the terms of a revocable trust agreement. In the course of the opinion finding a valid inter vivos trust, the Court mentioned that under G. S. § 39-6.2, a remainder in personal property after a life estate may now be created by deed. Prior to this statute, a remainder in personalty could only be created by will.[20]

[13] See Carolina Power and Light Co. v. Haywood, 186 N. C. 313, 119 S. E. 500 (1923) for a discussion of vested and contingent remainders.
[14] 244 N. C. 142, 92 S. E. 2d 776 (1956).
[15] See Mason v. White, 53 N. C. 421 (1852).
[16] G. S. § 29-1 (6) (1950).
[17] 187 N. C. 248, 121 S. E. 529 (1924).
[18] See McCall, *The Destructibility of Contingent Remainders in North Carolina*, 16 N. C. L. Rev. 87, 108 (1938).
[19] 244 N. C. 345, 93 S. E. 2d 607 (1956).
[20] See *A Survey of Statutory Changes*, 31 N. C. L. Rev. 375, 408 (1953) for discussion.

INSURANCE

AUTOMOBILE THEFT POLICIES

Plaintiff sought to recover on an automobile accident and theft policy. The stipulated facts showed that an employee of plaintiff who used the auto in performing his work around town went, "without the knowledge or consent" of plaintiff, to Texas, where the auto was found some nine days later; and that plaintiff suffered $1,000.00 damages. The Court stated[1] succintly that the taking of the auto did not come within the term "accident" as it is ordinarily used, and that the facts agreed did not bring the case within the meaning of the "theft" clause. The Court cited two earlier decisions,[2] one of which held taking with felonious intent must be shown.

EFFECT OF TENANCY BY ENTIRETY

In a case of first impression,[3] the Court held that the insurable interest of a husband runs to the whole of the property held by him and his wife as tenants by the entirety, and that when the property is destroyed by fire, followed by divorce of husband and wife, the wife is entitled to half the insurance proceeds, although the husband alone was in possession, took out the policy and paid the premium.[4]

STRICT CONSTRUCTION OF POLICY

Where a policy insures against death by "external, violent and accidental means which, except in case of drowning or death from internal

[1] Sparrow v. American Fire & Casualty Co., 243 N. C. 60, 89 S. E. 2d 800 (1955).

[2] Funeral Home v. Ins. Co., 216 N. C. 562, 5 S. E. 2d 520 (1939) and Auto Co. v. Ins. Co., 239 N. C. 416, 80 S. E. 2d 35 (1954). In the former, plaintiff's auto had been taken by his nephew "to keep an engagement with a girl friend." The fatal flaw in plaintiff's case was failure of the evidence to show "any unlawful and felonious intent on the part of" the taker, the Court saying that theft is a popular term for larceny, and that requisites for larceny are: (1) a taking without consent of the owner, (2) with felonious intent to deprive the owner of the property.

In the latter case, an employee of plaintiff, instructed to take the auto to a garage for repair, upon arriving at the garage found that "the job could not be done at that time," and desiring breakfast, drove the car home. Stipulated facts showed a conviction of the employee under G. S. § 20-105, violation of which requires (1) a taking without the consent of the owner, (2) with intent temporarily to deprive the owner of possession. The Court conceded, without deciding, that the insurance policy included statutory taking of a vehicle as defined by G. S. § 20-105, but stated that the stipulation of conviction under the statute was ". . .an erroneous admission of law, rather than . . . of fact, [and] may be disregarded." In affirming judgment for defendant, the Court noted that the stipulated facts nowhere stated a taking "without consent of the owner," with intent to "temporarily deprive."

Thus, it appears that in the instant case plaintiff needed at most to show that his employee took the car "with felonious intent." And had the Court been squarely presented with the issue, and had decided to *hold*, that a "theft" policy insures against a statutory taking of an auto as defined by G. S. § 20-105, showing a taking with mere "intent to *temporarily* deprive" the owner of his possession of the vehicle would have sufficed.

[3] Carter v. Continental Ins. Co., 242 N. C. 578, 89 S. E. 2d 122 (1955).

[4] For full treatment of this case, see Note, 35 N. C. L. Rev. 134 (1956).

injuries revealed by autopsy, leave a visible contusion or wound upon the exterior of the body," proof of death by heatstroke does not come within the coverage regardless of whether such death be deemed through external, violent, or accidental means, since there is no visible contusion or wound upon the exterior of the body.[5]

MUNICIPAL CORPORATIONS

In *North Carolina ex rel. Tillett v. Mustian*[1] the Court was called upon to determine the validity of an election which resulted in the repeal of the town charter. The charter was granted by a special act of the General Assembly in 1953 and the town's first officers were appointed to serve until the first election in 1955. G. S. § 160-353 provides that an election to vote upon a proposed amendment to, or repeal of, the charter of a municipal corporation may be initiated in either of two ways. One is by ordinance of the governing body, predicated upon its finding that the amendment or repeal is for the best interests of the municipality. The other is by petition signed by not less than twenty-five per cent of the qualified electors entitled to vote at the next preceding election in the municipality. The election in question was called by petition and was held on the same day as the first election of officers. The Court, construing the statute strictly, held that as there had been no next preceding election, the petition—and therefore the repeal vote—was invalid.

There is some question as to whether giving the voters the authority to repeal or amend a municipal charter under this section is an unconstitutional delegation of legislative power. Deciding this case on the narrow procedural ground, the Court left this question untouched.

Lexington Insulation Co. v. Davidson County[2] appears to be the first case in which our Court has denied at least a quantum meruit recovery to a plaintiff who has performed under an invalid contract with a city.[3] Here, the Chairman of the Board of County Commissioners was a stockholder and officer of a private corporation. The county manager let contracts to this corporation for the insulation of the county home and court house and the Chairman of the Board executed the voucher in payment, all without the knowledge of the other commissioners. When the other commissioners learned of the contract they cancelled and demanded the return of the price paid. The corporation returned the money and sued for a quantum meruit recovery for work done up to the

[5] McDaniel v. Imperial Life Ins. Co., 243 N. C. 275, 90 S. E. 2d 546 (1955).

[1] 243 N. C. 564, 91 S. E. 2d 696 (1956).
[2] 243 N. C. 252, 90 S. E. 2d 496 (1955).
[3] G. S. § 14-234 (1953) prohibits an appointed or elected official from making a contract for his own benefit under the authority of his office.

time of cancellation.[4] The Court distinguished this case from others in which, even though a contract with a municipality had been declared void, a quasi-contractual recovery had been permitted, saying that in those cases[5] no moral turpitude or breach of public policy had been involved. However, the Court did not mention *Moore v. Lambeth*,[6] decided under a statute comparable to that in *Lexington* case, in which the reasonable value of the services rendered was deducted by the lower court from the city's recovery of the contract price paid. Although not directly in issue upon the appeal, the Court seemed to approve the allowance of quantum meruit in that case even though there had been a conspiracy to evade the law, defraud the city, and let the contract at an excessive price.

Bryan v. City of Sanford[7] is another in a line of cases dealing with G. S. § 160-173. This statute, the constitutionality of which was upheld in *Marren v. Gamble*,[8] provides that when at any intersection two or more corners are zoned in a given way, the owner of another corner lot may have his lot zoned in the same way. In *Robbins v. Charlotte*,[9] the Court had held that the statute did not apply to a "T" intersection because there were not the necessary four corners. In the *Bryan* case there was also a "T" intersection, but a proposed street extension, not actually opened, could convert this to a regular intersection with four corners. The proposed extension had been dedicated to the public by a registered map, and the city had subsequently adopted this map as official by incorporating it into the zoning ordinance. The Court held that this amounted to an acceptance of the dedication and that the lot should be given the same treatment.

Convent of the Sisters of Saint Joseph v. Winston-Salem[10] seems to be the first case in North Carolina concerning the validity of conditions imposed by a board of adjustment in granting special zoning permits. The zoning ordinance allowed public schools to be built in the area but did not allow private schools except by special permit. The Catholic Bishop of the diocese purchased a large residence and applied for a special permit to operate a private school there. The permit was granted subject to the condition that no changes could be made in the exterior of the buildings. The property was subsequently transferred

[4] See BUSINESS ASSOCIATIONS, p. 187 *supra*. Compare the prior cases, reaching the same result, in which recovery was sought by individuals: Davidson v. Guilford County, 152 N. C. 436, 67 S. E. 918 (1910); Snipes v. Winston-Salem, 126 N. C. 375, 35 S. E. 610 (1900).

[5] Charlotte Lumber and Mfg. Co. v. Charlotte, 242 N. C. 189, 87 S. E. 2d 204 (1955); Hawkins v. Dallas, 229 N. C. 561, 30 S. E. 2d 561 (1948).

[6] 207 N. C. 23, 175 S. E. 714 (1934).

[7] 244 N. C. 30, 92 S. E. 2d 420 (1956).

[8] 237 N. C. 680, 75 S. E. 2d 880 (1953).

[9] 241 N. C. 197, 84 S. E. 2d 814 (1954); see *Case Survey*, 34 N. C. L. REV. 1, 61-62 (1955).

[10] 243 N. C. 316, 90 S. E. 2d 879 (1956).

to the plaintiff Convent, which desired to expand the school and applied for a permit to wall up the doors of the three-car garage so that it could be used as classroom space. The permit was denied by the board, and the plaintiff attacked the constitutionality of the ordinance for making an unfair discrimination between public and private schools. The Court did not reach the larger constitutional issue and decided the case on the ground that one who receives benefits under an ordinance or statute is estopped to attack its validity. The power of a zoning board of adjustment to impose conditions which are reasonable has been upheld elsewhere,[11] but it is not clear how far a board may go in a particular case.[12]

REAL PROPERTY

BOUNDARIES

The usual rule in the construction of the description in a deed is that in case of conflict a call for a course and distance in the deed must give way to a call for a natural boundary because the natural boundary is more certain.[1] A case illustrating this point is *Wachovia Bank and Trust Co. v. Miller*[2] where the plaintiff was seeking title to the disputed area under color of title[3] plus seven years adverse possession.[4] The Court found that the call in plaintiff's deed for 98 feet depth must give way to the call in the deed for the rear line, "the Springs line," which was well known and established by two independent walls to buildings on adjacent land and as such was a natural boundary.[5] Therefore the description in plaintiff's color of title included the area in question.

G. S. § 39-2 provides that "No deed . . . shall be declared void for vagueness in the description . . . for the reason that the boundaries given do not go entirely around the land described . . . provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed . . . no other land which at all corresponded to the description contained in such deed or paper writing."

[11] See Hopkins v. Bd. of Appeals, 179 Misc. 325, 39 N. Y. S. 2d 167, 175 (Sup. Ct. 1942).

[12] See BASSETT, ZONING 128-29 (2d ed. 1940), which indicates that the conditions which can be imposed are not necessarily limited to the scope of the police power.

[1] Wilson Lumber and Milling Co. v. Hutton, 152 N. C. 537, 68 S. E. 2 (1910).

[2] 243 N. C. 1, 89 S. E. 2d 765 (1955).

[3] Possession taken under color of title must be commensurate with the limits of the tract which the instrument purports to convey. Wallace v. Rice, 232 N. C. 371, 61 S. E. 2d 82 (1950).

[4] G. S. § 1-38 (1953).

[5] A call to the line of an adjacent tract, if well known and established, is a call to a natural boundary. Wilson Lumber and Milling Co. v. Hutton, 152 N. C. 537, 68 S. E. 2 (1910).

In *Brown v. Hurley*,[6] the description in the deed was held sufficiently certain to permit proof *aliunde* to be admitted to fit the description in the deed, although the boundaries given did not entirely enclose the land.[7] There was evidence as to location of corners, marked trees and other natural objects, and the testimony of a surveyor and others tended to fit the description to the land, with one witness testifying that she could walk the line at any time.

In *Jones v. Turlington*,[8] the question was whether the defendant owned the fee under a street bordering the Intra-Coastal Waterway, and if he thereby had the title to any adjacent accretion.[9] The Court found that a conveyance of the lot according to a map showing the lateral lines of the lot running across the full width of the street, carried the fee in the land covered by the street, subject to an easement for the street. The defendant thereby became a riparian owner with the title to accretion.

DEDICATION

It is a settled principle that if the owner of land, located within or without a city or town, has it subdivided and platted into lots and streets, and sells the lots with reference to the plat, he thereby dedicates the streets to the use of the purchasers and the public.[10] The purchaser acquires the right to have all the streets kept open and, when the land is within a municipality, this is true whether or not the streets in fact are accepted by the governing board.[11] However, as to the general public the dedication is not complete until acceptance. This acceptance may be shown not only by formal action on the part of the authorities having charge of the matter, but under certain circumstances by user as of right on the part of the public.[12] But in so far as a municipality is concerned, the platting of land and the sale of lots pursuant thereto amount to a mere offer of dedication. There is no complete dedication until the municipality accepts, either by formal action of the governing body[13] or by acts done under the authority of the governing body, such as improving, repairing, or paving a street.[14] This is to allow the municipality to limit its responsibility for street maintenance or other

[6] 243 N. C. 138, 90 S. E. 2d 324 (1955).
[7] G. S. § 8-39 (1953) provides that parol evidence may be introduced to fit the description in the deed to the land.
[8] 243 N. C. 681, 92 S. E. 2d 75 (1956).
[9] The owner of riparian lands acquires title to all accretions. 56 AM. JUR., *Waters* § 477 (1947).
[10] Home Real Estate Loan & Ins. Co. v. Carolina Beach, 216 N. C. 778, 7 S. E. 2d 13 (1940).
[11] *Ibid.*
[12] Town of Blowing Rock v. Gregorie, 243 N. C. 364, 90 S. E. 2d 898 (1956).
[13] Gault v. Town of Lake Waccamaw, 200 N. C. 593, 158 S. E. 104 (1931).
[14] 26 C. J. S., *Dedication* § 40 (1956).

liability.[15] In *Blowing Rock v. Gregorie,*[16] the Town Commissioners attempted to close a street. The town had accepted the dedication of the street by making repairs on it. The Court said that G. S. § 160-200 (11)[17] must be construed with G. S. § 153-9 (17),[18] and if a municipality wishes to close a street it must give the notices required by G. S. § 153-9 (17). In the instant case such notice had not been given; hence the resolution to close the street was void.

DEEDS

Parol evidence is admissible to fit the description to the land conveyed. 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 sought.[19] In *Baldwin v. Hinton,*[20] the description in the deed read: "Being a tract of land in Selma Township, in the settlement called 'Coonsboro' about three miles north of Selma, North Carolina, consisting of 10.65 acres, more or less." The Court held that the deed was void for insufficiency of description because the description could fit any tract of land "about three miles north of Selma."

Plaintiff executed a deed giving the defendant the right to cut over timber land only once during a five year period. The purpose of such restriction was to protect the new timber growth. Defendant cut over the land once for saw timber and again for pulp wood. The Court held that the defendant had no right to cut for pulp wood.[21] No classification of timber had been fixed in the deed. Therefore, the defendant had the right to cut only once for all the merchantable timber. There is a strong dissent which takes the view that the deed did not require that all the timber be cut in one continuous operation. Therefore, since there was only a special cutting for saw timber and never a general cutting, the defendant had the right to come back and cut the pulp wood.

DEFICIENCY JUDGMENT

G. S. § 45-21.38 precludes a deficiency judgment pursuant to foreclosure of real property securing a purchase money note. In *Fleishel v. Jessup,*[22] the defendant executed purchase money notes secured by a

[15] Home Real Estate Loan & Ins. Co. v. Carolina Beach, 216 N. C. 778, 7 S. E. 2d 13 (1940).
[16] 243 N. C. 364, 90 S. E. 2d 898 (1956).
[17] This statute provides that all cities shall have the power to open, change, widen, extend, and close any street.
[18] This statute provides that the governing body of any municipality shall have the power to close any street. It further provides for certain notices to be given when a street is to be closed.
[19] N. C. Self Help Corp. v. Brinkley, 215 N. C. 615, 2 S. E. 2d 889 (1939).
[20] 243 N. C. 113, 90 S. E. 2d 316 (1955).
[21] Scarborough v. Calypso Veneer Co., 244 N. C. 1, 92 S. E. 2d 435 (1956).
[22] 242 N. C. 605, 89 S. E. 2d 160 (1955).

deed of trust on certain machinery, equipment, and land. A fire destroyed the machinery and equipment, and the plaintiff brought an action on the notes and to foreclose the deed of trust. Deficiency judgment was awarded the plaintiff. In remanding the case, the Supreme Court held judgment for any deficiency was premature. There could be no deficiency until the sale. After a sale was held, plaintiff recovered a deficiency judgment in a second action. On appeal[23] the Court held that the lower court erred in excluding evidence showing whether the property was realty or personalty. The defendant was entitled to have the jury decide what proportion of the value of the property was realty, and as to that proportion deficiency judgment is barred by G. S. § 45-21.38. *Quaere,* if the holder of purchase money notes secured by realty can sue first on the notes separately, or must he sell or foreclose under his deed of trust and be barred from any later deficiency judgment? If the holder can sue on his notes separately, it would seem to be a device to evade this statute.[24]

EMINENT DOMAIN

Questions concerning eminent domain were before the Court in *Eller v. Bd. of Educ. of Buncombe County*[25] and *Sale v. Highway Comm'n.*[26] Both cases are treated in the CONSTITUTIONAL LAW section of this Survey. It is significant to note that the Court in the *Eller* case held G. S. § 40-12 *et seq.*[27] applicable only where the condemnor acquires title and right to possession of specific land.

Three appeals from special proceedings instituted under G. S. § 136-19 were consolidated and handled by the Court this year.[28] The Court held that acceptance by landowners of voluntary payments of awards fixed by the Commissioners settled the question of compensation. The cases were controlled by the decision in *Highway Comm'n v. Pardington.*[29]

Determination of amount of compensation was considered in *Carolina Power and Light Co. v. Clark.*[30] A treatment of this case may be found in the DAMAGES section of this Survey.

LANDLORD-TENANT

A magistrate's jurisdiction in an ejectment action obtains only if there is a landlord-tenant relation between the plaintiff and defendant.[31]

[23] Fleishel v. Jessup, 244 N. C. 451, 94 S. E. 2d 308 (1956).
[24] These problems will be considered in a forthcoming note in this *Law Review.*
[25] 242 N. C. 584, 89 S. E. 2d 144 (1955).
[26] 242 N. C. 612, 89 S. E. 2d 290 (1955).
[27] These statutes govern the condemnation of land under the power of eminent domain.
[28] Highway Comm'n v. Mullican, 243 N. C. 68, 89 S. E. 2d 738 (1955).
[29] 242 N. C. 482, 88 S. E. 2d 102 (1955), noted in *Case Survey,* 34 N. C. L. REV. 1, 67 (1955).
[30] 243 N. C. 577, 91 S. E. 2d 569 (1956).
[31] G. S. § 42-26 (1950), Howell v. Branson, 226 N. C. 264, 37 S. E. 687 (1946).

In *Harwell v. Rohrabacher*,[32] defendant made a purchase contract for a house and gave earnest money. Later the defendant withdrew his money and agreed that his contract was null and void. Then the defendant leased the house and paid rent. When the lease was terminated and the defendant refused to vacate, the plaintiff brought summary ejectment before a Justice of the Peace. The Court, in upholding the magistrate's jurisdiction, said that since the defendant's purchase contract had been cancelled, the defendant was a tenant and could not deny his landlord's title.[33]

In *Hedrick v. Akers*,[34] the plaintiff sued one of several lessees of a building for injuries sustained in a fall over a drainpipe across the sidewalk. In the course of the opinion affirming a nonsuit for plaintiff's contributory negligence, the Court stated that since the landlord installed the drainpipe and the tenant had no responsibility for either its upkeep or removal, the tenant was not responsible.[35]

QUIETING TITLE

Plaintiff sued the State Highway and Public Works Commission and a municipal corporation to remove a cloud on title based on an alleged invalid claim of right of way.[36] The Court stated that the Highway Commission is only subject to suit in the manner authorized by G. S. § 40-12 when it takes land under its eminent domain power under G. S. § 136-19 and G. S. §§ 40-12 *et seq.* It is not subject to suit to remove a cloud on title.[37] However, the defendant municipal corporation has no such rule applicable to it and can be sued under G. S. § 160-2 and G. S. § 41-10.

RESTRICTIVE COVENANTS

In *Shuford v. Asheville Oil Co.*,[38] the plaintiff sought to enforce certain restrictive covenants in a deed given by the plaintiff to the grantors of the defendant. However, the plaintiff at a later time made an agreement with the defendant's grantors and others, the terms of which placed less stringent restrictions upon the property in controversy. The plaintiff claimed the agreement was executed by him only to secure restrictions on lots within the adjacent subdivision, as the agreement

[32] 243 N. C. 255, 90 S. E. 2d 499 (1955).

[33] It is recognized as a general rule that a tenant cannot deny the title of his landlord. Lawrence v. Eller, 169 N. C. 211, 85 S. E. 291 (1915).

[34] 244 N. C. 274, 93 S. E. 2d 160 (1956).

[35] The landlord and not the tenant is responsible to persons on the sidewalk for injuries resulting from a defective sidewalk in front of a building leased to different tenants where the landlord exercises a general control of the building. 32 AM. JUR., *Landlord & Tenant* § 821 (1941); Childress v. Lawrence, 220 N. C. 195, 16 S. E. 2d 842 (1941); Knight v. Foster, 163 N. C. 329, 79 S. E. 614 (1913).

[36] Cannon v. Wilmington, 242 N. C. 711, 89 S. E. 2d 595 (1955).

[37] Compare, however, the cases discussed in *Eminent Domain* under CONSTITUTIONAL LAW.

[38] 243 N. C. 636, 91 S. E. 2d 903 (1956).

itself stated, and not to change the restrictions in plaintiff's prior deed. The Court held that the plaintiff could not deny knowledge of the provisions of the agreement and that he was estopped to enforce the restrictions in his deed, because he had accepted benefits under the agreement, which specifically liberalized the restrictions on the lot in question.

SALES

BREACH OF WARRANTY OF QUALITY

Measure of Damages

North Carolina is in accord with the weight of authority[1] and the *Uniform Sales Act*[2] as to the damages recoverable for breach of warranty of quality of merchandise sold. *In Grossman v. Johnson*[3] the defendant counterclaimed for breach of warranty to the plaintiff's action to recover a balance due for goods sold. The Court affirmed a nonsuit to the counterclaim because there was no evidence of the difference between the value of the goods sold as warranted, and as delivered.

The Court, after giving the general statement of the measure of damages, had added: "But, where there is no evidence as to the value of the goods at the time and place of delivery, the purchase price will be regarded as the actual value."[4] It should be noted that even though the price and the value as delivered are the same, there would still be damages if the goods as warranted would have had an even greater value. But where, as in this case, the purchase price must be taken as the true value and there is no showing that the goods as warranted would have had a greater value, there are no damages proved.

Cause of Action for Personal Injury

Plaintiff brought an action to recover damages for breach of warranty because upon application of a hair rinse she developed weeping dermatitis.[5] Plaintiff's girl friend also had a reaction to the preparation. The Court sustained a nonsuit to the action because the plaintiff failed to show that the rinse contained any deleterious substance. Therefore, the cause of her dermatitis remained a matter of conjecture.

The Court added that it might be that she and her friend were allergic to the ingredients in the rinse, and that it is generally held there is no liability on the part of the seller where the buyer was allergic or unusually

[1] 46 AM. JUR., *Sales* § 737 (1943).

[2] UNIFORM SALES ACT § 69 (7) provides: "In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

[3] 242 N. C. 571, 89 S. E. 2d 141 (1955).

[4] *Id.* at 573, 89 S. E. 2d at 143.

[5] Hanrahan v. Walgreen Co., 243 N. C. 268, 90 S. E. 2d 392 (1955).

susceptible to injury from the product, which fact was unknown to the seller and peculiar to the buyer. The Court, acknowledging that there are some decisions to the contrary, indicated its belief that the majority rule is the sounder view.

The opinion pointed out that the plaintiff produced no evidence that the rinse was adulterated under G. S. § 106-136, or misbranded under G. S. § 106-137, or falsely advertised under G. S. § 106-138.

TORTS

CONTRIBUTORY NEGLIGENCE

In more than one half of the tort cases covered by this Survey, contributory negligence has been an issue. Accordingly, this division of tort law merits considerable attention.

It has long been held in North Carolina that the driver who fails to stop within the range of his headlights is negligent per se. This is often referred to as "outrunning the headlights."[1] There was considerable opposition to this fixed formula and in 1953 the General Assembly abolished it by amending G. S. § 20-141 (e).[2] In *Burchette v. Davis Distributing Co.*,[3] the new amendment was applied for the first time, the Court stating: ". . . the courts may no longer hold such failure to be negligence *per se,* or contributory negligence *per se,* as the case may be. . . . However, this provision does not apply if it is admitted, or if all the evidence discloses that the motor vehicle was being operated in excess of the maximum speed limit under the existing circumstances as prescribed under G. S. § 20-141 (b)."[4]

In *Hyder v. Asheville Storage Battery Co.*,[5] plaintiff entered an intersection on a green light. The evidence indicated that because of a malfunction of the traffic control light, defendant also had a green light and entered the intersection from plaintiff's right. Defendant moved for nonsuit on the ground that contributory negligence affirmatively appeared from plaintiff's evidence. The motion was overruled. In approving this ruling, the Court stated that a motorist is not under a duty to anticipate the negligence of others unless there is something to put him on notice of it, but he nevertheless has a duty to expect and anticipate the presence

[1] Note, 34 N. C. L. REV. 137, 140 (1955).

[2] The amendment added: "Provided that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G. S. 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence per se or contributory negligence per se in any civil action, but the facts relating thereto may be considered with other facts in determining the negligence or contributory negligence of such operator."

[3] 243 N. C. 120, 90 S. E. 2d 232 (1955).

[4] *Id.* at 125, 90 S. E. 2d at 236.

[5] 242 N. C. 553, 89 S. E. 2d 124 (1955).

of others. The green light is not a command to go, but a qualified permission to enter the intersection with caution. The Court ruled that failure of plaintiff to observe traffic before entering the intersection should be submitted to the jury on the issue of contributory negligence but did not warrant a finding of contributory negligence as a matter of law.

Southern R.R. v. Akers Motor Lines, Inc.,[6] involved a collision between a tractor-trailer and a train. Defendant's driver approached a railroad crossing and when about thirty-five feet away, looked down the track and saw the oncoming train. As it was too late to stop the tractor-trailer, the driver accelerated in an attempt to clear the crossing before the train arrived. A collision resulted and the railroad sued defendant for damages to the train. The crossing was marked with a standard crossing marker, but defendant contended that plaintiff was contributorily negligent for failure to mark the crossing with lights or gongs of some type. The Court answered this contention by stating that the railroad was not necessarily negligent for failure to provide lights at the crossing, since the State Highway and Public Works Commission under authority of G. S. § 136-20 (f), has exclusive discretion as to where such lights will be placed. The Court, in ruling on defendant's counterclaim, said that the failure of defendant's driver to observe the track in time to bring his vehicle to a halt constituted negligence as a matter of law. He not only has a duty to look and listen but to do so in time to save himself if it becomes necessary.

Dennis v. Albemarle[7] came before the court on rehearing.[8] In this case, plaintiff was standing on the back of a truck as it passed under a wire suspended over the road. Plaintiff turned his head involuntarily in response to hearing his name called and was struck and seriously injured by the wire. In its first opinion, the Court ruled that there was a permissible inference that plaintiff's action under the circumstances did not necessarily deviate from the conduct of a reasonable and prudent man and, therefore, plaintiff could not be held to be contributorily negligent as a matter of law. Defendant contended on rehearing that this was tantamount to a ruling contrary to prior North Carolina case law, that diverting circumstances are sufficient to negative contributory negligence. In explaining and confirming its decision, the Court pointed out that each case involving diverting circumstances is considered on its own merits in the light of all the facts. Hence, the question was not whether diverting circumstances could excuse a failure to keep a proper lookout, but rather whether one keeping a proper lookout is charged with

[6] 242 N. C. 676, 89 S. E. 2d 392 (1955).
[7] 243 N. C. 221, 90 S. E. 2d 532 (1955).
[8] See Dennis v. Albemarle, 242 N. C. 263, 87 S. E. 2d 561 (1955), discussed in a previous *Case Survey*, 34 N. C. L. REV. 1, 75 (1956).

contributory negligence as a matter of law because he is momentarily and involuntarily diverted.

It is the general rule in North Carolina that to grant a motion for nonsuit based on plaintiff's contributory negligence as a matter of law, the evidence must establish contributory negligence so clearly that no other conclusion may be reasonably inferred.[9] Where plaintiff is forced off a dominant road in order to avoid colliding with defendant who has entered from a servient road without stopping, there is a permissible inference that defendant was negligent in failing to stop before entering the dominant road and that his negligence was the sole proximate cause of the accident.[10] But there is also a permissible inference that plaintiff failed to exercise proper care, or having been put on notice of defendant's negligent conduct, failed to take such action as an ordinarily prudent person would take, and that such lack of care contributed to the accident. There being two reasonable inferences possible, it is a case for the consideration of the jury and it was held error to declare plaintiff contributorily negligent as a matter of law.[11]

VIOLATION OF A STATUTE AS NEGLIGENCE

Generally, one who violates a safety statute is guilty of negligence per se.[12] In such case, the relative standard of care based on the conduct of a reasonable man under the same or similar circumstances has no application, for the standard is said to be an absolute one prescribed by the statute. Consequently, proof of the violation proximately resulting in injury is proof of actionable negligence.[13]

G. S. § 20-154 (a) imposes two duties upon a motorist before making a left turn. He must (1) see that such movement can be made in safety, and (2) give a signal of his intention to make such movement that is plainly visible to the operators of other vehicles which his movement might affect. In *Bradham v. McLean Trucking Co.*,[14] plaintiff failed in both these duties. While the intersection was covered with a dense fog

[9] Wright v. Pegram, 244 N. C. 45, 92 S. E. 2d 416 (1956).

[10] Caughron v. Walker, 243 N. C. 153, 90 S. E. 2d 305 (1955). Although failing to stop when entering a dominant highway is prohibited by G. S. § 20-158 (a) (1950), by the express terms of the statute the violation is not negligence per se.

[11] For a similar case in which the Court also refused to say plaintiff was contributorily negligent as a matter of law, see Freedman v. Sadler, 243 N. C. 186, 90 S. E. 2d 380 (1955). In Smith v. Buie, 243 N. C. 209, 90 S. E. 2d 514 (1955) the Court applied virtually the same principles to a collision occurring at a street intersection. The opinion also discusses the difference in proof required when a stop sign, as distinguished from a traffic light, is involved. Two judges dissented.

[12] See *Case Survey*, 33 N. C. L. REV. 157, 215 (1955).

[13] However, violation of a safety statute is not always negligence per se. In Landini v. Steelman, 243 N. C. 146, 90 S. E. 2d 377 (1955) plaintiff violated G. S. § 20-174 (a) (1950) by failing to yield the right of way to traffic when crossing the street within a city block, and was struck by defendant's car. The violation of the statute was not held to be contributory negligence per se. *But see* Garmon v. Thomas, 241 N. C. 412, 85 S. E. 2d 589 (1955).

[14] 243 N. C. 708, 91 S. E. 2d 891 (1956).

which obscured visibility beyond a distance of ten feet, plaintiff attempted a left turn and was struck by defendant's truck while moving across defendant's traffic lane. On the basis of plaintiff's violation of the statute, the Court ruled that he was contributorily negligent as a matter of law.

Once negligence is established by way of violation of a statute, the ordinary rules of negligence apply. Thus it is error to instruct the jury that defendant would be liable for all the proximate results of the violation whether foreseeable or not.[15] Proximate cause is an essential element of every negligence action, and foreseeability is an essential element of proximate cause.[16]

Although defendant's negligence is based upon violation of a safety statute, contributory negligence is a valid defense.[17] *Barker v. Gilbert Engineering Co.*[18] clearly illustrates this point.

AUTOMOBILES

The decisions involving motor vehicles since the last *Case Survey* may be grouped into the following categories: seven concerned collisions between vehicles at intersections;[19] four involved train-motor vehicle collisions;[20] six arose when vehicles struck pedestrians or children on the road;[21] in four, the vehicles were moving in the same direction when they collided,[22] while two were concerned with vehicles moving in the opposite direction;[23] five involved vehicles striking a stopped or parked vehicle;[24] two concerned vehicles overturning;[25] and one involved a car

[15] McNair v. Richardson, 244 N. C. 65, 92 S. E. 2d 459 (1956).
[16] *Ibid.*
[17] RESTATEMENT, TORTS § 286 (d) (1934).
[18] 243 N. C. 103, 89 S. E. 2d 804 (1955).
[19] Wright v. Pegram, 244 N. C. 45, 92 S. E. 2d 416 (1956); Bradham v. McLean Trucking Co., 243 N. C. 708, 91 S. E. 2d 891 (1956); Smith v. Buie, 243 N. C. 209, 90 S. E. 2d 514 (1955); Freedman v. Sadler, 243 N. C. 186, 90 S. E. 2d 380 (1955); Caughron v. Walker, 243 N. C. 153, 90 S. E. 2d 305 (1955); Barker v. Gilbert Engineering Co., 243 N. C. 103, 89 S. E. 2d 804 (1955); Hyder v. Asheville Storage Battery Co., 242 N. C. 553, 89 S. E. 2d 124 (1955).
[20] Gray v. Carolina & N. Ry., 243 N. C. 107, 89 S. E. 2d 807 (1955); Wrenn v. Southern Ry., 243 N. C. 76, 89 S. E. 2d 761 (1955); Moser v. Southern Ry., 243 N. C. 74, 89 S. E. 2d 752 (1955); Southern Ry. v. Akers Motor Lines, 242 N. C. 676, 89 S. E. 2d 392 (1955).
[21] Merrill v. Kindley, 244 N. C. 118, 92 S. E. 2d 671 (1956); Pope v. Patterson, 243 N. C. 425, 90 S. E. 2d 706 (1956); Landini v. Steelman, 243 N. C. 146, 90 S. E. 2d 377 (1955); Lewis v. Farm Bureau Mut. Automobile Ins. Co., 243 N. C. 55, 89 S E. 2d 788 (1955); Gentile v. Wilson, 242 N. C. 704, 89 S. E. 2d 403 (1955); Pavone v. Merion, 242 N. C. 594, 89 S. E. 2d 108 (1955).
[22] Royal v. McClure, 244 N. C. 186, 92 S. E. 2d 762 (1956); Lawrence v. Bethea, 243 N. C. 632, 91 S. E. 2d 594 (1956); Dosher v. Hunt, 243 N. C. 247, 90 S. E. 2d 374 (1955); Kimsey v. Reaves, 242 N. C. 721, 89 S E. 2d 386 (1955).
[23] McNair v. Richardson, 244 N. C. 65, 92 S. E. 2d 459 (1956); Riddle v. Artis, 243 N. C. 668, 91 S. E. 2d 894 (1956).
[24] Lambert v. Bland, 244 N. C. 283, 93 S. E. 2d 89 (1956); Baxley v. Cavenaugh, 243 N. C. 677, 92 S. E. 2d 68 (1956); Garrenton v. Maryland, 243 N. C. 614, 91 S. E. 2d 596 (1956); Weavil v. Myers, 243 N. C. 386, 90 S E. 2d 733 (1956); Burchette v. Davis Distributing Co., 243 N. C. 120, 90 S. E. 2d 232 (1955).
[25] Ransdell v. Young, 243 N. C. 75, 89 S. E. 2d 773 (1955); Sears v. Boyce, 242 N. C. 606, 89 S. E. 2d 147 (1955).

striking a building.[26] Several points raised in these cases perhaps merit special mention.

A motorist's duty to children was considered by the Court in *Pavone v. Merion.*[27] The minor plaintiff, suing by her next friend, had darted into the street and been struck by defendant's automobile. The Court reversed a lower court judgment of involuntary nonsuit, stating that a motorist has a duty to avoid injuring children whom he sees and those whom by the exercise of due care he should have seen. He must act in accordance with the knowledge that children, unmindful of danger, may enter the street without warning. In this situation, the motorist's duty was defined as that of exercising care in proportion to the child's incapacity to foresee and avoid danger. It would seem, however, that this duty would not apply if the child suddenly darted from behind an obstruction, not giving the motorist an opportunity to anticipate his presence.[28]

The fact that a car door flies open, causing the driver to fall out of the car and lose control, does not compel the conclusion that the resulting collision was an unavoidable accident.[29] The unavoidable accident occurs only when there is a lack of causal negligence.[30] Evidence that the driver failed to close the door properly or leaned on it while rounding a curve, when considered with all other circumstances of the case, could be evidence of causal negligence.

Dosher v. Hunt,[31] involving interesting questions of imputed negligence, is discussed under AGENCY AND WORKMEN'S COMPENSATION.

THE AUTOMOBILE RACE TRACK AND RACING

The ordinary rules of negligence and contributory negligence apply to the automobile race track. In *Blevins v. France,*[32] plaintiff's intestate who was a participant in an automobile race, stalled his car on the track while he and the other participants were following a lead car around the track preliminary to the start of the race. Another car then had to push intestate's car to start it. Upon starting, intestate continued around the track, but his car stalled again. Before it could be removed from the track, the race was started. One of the racing cars crashed into the rear of the stalled car killing plaintiff's intestate. Plaintiff joined the pro-

[26] Hensley v. Harris, 242 N. C. 599, 89 S. E. 2d 155 (1955).
[27] 242 N. C. 594, 89 S. E. 2d 108 (1955).
[28] See also Pope v. Patterson, 243 N. C. 425, 90 S. E. 2d 706 (1956).
[29] Baxley v. Cavenaugh, 243 N. C. 677, 92 S. E. 2d 68 (1956).
[30] Causal negligence is defined as negligence which is the proximate cause of the injury. The proximate cause of an event is that which in natural sequence, unbroken by any new cause, produces the event, and without which the event would not have occurred. See Montgomery v. Blades, 222 N. C. 463, 468; 23 S. E. 2d 844, 848 (1943).
[31] 243 N. C. 247, 90 S. E. 2d 371 (1955).
[32] 244 N. C. 334, 93 S. E. 2d 549 (1956).

moters and directors of the race as defendants in her wrongful death action.

In affirming a nonsuit, the Court ruled that intestate was contributorily negligent for remaining on the track after he was aware that his car was operating imperfectly, pointing out that he could have removed the car from the track while it was being pushed and thus could have avoided the accident. Although the language of the Court implied that intestate might be guilty of contributory negligence by virtue of having assumed the risk in voluntarily entering the race, the principal basis of the decision seems to rest on his lack of due care while participating in the race.

JOINT TORT-FEASORS

It is fundamental that there may be two or more proximate causes of an accident. Two causes may operate independently of each other, but if both concur to produce a single injury, the tort-feasors are jointly and severally liable as joint tort-feasors.[33]

In *Lewis v. Farm Bureau Mut. Automobile Ins. Co.*,[34] plaintiff's intestate, an unemancipated child, ran onto the highway and was killed by defendant's automobile. Defendant contended that the child's mother was concurrently negligent in allowing the child to run into the street and that she should be joined under the provisions of G. S. § 1-240.[35] The Court pointed out that the personal representative of the deceased has a right of action only if his intestate would have had a cause of action had he lived.[36] As an unemancipated child cannot sue his parent for ordinary negligence,[37] the mother could not be joined, there being no cause of action against her.[38]

In *Riddle v. Artis*,[39] *A's* car skidded to its left in front of plaintiff's car and the two vehicles collided. *B's* car, which apparently was following too close, then struck the rear of plaintiff's car. When plaintiff sued both *A* and *B*, *B* demurred, contending that, under the allegations of the complaint, the negligence of *A* was the sole proximate cause of the injury. *B's* theory was that *A's* negligence had intervened to insulate his negligence. In reversing judgment sustaining the demurrer, the Court explained that the doctrine of intervening cause will operate to relieve the original tort-feasor of liability only where a new cause intervenes between the initial negligent act and the resulting injury, effectively breaking the chain of causation and becoming solely responsible for the

[33] Shaw v. Barnard, 229 N. C. 713, 715, 51 S. E. 2d 295, 296 (1949) (dictum).
[34] 243 N. C. 55, 89 S. E. 2d 788 (1955).
[35] This statute permits a defendant tort-feasor to bring in another for contribution.
[36] G. S. § 28-173 (1950).
[37] Small v. Morrison, 185 N. C. 577, 118 S. E. 2d 12 (1923).
[38] See Note 35 N. C. L. Rev. 141 (1956).
[39] 243 N. C. 668, 91 S. E. 2d 894 (1956).

injury. The cause must be of such a character that the injury produced would not have followed had the cause not intervened. To operate as an intervening cause, it must be reasonably unforeseeable. Otherwise, the acting parties are joint tort-feasors. Here, the Court ruled that the complaint alleged concurring negligence against both *A* and *B*.

RESCUE

Alford v. Washington[40] was before the Court on a second appeal. There, defendant ran through a stop sign and collided with another car at an intersection. One of the cars was thrown against a pole carrying high tension electric wires and, as a result, a wire fell across the car. Plaintiff's intestate arrived shortly afterwards and in an apparent attempt to extricate people from the car, touched the car and was electrocuted. In affirming a verdict for plaintiff, the Court applied the rescue doctrine, stating that when the life of a human being is subjected to danger, a bystander is justified in attempting to save the life of the endangered person; and, in doing so, his conduct is not subjected to the same standard of care required in ordinary circumstances. In such a case the rescuer is allowed to risk his own safety, and unless his conduct can be said to be reckless or rash under the circumstances, he cannot be adjudged contributorily negligent.

PHYSICIANS AND SURGEONS

As was noted in *Hunt v. Bradshaw*,[41] an unauthorized surgical operation is an "assault and battery." The action is predicated on the patient's lack of consent. Thus, if the patient can show lack of consent, he may recover for resulting injury even though the doctor possessed sufficient skill and the operation conformed to good surgical practice.[42]

The rule was relaxed to an appreciable extent in *Kennedy v. Parrott*.[43] There, *feme* plaintiff consented to an appendectomy in which a general anesthetic was used. After defendant doctor had made his incision, he noticed a cyst on her ovary and punctured it. Plaintiff alleged that this resulted in her extended illness. In ruling that the extended operation was "permitted" and therefore could not be a technical battery based on lack of consent, the Court said: ". . . where an internal operation is indicated, a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated,

[40] 244 N. C. 132, 92 S. E. 2d 788 (1956). The case was previously considered in 238 N. C. 694, 78 S. E. 2d 915 (1953). See *Case Survey*, 32 N. C. L. REV. 379, 496 (1954).
[41] 242 N. C. 517, 88 S. E. 2d 762 (1955).
[42] PROSSER, TORTS § 18 at p. 85 (2d ed. 1955).
[43] 243 N. C. 355, 90 S. E. 2d 754 (1956).

and for so doing he is not to be held in damages as for an unauthorized operation."[44]

Thus the Court has adopted a broad interpretation of the patient's consent. Considering that the doctor's diagnosis cannot be infallible, and that the desirable extent of the operation cannot be determined until after the incision when the patient is under anesthesia and unable to consent, it is felt that such a construction is proper.[45]

DUTY OF A SUPPLIER OF CHATTELS

In *Petty v. Cranston Print Works Co.*,[46] plaintiff was an employee of an independent contractor doing repair work in a factory. After falling off a scaffold during the course of the work, plaintiff sued the factory owner for negligence. The evidence indicated that the scaffold, equipped with rollers, belonged to defendant and had been placed in defendant's plant for the general use of anyone who wanted to use it, but that defendant was under no obligation, by contract or otherwise, to provide it. While plaintiff was using the scaffold, a locking mechanism on one of the rollers came loose, allowing the scaffold to roll and plaintiff fell to his injury. The Court affirmed a judgment of involuntary nonsuit, and pointed out that to establish a cause of action for actionable negligence there must be a legal duty owed, a breach thereof, and resulting injury proximately caused by such breach. A person who contracts to furnish equipment is under a duty to see that it is in safe working order for the purpose intended; however, a person who *permits* his equipment to be used, not being under an obligation to do so, is only under a duty to disclose latent defects of which he has notice. The Court found that defendant had no effective notice of the defect in the locking mechanism, and that it was not a latent defect since the plaintiff had been aware of it. Although the discussion of the Court implied that plaintiff was contributorily negligent, the principal basis for upholding the nonsuit seems to be that plaintiff simply failed to show a breach of any duty owed by defendant to plaintiff.

STATE TORT CLAIMS ACT

Under the State Tort Claims Act of 1951,[47] the Industrial Commission has authority to hear and decide tort claims against the state and its agencies. Under the act it must appear that: (1) plaintiff was free of contributory negligence; (2) an employee of the state or of a state agency was negligent while acting within the scope of his employment; and (3) such negligence was a proximate cause of plaintiff's injury. The

[44] *Id.* at 363, 90 S. E. 2d at 759.

[45] For a contrary view, see Note, 34 N. C. L. REV. 581 (1956), where the principal case is discussed.

[46] 243 N. C. 292, 90 S. E. 2d 717 (1956).

[47] G. S. §§ 143-291 through -300 (1952 and Supp. 1955).

Industrial Commission has authority to award damages up to $10,000[48] but its decisions are subject to judicial review.

In *Lowe v. Department of Motor Vehicles,*[49] defendant's employee, a highway patrolman, pursued plaintiff for several miles at high speeds. When plaintiff finally stopped his car, the patrolman got out of his car with his pistol in hand pointed at plaintiff. The patrolman, running in the darkness toward plaintiff's car, tripped. The pistol accidentally discharged, wounding plaintiff. The Court, in sustaining the Commission's award for negligent injury, ruled that the patrolman, in unjustifiably and intentionally pointing the pistol at plaintiff, had violated G. S. § 14-34,[50] and by virtue of the violation was guilty of an assault. Since the statute was enacted for the protection of the public,[51] the Court said that the violation of it constituted negligence per se. Thus the Court appears to have taken the position that an intentional act may be the basis of a negligence action. Plaintiff could not have recovered for assault because, under the Tort Claims Act,[52] the state is not liable for the intentional torts of its employees.

TRESPASS, NEGLIGENCE AND NUISANCE

In two cases, the Court used the labels trespass and negligence to refer to torts which also might have been properly called nuisance. Where defendant's mining operation discharged clouds of dust so that plaintiffs' residence was damaged and their family was constantly under a threat of silicosis, the Court held that the dust falling on the plaintiffs' property constituted a trespass.[53] In the other case,[54] defendant caused dust from a road construction project to fall on plaintiff's tobacco crop, resulting in damage to the tobacco. It was held that a cause of action was stated for negligence, the Court saying that defendant had violated a duty it owed to plaintiff in failing to keep the dust down.

In *Lovin v. Hamlet,*[55] the Court held that since a municipal park is maintained for the amusement of children impliedly invited to visit there, the attractive nuisance doctrine[56] could have no application.[57] It ap-

[48] G. S. § 143-291 (Supp. 1955).
[49] 244 N. C. 353, 93 S. E. 2d 448 (1956).
[50] This statute provides that pointing a gun at a person constitutes assault.
[51] See VIOLATION OF A STATUTE, p. 249 *supra.*
[52] G. S. § 143-291 (Supp. 1955). In a more recent case based on similar facts the Court denied recovery, saying that an intentional act could not be the basis of a negligence action. The fact that the patrolman might have been guilty of negligence per se by having violated G. S. § 14-34 (1953) was not mentioned. Jenkins v. North Carolina Department of Motor Vehicles, 244 N. C. 560, 94 S. E. 2d 577 (1956).
[53] Hall v. DeWeld Mica Corp., 244 N. C. 182, 93 S. E. 2d 56 (1956).
[54] Billings v. Taylor, 243 N. C. 57, 89 S. E. 2d 743 (1955).
[55] 243 N. C. 399, 90 S. E. 2d 760 (1956).
[56] See Note, 26 N. C. L. REV. 227 (1948).
[57] The Court acknowledged the existence of a possible conflict in prior cases as to whether maintenance of a municipal park is a governmental function. It did not undertake to resolve the conflict.

parently thought that the doctrine might be applicable to the maintenance of a municipal lake adjacent to the park, but found that the complaint provided, at best, a defective statement of a cause of action. Plaintiff's minor intestate had drowned in the lake; but there were no allegations as to how or when he fell into the lake; and no facts were stated sufficient to put the defendant on notice, such as that children were accustomed to playing in the lake or at the water's edge. The Court held that the lower court should have sustained the defendant's demurrer.[58]

FRAUD

Early v. Eley[59] involved alleged fraud in the sale of corporate stock. Plaintiff alleged in effect and testified in detail that the individual defendant, the president of the corporate defendant, asserted that the corporation had made a twelve per cent profit during the preceding year, and further stated concerning the stock: "It is gilt edged. You cannot buy anything better." Plaintiff also alleged that the statements were false to defendant's knowledge, that in reliance on them he invested in the corporation and as a consequence suffered a loss. The Court observed that the elements of fraud are: (1) that defendant made a false representation or concealment of a material fact either knowingly or recklessly in conscious ignorance of the truth; (2) that the statement was reasonably calculated to deceive; (3) that defendant intended to deceive; (4) that plaintiff was in fact deceived; and (5) that damage to plaintiff resulted.

In ordering a nonsuit, the Court found the evidence indicated that the corporation had in fact made a twelve per cent profit during the preceding eight months. The Court went on to say that even if no such profit had been made, there was no evidence to charge defendant with knowledge of the falsity of the representation or with making it recklessly in conscious ignorance of the truth. As to the statements made by defendant regarding the "gilt-edged" quality of the stock, the Court ruled that they were expressions of opinion and therefore could not support a finding of fraud.[60]

LIBEL AND SLANDER

The best that can be said of the common law of defamation is that it was illogical and overly technical. As it developed, slander came to be divided into slander per se and slander per quod. If the spoken words were such that they (1) imputed the commission of a crime, (2) tended

[58] In Jessup v. High Point, T. & D. R.R., 244 N. C. 242, 93 S. E. 2d 84 (1956) the Court held that a child who was killed while playing on defendant's train was a trespasser and defendant had only a duty to refrain from wantonly or wilfully injuring him.

[59] 243 N. C. 695, 91 S. E. 2d 919 (1956).

[60] Another recent fraud case is Thompson v. Stadiem, 243 N. C. 291, 90 S. E. 2d 518 (1955), discussed in *Rescission* under CONTRACTS.

to prejudice one in his profession, trade or calling, or (3) imputed a loathsome disease, it was said they were slanderous per se.[61] If the words fell into either of these classes, malice and damages were conclusively presumed, and this was true whether extrinsic evidence had to be brought in to prove the defamatory nature or not. If the words did not fall into one of the three classes, malice and special damages were not presumed and had to be alleged and proved. This group was called slander per quod.[62]

Originally, libel had no such classification. All written matter tending to injure a person's reputation was actionable without proof of special damages. Today however, the majority of American courts do make a classification: if the words are defamatory on their face, they are said to be libelous per se; but if extrinsic evidence is required to prove their defamatory nature, they are libelous per quod and special damages must be alleged and proved.[63] Although the growth of the libel per quod concept was undoubtedly the result of confusion with the slander labels and the special damage requirement, the basis for making the distinction in the respective torts was radically different. Slander's dividing line was reached if the derogatory words did not fit into one of the arbitrary categories; in libel the division was made between words defamatory on their face and those not.

In *Badame v. Lampke*,[64] one businessman orally accused his competitor of pulling "shady deals." The words would seem to fall within the common law definition of slander per se, and the Court apparently so held. Yet while the result of the *Badame* case is not questioned, certain language in the opinion casts doubt on North Carolina's present position as to slander. The Court stated that "defamatory words" are "actionable *per se*" when "the law treats their injurious character as a fact of common acceptance." The Court then continued: "On the other hand, if the injurious character of the *spoken statement*[65] appears . . . only in consequence of extrinsic, explanatory facts showing its injurious effect, such utterance is said to be actionable only *per quod,* and in such cases the injurious character of the words must be pleaded and proved, and in order to recover there must be allegation and proof of some special damage."[66] In the opinion, there is no specific mention of the three common law classes of slander per se nor is there a use of the word "slander" itself. (The preliminary statement of facts uses

[61] PROSSER, TORTS § 93, at 584 (2d ed. 1955). By Statute, North Carolina has added a fourth class. G. S. § 99-4 (1953) (charges of incontinency against a woman).
[62] PROSSER, TORTS § 93 at 585 (2d ed. 1955).
[63] *Ibid.*
[64] 242 N. C. 755, 89 S. E. 2d 466 (1955).
[65] Emphasis added.
[66] 242 N. C. 755, 89 S. E. 2d 466, 467 (1955).

"slander.") The contention might be made that the Court was nevertheless referring to the arbitrary slander per se classes when it dealt with the words as injurious to plaintiff in his special occupation (the second category of slander per se, as listed above). Pointing in the other direction is the Court's clear invocation of the extrinsic fact test for spoken words which are to be placed in the contrasting per quod category.

The Court certainly appears to have imported libel rules into a slander case, but it is not possible to say categorically whether this was done deliberately or by inadvertance.[67] If the Court intends a total abolition of all distinction, it can properly be inferred that "defamatory words" "actionable per se" are not, where oral, restricted to the three slander per se classes. If this assumption is correct, the position of the Court is a laudable one. There seems to be no defensible basis here for adhering to irrational tort concepts created several centuries ago. However, if the Court intends to effect such a change, it would be preferable that it do so in clear and unmistakable language. As it stands, this case actually increases the uncertainty and confusion in the North Carolina law of defamation.

TRIAL AND APPELLATE PRACTICE

PROCESS

The importance of complying in detail with all statutory requirements where service by publication is attempted was pointed out in the partition proceeding of *Jones v. Jones*.[1] The trial judge found that all interested and necessary parties were before the court. However, the record showed that the affidavit on which the order of publication was made was defective in that it failed to give the name and residence of the persons so to be served, or that if unknown, diligent search to discover such name and residence was made. Neither did the affidavit show whether any such person was a minor or incompetent. The Court further noted that the notice of publication was defective in that it did not give the absent defendants the time to answer allowed by G. S. § 1-100 and G. S. § 1-125. Since these defects all appeared on the record the Court declared the judgment void *ex mero motu*.

In *Dellinger v. Bollinger*[2] the plaintiff putative father filed a petition in which he sought custody of an illegitimate child born to the defendant. Defendant made what purported to be a special appearance and de-

[67] See Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N. C. L. REV. 249, 269 *et seq.*, discussing prior North Carolina cases and recognizing a possibility that the libel rule might be imported into slander.

[1] 243 N. C. 557, 91 S. E. 2d 562 (1956).
[2] 242 N. C. 696, 89 S. E. 2d 592 (1955).

murred *ore tenus* to the petition contending that the putative father was not entitled to maintain an action for custody under G. S. § 50-13. No summons was issued. The trial judge heard the evidence in affidavit form on the demurrer and motion to dismiss, overruled the demurrer and awarded custody to the father. On appeal the Court held that despite the purported special appearance, the demurrer *ore tenus* was a waiver of the absence of summons and constituted a general appearance. Further, the Court held the trial judge erred in making a final award of custody at that point in the proceedings. He should have given the defendant an opportunity to answer the petition before rendering final judgment.

VENUE

In *Noland Co. v. Laxton Construction Co.*[3] the plaintiff foreign corporation maintained its principal office in North Carolina in Wake County until not later than March 21, 1955, when it moved its office to Durham County. On April 19, 1955, the plaintiff instituted this action in Wake County against the defendant who was of Mecklenberg County. On the same day it filed in the office of the Secretary of State a certificate noting its change of principal office from Wake to Durham County. Defendant moved, as of right, to have the venue changed to Mecklenberg County. The trial court held that until the certificate had been duly filed with the Secretary of State the principal office of the plaintiff would be deemed to be in Wake County. In reversing, the Supreme Court stated that the plaintiff could not take advantage of its own delay in filing, that it is the actual location of the principal office that controls and not the date of filing notice of change with the Secretary of State. The Court conceded that, for venue purposes domesticated foreign corporations are treated as domestic corporations, but did not mention G. S. § 1-79, which expressly makes the location of the principal office the residence of a domestic corporation for venue purposes.

DISCOVERY

The matter of when discovery shall be allowed has been before the North Carolina courts on many occasions. It is not easy to predict whether discovery will or will not be allowed in a given case. The Supreme Court has two manners of approach to this question: the one used by the Court when considering G.S. § 8-89 in *H. L. Coble Construction Co. v. Housing Authority*[4] that the statute is remedial and "should be liberally construed to advance the remedy intended thereby to be afforded to the party," and the other illustrated by *Cates v. Griffith Fi-*

[3] 244 N. C. 50, 92 S. E. 2d 398 (1956).
[4] 244 N. C. 261, 93 S. E. 2d 98 (1956).

nance Co.[5] that as viewed by the Court the application for discovery made under G. S. § 1-568.10 is in its broad scope "a fishing expedition." Space does not permit the detailing of the particular matters sought to be elicited and the action of the Court in each instance. However, any attorney having a discovery matter before him would be well advised to study the above two cases from their factual standpoint.

NONSUIT MOTION

Kennedy v. Parrott[6] was a suit for malpractice. Plaintiff had offered no expert testimony. Defendant's experts testified that the plaintiff's condition was not the result of the operative procedures used. The trial court nonsuited. The Supreme Court in sustaining the nonsuit stated that it would take judicial notice of what was said about the cause of plaintiff's condition by recognized medical texts. It proceeded to name some such texts considered by it. Then the Court delved into the testimony of the defendant's experts. In doing so it recognized that on a motion for nonsuit the court may not consider the testimony of the defendant as it tends to contradict the evidence offered by the plaintiff. However, the Court does now consider the defendant's experts' testimony ". . . for the purpose of ascertaining what are the known and generally accepted facts about phlebitis, *as it tends to corroborate the textbook statements in respect thereto.*" (Emphasis added.) In fact, the Court continues, ". . . the trial judge had the right to call upon experts in the science of medicine to inform him on the subject."

G. S. Section 1-180

As long as G. S. § 1-180 stands on the books we may expect to see trial judges reversed because the Supreme Court finds they violated this statute. Thus in *Hyder v. Asheville Storage Battery Co.*[7] the trial judge in a negligence action stated to counsel within the hearing of the jury that he did not see any evidence of contributory negligence in the case but would nevertheless submit an issue on the subject to the jury. On defendant's appeal from a verdict and judgment for plaintiff the Court reversed on the ground that the trial court had expressed an opinion within the presence of the jury which was prejudicial to the defendant and in violation of G. S. § 1-180.

In *State v. Kluckholn*[8] the trial judge charged the state's contentions in great detail but treated the defendant's contentions in a very general and summary manner. This was held to be a violation of G. S. § 1-180 to the effect that the trial judge must state the contentions of the parties with "equal stress."

[5] 244 N. C. 277, 93 S. E. 2d 145 (1956).
[6] 243 N. C. 355, 90 S. E. 2d 754 (1955).
[7] 242 N. C. 553, 89 S. E. 2d 124 (1955).
[8] 243 N. C. 306, 90 S. E. 2d 768 (1955).

In *State v. Robbins*[9] the trial court charged the contentions of the state and then as to the defendant said, "I don't know what he contends . . . to be frank I am at a loss to know what to tell you the contentions of the defendant are." Held, that this was error in that the court failed to comply with G. S. § 1-180.

In re Will of Holcomb[10] was a caveat proceeding. A witness was asked if he knew the signature of his father, the alleged testator. He said he did. The trial judge then proceeded to violate G. S. § 1-180 by saying, "As far as I am concerned he knows his father's signature . . . objection overruled." Clearly the remarks endorsed the veracity of the witness.

CONDUCT OF JURORS

In *State v. Barnes*[11] the defendant was found guilty on a verdict of the jury. It appeared that a juror when returning to the courtroom stated that the jury stood 10 to 2 for conviction. This remark seems to have been spontaneously made and not in reply to a question by the court as to the verdict. Held, that such a statement was innocuous and no ground for reversal.

In *State v. Scott*[12] after the court had adjourned for the day the defendant talked to a juror, not realizing he was a juror. It does not appear what the conversation was but the following day while the jury was deliberating its verdict defense counsel informed the court of the conversation. The jury then returned a verdict against the defendant. On motion for a new trial the court failed to find that the conversation had been the cause of any prejudice against the defendant and refused to award a new trial. The Supreme Court affirmed. Mere evidence of the conversation was not enough; prejudice must be shown.

MOTION TO SET ASIDE VERDICT

Williams v. Stumpf[13] presented a most unusual situation which the Supreme Court, while expressing regret, did not feel required a reversal. There had been a verdict for the defendant and motion made by plaintiff to set it aside. The court called witnesses on his own account, took their testimony and refused to permit the defendant to cross examine. The witnesses do not appear to qualify as witnesses giving newly discovered evidence. Being satisfied that there should be a new trial on the evidence thus taken the verdict was set aside and a new trial ordered. The Supreme Court commented ". . . it is questionable whether

[9] 243 N. C. 161, 90 S. E. 2d 322 (1955).
[10] 244 N. C. 391, 93 S. E. 2d 454 (1956).
[11] 243 N. C. 174, 90 S. E. 2d 321 (1955).
[12] 242 N. C. 595, 89 S. E. 2d 193 (1955).
[13] 243 N. C. 434, 90 S. E. 2d 688 (1955); noted at length in 34 N. C. L. Rev. 585 (1956).

the court should take additional testimony or base its decision only on that which the jury considered." Obviously the verdict was set aside on the basis of evidence not heard by the jury. One may well wonder how secure any jury verdict is if it may be set aside upon the judge considering on his own motion testimony of witnesses not heard by the jury and not subject to cross examination.

BROADSIDE EXCEPTIONS

In several cases the Court found the assignment of errors were broadside.[14] In *Harris v. Carolina Power & Light Co.*[15] a motion had been made to strike out portions of the defendant's answer. The motion was granted in part and denied in part. Both parties appealed, alleging as error either the striking or nonstriking of portions of the answer "as shown by the order appealed from." Held, that the assignments of errors of both parties were broadside since no specific matter was set out and the Court was invited to make a "voyage of discovery" through the record.

APPEALS

By Rule 4 (a) adopted by the Supreme Court, October 19, 1955, the right to appeal from certain demurrers and orders denying motions to strike allegations contained in pleadings is drastically limited. The rule which went into effect at the Spring Term, 1956 provides as follows:

> "From and after the first day of the Spring Term of 1956, this Court will not entertain an appeal:
>
> (1) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. The movant may enter an exception to the order overruling the demurrer and present the question thus raised to this Court on the final appeal; provided that when the demurrant conceives that the order overruling his demurrer will prejudicially affect a substantial right to which he is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order overruling the demurrer.
>
> (2) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order."

[14] Tillman v. Talbert, 244 N. C. 270, 93 S. E. 2d 101 (1956); Highway Commissioner v. Brann, 243 N. C. 758, 92 S. E. 2d 146 (1956); Merrell v. Jenkins, 242 N. C. 636, 89 S. E. 2d 242 (1955).

[15] 243 N. C. 438, 90 S. E. 2d 694 (1955).

It would appear that the writ of certiorari will be more frequently used as a result of the foregoing rule.

Without the aid of the new rule the Court in *Hamilton v. Hamilton*[16] affirmed its previous rulings that no appeal lies from an order overruling a demurrer *ore tenus*.

MOTION IN CAUSE OF THIRD PARTY

In *Carpenter v. Carpenter*[17] the second husband brought an action to have his marriage annulled on the ground that the divorce obtained by his wife from her former husband, Shaver, was obtained on the basis of false swearing by both parties. He contended that the Shavers had not been separated for the requisite statutory period contrary to what appeared on the face of the record. The Court stated the case was one of first impression but came to the conclusion that the plaintiff was a stranger to the divorce suit and accordingly could not collaterally attack the divorce decree. Neither could the Shavers attack it if they were both parties to the false swearing. Justice Parker dissented on the theory that if what the plaintiff alleged was true there was no jurisdiction to grant the divorce and it was a nullity.

Carpenter then appeared in the *Shaver v Shaver*[18] cause and moved that the judgment be vacated for the reasons above stated. The two Shavers moved to dismiss the motion and from an order denying their motion an appeal was taken. Held, that Carpenter was a stranger to the Shaver cause and had no standing to move to vacate the judgment. Notwithstanding the latter appeal the court below took proof and found the divorce judgment was based on fraud and declared the divorce void *ab initio*. On appeal from this order the Supreme Court held the prior appeal had removed the case from the trial court's domain and his judgment purporting to vacate the decree was a nullity.[19]

EXECUTION AND TRUST PROPERTY

In *Cornelius v. Albertson*[20] the judgment creditor had the clerk issue an execution directing the sheriff to satisfy the judgment out of property held by a third person in trust for the debtor. Defendant made a motion to restrain the plaintiff and sheriff from levying on the trust property. The court granted the injunction finding the trust in question was an active trust. Plaintiff contended on appeal that the levy was authorized by G. S. § 1-315 (4). The Court referred to its previous decisions that G. S. § 1-315 (4) and G. S. § 1-316 do not apply to active trusts. However, the Court found that the procedure engaged in by the defendant was

[16] 242 N. C. 715, 89 S. E. 2d 417 (1955).
[17] 244 N. C. 286, 93 S. E. 2d 617 (1956).
[18] 244 N. C. 309, 93 S. E. 2d 614 (1956).
[19] Shaver v. Shaver, 244 N. C. 311, 93 S. E. 2d 615 (1956).
[20] 244 N. C. 265, 93 S. E. 2d 147 (1956).

wrong. Instead of making a motion in the cause to enjoin the plaintiff from levying on and selling trust property the defendant should have made a motion in the cause before the Clerk of the Superior Court to recall or withdraw the execution which commanded a levy on trust property held by a stranger. Any finding by the Court below that the trust was active or passive should not have been made and was not then up for review. Accordingly, the proceeding was remanded to the lower court with a direction that it strike out of its order all its findings of fact as to the trust created for the defendant and that it vacate the injunction and enter an order denying defendant's motion for the same. The defendant could then move before the clerk to recall or withdraw the execution, which should be allowed. The plaintiff could then have an execution issued to satisfy her judgment uot of the property of the debtor and after such execution was issued could by supplementary proceedings pursuant to G. S. § 1-360 bring in the trustee and subject him to the court's jurisdiction. Plaintiff could then present to the court or judge the question as to whether or not the trust estate should be applied to the satisfaction of the judgment. The Court pointed out that the statutory provisions relating to supplementary proceedings, G. S. § 1-352 *et seq.*, were intended to supply the place of a proceeding in equity where relief was given after a creditor had determined his debt by a judgment at law and was unable to obtain satisfaction by process of law. Whether the Court means to imply that the equitable remedy is no longer availabe and that recourse must be had under the supplementary proceeding statute is not made clear.

TRUSTS

The opinion in *Roberson v. Pruden*[1] repeats the familiar doctrine that one who buys a debtor's land at a foreclosure sale, having previously agreed orally to hold it for him until reimbursed, cannot resist the enforcement of the parol trust, after repayment is tendered, by pleading the Statute of Frauds. Even in jurisdictions which have the trust section of the Statute, the debtor's reliance upon the purchaser's promise renders unconscionable the latter's attempt to keep what he has acquired. Reliance on the oral agreement keeps the debtor from seeking another purchaser or competing bidders at the sale and the land is usually bought at a price below its value. A court will not let the buyer profit under the agreement while attacking its validity.[2] The same rule is applied in

[1] 242 N. C. 632, 89 S. E. 2d 250 (1955); see CREDIT TRANSACTIONS, p. 212 *supra*.

[2] Nichols v. Martin, 277 Mich. 305, 269 N. W. 183 (1936); Moore v. De Bernardi, 47 Nev. 33, 213 Pac. 1041, *rehearing denied*, 220 Pac. 544 (1923); Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696 (1866); *accord*: Embler v. Embler, 224 N. C. 811, 32 S. E. 2d 619 (1945); Rush v. McPherson, 176 N. C. 562, 97 S. E. 613 (1918).

North Carolina, which does not have the trust section of the Statute of Frauds; an oral agreement by the grantee to hold the land in trust for a person other than the grantor is enforceable even against a plea of the contract section of the Statute.[3] The oral trust in the principal case is distinguishable from that in which *A* deeds land to *B* on an oral trust for *A* himself, which is condemned as being too susceptible to fraud.

In *Ridge v. Bright*[4] the Court extends the frontiers of the North Carolina law on the validity of inter vivos trusts. Heretofore, our decisions have not gone beyond indicating that a reserved power to revoke did not invalidate the trust.[5] Now it is held that a settlor may safely reserve the income, the power to amend the trust and to change the beneficiary as well as to revoke, and the power to withdraw the principal in whole or in part. These reservations will not render the trust void as an attempted testamentary disposition not meeting the formal requirements for wills; nor does reservation of these powers give so much control over the trustee as to constitute an agency, which would be terminable upon death. This rationale, applied to the facts of *Ridge v. Bright,* is in accord with recent decisions elsewhere[6] and with the 1947 revision of section 57 of the *Restatement of the Law of Trusts.* However, the transaction before the court did not go so far as that in *National Shawmut Bank v. Joy,*[7] the high water mark of this development. There, the Massachusetts court sustained a trust, *A* to *B* for *A* and *C,* in which full control over the trustee's investments was reserved by the settlor in addition to the other powers listed above. *Ridge v. Bright* was the case of the settlor declaring herself trustee for a niece of shares in an investment company, the instrument providing: "During my lifetime I reserve the right, *as trustee,* to vote, sell, redeem, exchange or otherwise deal in or with the stock subject hereto. . . ."[8] Moreover, it provided that upon any sale or redemption, the trust should terminate as to the stock sold or redeemed, with the settlor entitled to retain the proceeds for her personal account and use.

WILLS AND ADMINISTRATION

ENFORCEMENT OF ANTENUPTIAL AGREEMENTS AFTER DEATH OF A SPOUSE

G. S. § 52-13 provides that "Any persons of full age about to be married . . . may release and quitclaim dower, tenancy by curtesy . . . in

[3] Embler v. Embler, *supra* note 2; Avery v. Stewart, 136 N. C. 426, 48 S. E. 775 (1904).
[4] 244 N. C. 345, 93 S. E. 2d 607 (1956).
[5] Springs v. Hopkins, 171 N. C. 486, 88 S. E. 774 (1916); Witherington v. Herring, 140 N. C. 495, 53 S. E. 303 (1906).
[6] See 1 *Scott, Trusts* §§ 57, 57.1, and 57.2 (2d ed. 1956).
[7] 315 Mass. 457, 53 N. E. 2d 113 (1944).
[8] 244 N. C. 345, 346, 93 S. E. 2d 607, 609 (1956). (Emphasis supplied.)

the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released." In *Turner v. Turner*,[1] husband and wife mutually released rights in each other's property by an antenuptial agreement. Later they executed a separation agreement by which they also released rights in each other's property. The separation agreement was annulled by subsquent conjugal cohabitation. The North Carolina Supreme Court found that since the separation agreement was not inconsistent with the antenuptial agreement, the intent of the parties was for the separation agreement to be supplementary to the antenuptial agreement. Therefore the antenuptial agreement had not been rescinded, and it defeated the wife's dower.

In *Stewart v. Stewart*,[2] the Court held that where the will provided that testator's estate should remain unsettled during his wife's lifetime for the purpose of carrying out an antenuptial agreement providing an annuity for the wife, the executor could not force the wife to accept a lump sum payment based upon her life expectancy, but that the wife could enforce the agreement. The result is to prevent the ultimate settlement of the testator's estate until the wife dies.

DOWER

G. S. § 30-4 and § 52-19 provide that when a married woman shall be convicted of the felonious slaying of her husband, or of being an accessory before the fact to such slaying, she shall lose all rights to dower. In *McMichael v. Proctor*,[3] the wife had been acquitted of the murder of her husband. The North Carolina Court held that the acquittal was a complete defense to the claim that she forfeited her dower because G. S. § 30-4 and § 52-19 specifically require a conviction in order to work a forfeiture. This decision is in accord with the rule that such statutes will be construed narrowly.[4] The question may arise, if the widow is an accessory after the fact, would she still get the property?[5] The Court might raise a constructive trust in such a situation, as was done in *Bryant v. Bryant*,[6] where the husband and wife held an estate by the entirety and the husband murdered the wife. Also, in *Garner v. Phillips*,[7] where the son murdered his parents, the Court impressed a constructive trust on the property.

[1] 242 N. C. 533, 89 S. E. 2d 245 (1955).
[2] 243 N. C. 284, 90 S. E. 2d 387 (1955).
[3] 243 N. C. 479, 91 S. E. 2d 231 (1956).
[4] See 1 PAGE, WILLS § 231, 232 (3d Lifetime ed. 1941).
[5] See 26 N. C. L. REV. 232 (1948) for a discussion of the problem of accelerating inheritance by murder.
[6] 193 N. C. 373, 137 S. E. 188 (1927), commented on in 5 N. C. L. REV. 373 (1927).
[7] 229 N. C. 161, 47 S. E. 2d 845 (1948).

EXECUTORS AND ADMINISTRATORS

The will directed the executor to take an inventory of the testator's chattel property and real estate and bequeathed the home tract to "my wife Lizzie Gomer during her natural life after her death to be sold & divided (as all of my other property) equally between all of my children."[8] When the wife dissented and terminated her life estate and thereby accelerated the vesting of the children's right to immediate enjoyment of the home tract, the question of whether the executor had the power to sell the realty arose. The Court said he had the power to sell subject to the wife's dower right. In doing so, the Court followed previous North Carolina holdings that where land is devised to be sold for division among the heirs or designated beneficiaries, nothing else appearing, the executor has no implied power to make the sale; but where realty and personalty are mixed and are to be sold for division, there is an implied power in the executor to sell both the realty and personalty.[9]

In *In re Estate of Boyles,*[10] the executor refused to pay a beneficiary her share of the personalty, and commingled funds of the estate with money of the beneficiary. The Court found the clerk was justified in revoking the executor's letters of administration under G. S. § 28-32, which states that the clerk can revoke letters where the personal representative has been guilty of default or misconduct in due execution of his office.

In *Poindexter v. First Nat'l Bank,*[11] the beneficiaries were suing the personal representative for losses allegedly caused by mismanagement in carrying on the intestate's manufacturing business, without adequate authority to do so, for twenty-one months after intestate's death. The Court stated that the usual rule is that the administrator is not an insurer of the assets of the estate, but is required only to act in good faith, and with such care as an ordinary, sensible, and prudent man would act with his own property under like circumstances. The Court said: " 'Accordingly, it may in general be said that unless expressly authorized by statute, by an order of court, by the will of the decedent, or by the terms of a partnership agreement, neither an executor nor an administrator has any authority or power to continue the estate of his decedent in trade or business . . . except for the purpose of disposing of his stock in trade in order to settle the estate or by disposing of the business of a going concern.' "[12] The personal representative cannot without specific authority

[8] Gomer v. Askew, 242 N. C. 547, 548, 89 S. E. 2d 117, 119 (1955).
[9] Council v. Averett, 95 N. C. 131 (1886); Vaughan v. Farmer, 90 N. C. 607 (1882).
[10] 243 N. C. 279, 90 S. E. 2d 399 (1955).
[11] 244 N. C. 191, 92 S. E. 2d 773 (1956).
[12] *Id.* at 194, 92 S. E. 2d at 776, quoting 21 AM. JUR., *Executors and Administrators* § 255 (1939).

undertake generally to carry on the business. The Court reversed the judgment of involuntary nonsuit entered by the trial judge.

EQUITABLE ELECTION

The doctrine of equitable election is based upon the principle that a devisee cannot take benefits under a will and reject its adverse provisions.[13] The intent to put a beneficiary to an election must appear plainly from the terms of the will itself.[14] The doctrine applies when the devisor purports to devise property which belongs to the beneficiary, giving it to another, and also devises property of his own to the beneficiary. The beneficiary is put to his election in such a case.[15] In two recent cases,[16] the Supreme Court held the doctrine of equitable election inapplicable where the testator attempted to devise lands held by himself and his wife by the entirety under the mistaken belief that he owned it all individually. In neither case could there have been an intent to put the wife to an election, since the husband thought he owned it all.

PATENT AND LATENT AMBIGUITY

Testatrix bequeathed to her sister "my furniture, household effects and personal property. The balance of my estate I leave to the National Red Cross Society of America."[17] After payment of specific bequests, and excluding the furniture and household effects, there was left some $21,000.00 in cash and bonds. The problem then was whether the words "personal property" in the bequest to the sister included the $21,000.00. The Red Cross contended that personal property here meant household effects and that it would not include the $21,000.00. In the course of the opinion the Court discussed patent and latent ambiguities,[18] and

[13] Lamb v. Lamb, 226 N. C. 662, 40 S. E. 2d 29 (1946).

[14] *Ibid.*

[15] Sandlin v. Weaver, 240 N. C. 703, 83 S. E. 2d 806 (1954).

[16] Honeycutt v. Citizens Nat'l Bank, 242 N. C. 734, 89 S. E. 2d 598 (1955). The husband purchased land in the name of the husband and wife, thereby creating a tenancy by entirety. Then the husband and wife made a deed to a trustee, void because the provisions of G. S. § 52-12 were not followed. The trustee conveyed back to the husband, who sold part of the land to third parties. The husband left a will leaving the homeplace (not involved in the above-mentioned transaction) and $50,000.00 to the wife. The Court held there was no election and the wife took under the will and she also got the unsold portion of the tenancy by entirety, plus one-half of the proceeds of the entirety land previously sold by the husband. Taylor v. Taylor, 243 N. C. 726, 92 S. E. 2d 136 (1956). The testator devised a life estate in three tracts to his wife, and the remainder to his sons. The testator owned one tract individually, and was tenant by the entirety in the other two tracts. The Court held that there was no election, and the wife took the personalty and a life estate in the husband's tract under the will, and she also got the fee in the entirety land by survivorship.

[17] Wachovia Bank and Trust Co. v. Wolfe, 243 N. C. 469, 471, 91 S. E. 2d 246, 248 (1956).

[18] "If there be a patent ambiguity in an instrument, the instrument must speak for itself and evidence dehors cannot be resorted to . . . it is a question of construction . . . and the only purpose of construction is to find out what the instrument means, and that must depend upon what the instrument says. In cases of

held that when a will contains a patent ambiguity, extrinsic evidence is not admissible to explain the meaning of the words used; but if the patent ambiguity relates to intent as expressed in the will, evidence as to facts and circumstances surrounding the testator at the time of the execution of the will[19] is competent to aid the Court in ascertaining that intent.[20] Judgment for the Red Cross, entered by the court below, was vacated because such evidence was excluded.

RELEASE OF EXPECTANCY

Intestate died survived by four sons and four daughters. Prior to his death each daughter had released her expectancy to the intestate for a consideration.[21] The previous North Carolina rule, as stated in *Cannon v. Nowell*,[22] was that an expectancy could not be released. The North Carolina Supreme Court referred to this decision and said that it was the minority view in America and had never since been followed in North Carolina. The Court referred to various North Carolina equity cases allowing transfers of expectancies,[23] and then adopted the majority American rule[24] holding the release of an expectancy binding if the consideration is not grossly inadequate and the release is not procured by fraud or undue influence.

latent ambiguity, evidence dehors is necessary. It is a question of identity, a fitting of the description of the person, or thing, which can only be done by evidence outside the instrument." Institute v. Norwood, 45 N. C. 64, 68 (1853).

[19] The facts and circumstances surrounding the testator at the time of the execution of the instrument are called "circumstances attendant."

[20] See recent note on this case in 35 N. C. L. REV. 167 (1956).

[21] Price v. Davis, 244 N. C. 229, 93 S. E. 2d 93 (1956), commented on in 35 N. C. L. REV. 127 (1956).

[22] 51 N. C. 436 (1859). Heirs take by positive law and the course of descent cannot be altered by any agreement of the parties.

[23] McDonald v. McDonald, 58 N. C. 211 (1860); Mastin v. Mastin, 65 N. C. 696 (1871); Wright v. Brown, 116 N. C. 26, 22 S. E. 313 (1895); Kornegay v. Miller, 137 N. C. 659, 50 S. E. 315 (1905).

[24] The majority rule is that a release by an heir or distributee, made to the ancestor before the latter's death, where supported by an advancement or other consideration, and freely and fairly made, is binding on the heir or distributee. 16 AM. JUR., *Descent and Distribution* § 152 (1938).