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SECOND ANNUAL SURVEY OF NORTH CAROLINA CASE LAW*

This *Survey* presents the second review of North Carolina Supreme Court cases undertaken by the *North Carolina Law Review.* It has found its motivation in the favorable reception of its predecessor by members of the practicing Bar.

Again this year, the *Survey* is not intended to discuss all the cases included within the period of its coverage. Rather it is designed to deal with 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:

Alexander H. Barnes (Agency and Workmen's Compensation, Contracts, and Insurance); George M. Britt (Future Interests, Real Property, and Wills and Administration); Bobby G. Byrd (Torts); Joseph G. Dail, Jr. (Constitutional Law); James Albert House, Jr. (Criminal Law, Domestic Relations, and Municipal Corporations); Milton E. Loomis (Evidence); Naomi E. Morris (Courts, Equity, and Trusts); William P. Skinner, Jr. (Civil Procedure); and Robert C. Vaughn, Jr. (Administrative Law, Corporations, and Credits).

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

Several of the administrative law cases treated in this *Survey* were concerned with findings of fact by the administrative agency or judicial review of such findings.

Before the above matters can arise, however, the original tribunal

*The period covered embraces the decisions of the North Carolina Supreme Court as reported in 239 N. C. 437 through 240 N. C. 566.

must exercise appropriate jurisdiction. In *McNair v. Ward*,[1] an action for damages in the superior court by an employee against his employer, the evidence showed that there were at least five employees and that the plaintiff was injured in performance of his employment. Therefore a nonsuit by the superior court was held proper because of the exclusive jurisdiction of the Industrial Commission under G. S. § 97-10.

Assuming now that the proper administrative agency has the cause, after the hearing it must make proper findings of fact. In *Utilities Commission v. Carolina Telephone & Telegraph Co.*,[2] for example, the company filed a petition for permission to sell authorized but unissued stock at not less than $100.00 per share. The commission, apparently basing the decision merely on the petition without aid of any other evidence, ordered that the stock not be sold for less than $115. A judgment of the superior court affirming the commission's order was vacated and the proceeding remanded with the mandate that the commission make specific findings as to (1) why it was necessary to fix the sale price at not less than $115, and (2) whether the sale at such a price would be in the public interest.

Again a necessary finding by the Utilities Commission was lacking in *Utilities Commission v. Thurston Motor Lines, Inc.*,[3] where the commission struck down an agreement between two carriers providing for division of rates on interchanged shipments. Concerning the practice provided for in the agreement, the commission recited in its findings, "this Commission does not accept such a practice as being equitable." The Court pointed out that the statute authorized the commission to vacate the agreed divisions only where they "are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto,"[4] and remanded the case for lack of a jurisdictional finding to that effect.

The Court has said that on an appeal from the Industrial Commission, the superior court, when the question is raised by proper exceptions, reviews the evidence to see if it supports the findings of fact, and if so, these findings are conclusive upon the lower court.[5] After

[1] 240 N. C. 330, 82 S. E. 2d 85 (1954).
[2] 239 N. C. 675, 80 S. E. 2d 643 (1954).
[3] 240 N. C. 166, 81 S. E. 2d 404 (1954).
[4] N. C. GEN. STAT. § 62-121.28 (Supp. 1953).
[5] *See* Vause v. Vause Farm Equipment Co., Inc., 233 N. C. 88, 93, 63 S. E. 2d 173, 177 (1951). In Stewart v. Duncan, 239 N. C. 640, 80 S. E. 2d 764 (1954) the Court did not comment on this point, but the lower court did in fact review the evidence because the appellant had filed specific exceptions to the findings of the commission, and the lower court found that there was competent evidence to support the findings. Although the point was not before it, the Court commented that the findings were supported by competent evidence.

this, the question is presented whether the findings support the judgment entered.

In the absence of specific exceptions to challenge the sufficiency of evidence to support particular findings of fact by an administrative agency, the superior court considers the question of law whether the facts as found support the decision, and is not required to examine the evidence to see if it supports such findings.[6]

On appeal to the Supreme Court, which reviews not the administrative agency but the lower court for possible errors of law, the above principle also applies, *i.e.*, the Court is not required to review the evidence if there are no exceptions to the lower court's ruling on particular findings, but the findings of fact will be considered to see if they support the judgment.[7] Illustrative of the several cases on this point is *Worsley v. S. & W. Rendering Co.*[8] in which Mr. Chief Justice Barnhill intimated that the decision "might be quite different"[9] if the appellant had done more than make a mere "broadside" exception to the signing of the judgment, which did not properly raise the question of the sufficiency of the evidence. In this case the claimants were stockholders in a close corporation and were injured while on corporate business. They claimed that they were acting as employees and, notwithstanding the fact that they were paid full salary while incapacitated, contended that they were entitled to compensation under the Workmen's Compensation Act. The facts as stated were found by the commission and at no time did the defendant corporation make specific exceptions to these findings. Therefore the Court refused to determine whether the evidence supported the findings and merely affirmed the judgment of the lower court, which had affirmed the award on the basis that it was supported by the facts as found. The Court commented that they were not establishing any new law but were merely restating well-established rules "at the risk of needless repetition." It seems that the reiteration was not as "needless" as the Court feared, because five more times during the same term it was called upon to restate this very point.[10]

[6] Willingham v. Bryan Rock & Sand Co., 240 N. C. 281, 82 S. E. 2d 68 (1954); Wyatt v. Sharp, 239 N. C. 655, 80 S. E. 2d 762 (1954); Worsley v. S. & W. Rendering Co., 239 N. C. 547, 80 S. E. 2d 467 (1954).

[7] See notes 8 and 10 *infra*.

[8] 239 N. C. 547, 80 S. E. 2d 467 (1954).

[9] *Id.* at 553, 80 S. E. 2d at 472.

[10] Beaver v. Crawford Paint Co., 240 N. C. 328, 82 S. E. 2d 113 (1954); Willingham v. Bryan Rock & Sand Co., 240 N. C. 281, 82 S. E. 2d 68 (1954) (an exception "for errors in the findings of fact unsupported by any evidence in the record" is too broad and is insufficient to challenge the sufficiency of the evidence in the lower court); Glace v. Pilot Throwing Co., Inc., 239 N. C. 668, 80 S. E. 2d 759 (1954); Wyatt v. Sharp, 239 N. C. 655, 80 S. E. 2d 762 (1954); Stewart v. Duncan, 239 N. C. 640, 80 S. E. 2d 764 (1954).

The Court can review the evidence when the appellant makes specific exceptions to the rulings of the lower court on whether the evidence supports the particular findings of the agency and, as in the case of appeals from the agency to the superior court, when the Court finds that any competent evidence supports the findings, these findings are conclusive upon the Court.[11] In *Baker v. Varser*,[12] for example, the Court held that no legal error was committed by the Board of Law Examiners and the lower court in construing "residence" to be synonymous with "domicile," and since the board's findings as to residence were supported by competent evidence, the Court could not review these findings further.

In several instances[13] the Court, though not required to consider the evidence by reason of lack of proper exceptions, did look at the evidence, apparently to reassure counsel by indicating that the outcome would have been the same even if the point had been properly raised.

In two cases[14] the Court had before it a finding on a mixed question of law and fact. In one it was said that if there is sufficient evidence to sustain the factual part, then this finding is conclusive on the Court.[15] Both cases involved the requirement that injuries, to be compensable under the Workmen's Compensation Act, must "arise out of and in the course of employment,"[16] and the Court reversed in each instance after reviewing the evidence and concluding that the evidence did not support a finding that the injury "arose out of and in the course of employment."[16a] In *Lewter v. Abercrombie Enterprises, Inc.*[17] the commission had found that an employee's heart attack was an accident "arising out of and in the course of her employment." Here the employee was greatly excited by a fire at the theatre where she worked and died of a cerebral hemorrhage shortly after giving

[11] *See* Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 402, 82 S. E. 2d 410, 413 (1954).

[12] 240 N. C. 260, 82 S. E. 2d 90 (1954) (the Court also said that the conclusiveness of the findings was not affected by the fact that a minority of the members of the administrative agency disagreed).

[13] Willingham v. Bryan Rock & Sand Co., 240 N. C. 281, 82 S. E. 2d 68 (1954); Wyatt v. Sharp, 239 N. C. 655, 80 S. E. 2d 762 (1954); Stewart v. Duncan, 239 N. C. 640, 80 S. E. 2d 764 (1954).

[14] Poteete v. North State Pyrophyllite Co., 240 N. C. 561, 82 S. E. 2d 693 (1954); Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 82 S. E. 2d 410 (1954).

[15] Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 403, 82 S. E. 2d 410, 413 (1954).

[16] See Lockey v. Cohen, Goldman, & Co., 213 N. C. 356, 196 S. E. 342 (1938), and Plemmons v. White's Service, Inc., 213 N. C. 148, 195 S. E. 370 (1938) in which the Court held that whether an accident arises out of and in the course of the employment is a mixed question of law and fact.

[16a] See AGENCY AND WORKMEN'S COMPENSATION, p. 166 *infra*.

[17] 240 N. C. 399, 82 S. E. 2d 410 (1954).

warning to the customers. The Court took the position that her death was due solely to her heart ailment and did not arise out of her employment, thus apparently substituting its judgment for that of the commission as to whether the plaintiff's employment was a contributing cause.

Notice and Hearing

The Court in *Willingham v. Bryan Rock & Sand Co.*[18] seems to doubt that the Industrial Commission had the authority to bring in as an additional party another defendant because at that time the plaintiff had not asserted any claim against this defendant. But whatever doubt may have existed, arising from failure to file a claim as required by G. S. § 97-58, was dispelled by what amounted to a general appearance. Here this defendant (1) responded to notice by appearing at the hearing, (2) stipulated that it was subject to the Workmen's Compensation Act, and (3) joined in the hearing; therefore, the Court had no hesitancy in holding that by these acts the defendant "submitted itself to the jurisdiction of the Commission." This discussion was rendered academic, however, when the Court said that when all parties entered into a stipulation that Willingham was dead and "his widow is now a proper party to this action as a claimant claiming compensation for his death which is alleged to have resulted from silicosis," this was a waiver of any procedural defect in the filing of the claim.

Delegation

Article 13C, Chapter 131, of the North Carolina General Statutes was substantially amended by Chapter 1045 of the 1953 Session Laws. Under the revised law, in order to create a new hospital district, there must be approval of the County Board of Commissioners and a petition signed by at least five hundred voters in the territory. After public hearing, the North Carolina Medical Care Commission, if the commission "shall deem it advisable," shall pass a resolution creating such district, defining its limits, and "determining that the residents of all the territory to be included in such district will be benefited by the creation of such district."

Williamson v. Snow[19] was an action instituted to enjoin the necessary bond issue by a hospital district which had been created under the statute. The plaintiff contended that this statute was an unlawful delegation of legislative power to the commission. The Court said: "We concede that the Legislature may not delegate its power to make laws . . . however, it may make a law and delegate the power to a

[18] 240 N. C. 281, 82 S. E. 2d 68 (1954).
[19] 239 N. C. 493, 80 S. E. 2d 262 (1954).

subordinate agency of the State, under *proper guiding standards* [italics supplied], to determine the facts or state of things upon which the law shall become effective."[20] The Court, per Mr. Justice Denny, held that in this situation there was no unlawful delegation by the Legislature and that the determination that the residents will be benefited is no more than a requirement that the commission find that such a hospital is needed.

In *Utilities Commission v. Thurston Motor Lines, Inc.*[21] the Court, by dictum, called attention to the statutory provision that "for good cause, the Commission may, in its discretion, prohibit the establishment of joint rates,"[22] and implied that since there was no rule or standard to guide the commission, this might be an unlawful delegation of legislative power. This issue was not presented to the Court, however, and thus it was left an open question.[23]

AGENCY AND WORKMEN'S COMPENSATION

AGENCY

Attorney and Client

In accord with the general rule that an attorney has no implied authority to waive or surrender a substantial right of his client,[1] and invoking no new rule in this state,[2] the Court quickly disposed of two cases involving the attorney-client relationship. *Newkirk v. Porter*[3] involved an action between adjoining landowners, the plaintiff's action being based on title by deed and the defendant admitting the plaintiff's title, but disputing the location of the dividing line. One of the counsel for the plaintiff said to the trial judge, "We will stand on adverse possession." The lower court allowed the defendant's motion for compulsory nonsuit. The Court reversed on another ground,[3a] but said that a casual, hasty or ill-considered admission made by one of the attorneys, which is in irreconcilable conflict with defendant's admission and the theory of plaintiff's case, and which is repudiated in express terms by the other counsel for plaintiff, is not binding on the plaintiff.

State v. Barley[4] involved a criminal prosecution in which the lower

[20] *Id.* at 497, 80 S. E. 2d at 265.
[21] 240 N. C. 166, 81 S. E. 2d 404 (1954).
[22] N. C. GEN. STAT. § 62-121.28 (Supp. 1953).
[23] It seems, therefore, that the Court is inviting counsel to test the constitutionality of the delegation of power to the Utilities Commission under N. C. GEN. STAT. § 62-121.28 (Supp. 1953).

[1] See Note, 30 A. L. R. 2d 947 (1953).
[2] Bath v. Norman, 226 N. C. 502, 39 S. E. 2d 363 (1946).
[3] 240 N. C. 296, 82 S. E. 2d 74 (1954).
[3a] See REAL PROPERTY, p. 208 *infra*.
[4] 240 N. C. 253, 81 S. E. 2d 772 (1954).

court did not submit the case to the jury, but accepted a plea of nolo contendere as entered by defendant's counsel, notwithstanding that the defendant himself was insisting that he was not guilty. The defendant voiced his dissatisfaction with his attorney, who promptly withdrew with permission of the trial court, and the defendant took the stand and disavowed the plea entered by counsel. The trial judge, nevertheless, found him guilty. The Court, in reversing, pointed out that the relation of attorney and client rests upon principles of agency and not guardianship, and laid down the rule that "While an attorney has implied authority to make stipulations and decisions in the management and prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld."[5]

It would seem that the rule as laid down in *Barley* would govern both the above situations; for in both cases the attorney made a stipulation or decision in the management of the action which went beyond procedural matters and would have operated as a surrender of substantial rights. It should be pointed out that this relationship is governed in the main by the ordinary rules of agency, and that in these cases there could not be a ratification by or an estoppel of the client as the stipulations were expressly repudiated.[6]

Revocation

Julian v. Lawton[7] is largely a property case dealt with more fully elsewhere in this *Survey*.[8] However, it involves a novel application of a rule of agency. A covenant in the grantor's deed provided that plans of homes to be built on the lots would have to be approved by him or by an architect selected by him. He had executed before his death written authority to an architect to approve all plans. The Court held that the authority given to the architect was revoked by the death of the principal. It appears that the authority given was clearly not coupled with an interest.

G. S. § 20-71.1[9]

The statutory presumption of agency was again considered by the

[5] State v. Barley, 240 N. C. 253, 255, 81 S. E. 2d 772, 773 (1954).

[6] That an attorney has the power to bind his client by formal stipulation of facts in workmen's compensation cases, see Edwards v. Raleigh, 240 N. C. 137, 81 S. E. 2d 273 (1954).

[7] 240 N. C. 436, 82 S. E. 2d 210 (1954).

[8] See REAL PROPERTY, p. 209 *infra*.

[9] "(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner

Court in two cases during the past term. In *Jyachosky v. Wensil*[10] the evidence clearly showed that the operator of the vehicle was on a purely personal mission and was not acting within the scope of his employment. Nevertheless, the presumption raised by proof of ownership of the vehicle was held sufficient to carry the case to the jury on the issue of respondeat superior. The jury found for the plaintiff as against the defendant owner. The Court, in affirming, found that the trial judge had correctly charged the jury under the statute and that the issue of respondeat superior was then in the hands of the jury. In his concurring opinion, the Chief Justice vigorously pointed out the difficulty in this case when he said, "There is grave error appearing in the record. But it is error committed by the jury. While we need some statute such as G. S. 20-71.1, this Act should be so amended as to afford the Court an opportunity to grant relief in a case of this kind."[11]

In *Roberts v. Hill*[12] the statute was held inapplicable where the plaintiff sought to hold one of the defendants liable on the theory that defendant permitted an employee who was known to him to be an incompetent and reckless driver to operate the car causing the accident. The Court pointed out that G. S. § 20-71.1 was intended to apply only to those cases where the plaintiff seeks to hold an owner liable for the negligence of the operator under the doctrine of respondeat superior. An action brought on the theory of permitting a known reckless and incompetent person to operate a motor vehicle is based on the master's own negligence,[13] and, as the Court expressly indicated, the statute cannot have the effect of supplying the plaintiff's lack of proof that a defendant knowingly permitted a reckless employee to use a motor vehicle.

"To and from Work"

The case of *Ellis v. American Service Co.*[14] injects a new twist into the application of the rule that an employee is not engaged in the prosecution of his employer's business while proceeding to the place of his employment. The employee had two different types of duties

in the very transaction out of which said injury or cause of action arose.

(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and for the owner's benefit, and within the course and scope of his employment; provided, that no person shall be allowed the benefit of this section unless he shall bring his action within one year after his cause of action shall have accrued."

[10] 240 N. C. 217, 81 S. E. 2d 644 (1954).

[11] Jyachosky v. Wensil, 240 N. C. 217, 229, 81 S. E. 2d 644, 652 (1954).

[12] 240 N. C. 373, 82 S. E. 2d 373 (1954).

[13] Heath v. Kirkman, 240 N. C. 303, 82 S. E. 2d 104 (1954).

[14] 240 N. C. 453, 82 S. E. 2d 419 (1954).

to perform for his employer at two separate plants. As a matter of personal convenience or habit, he drove his own car first to the plant where he assisted the loading of ice trucks and then started to the plant where he was to pick up the truck which he used for deliveries. En route, he negligently injured the plaintiff.

The Court found that the employee was not engaged in the prosecution of his employer's business at the time of the accident, having no obligation to go first to the loading plant, but was merely proceeding to the place of his employment.

Independent Contractor

The test of right of control was again called into play in *Harris v. White Construction Co.*,[15] where one Nelson was hired to drive his own truck. The defendant Construction Company reserved the right to fire him at any time, gave directions as to the manner, time, and place of loading and unloading, and directed him in his work. The Court held that the evidence bearing on supervision and direction of his work was sufficient to justify the inference that the defendant retained the right to control the details of the work to be performed by Nelson, and that Nelson was an employee and not an independent contractor.

WORKMEN'S COMPENSATION

Procedure

Out of twelve workmen's compensation appeals before the Court during the past term, six[16] of them failed on procedural grounds involving a highly important rule of procedure on appeals from the Industrial Commission. These cases are treated more fully elsewhere in this *Survey*.[17]

"Arising Out Of"

Two interesting cases necessitated a close look at the phrase "arising out of." One is worthy of mention simply as another pin in the vast map of the area covered by the phrase; the other because it indicates the narrow construction the Court places upon the phrase when applying it to an accident aggravating a pre-existing condition.

In *Poteete v. North State Pyrophyllite Co.*,[18] claimant was a fore-

[15] 240 N. C. 556, 82 S. E. 2d 689 (1954).

[16] Beaver v. Crawford Paint Co., 240 N. C. 328, 82 S. E. 2d 113 (1954); Willingham v. Bryan Rock and Sand Co., 240 N. C. 281, 82 S. E. 2d 68 (1954); Glace v. Pilot Throwing Co., 239 N. C. 668, 80 S. E. 2d 759 (1954); Wyatt v. Sharp, 239 N. C. 655, 80 S. E. 2d 762 (1954); Stewart v. Duncan, 239 N. C. 640, 80 S. E. 2d 764 (1954); Worsley v. S. & W. Rendering Co., 239 N. C. 547, 80 S. E. 2d 467 (1954).

[17] See ADMINISTRATIVE LAW, pp. 158, 159, *supra*.

[18] 240 N. C. 561, 82 S. E. 2d 693 (1954).

man in the employer's plant. Upon returning to the plant after his regular working hours, an accepted custom for which he was paid, but this time to see a fellow employee about a personal debt, he helped that employee straighten out some difficulty and, without having spoken of the debt, sat on a wall to rest and wait for a lull in the co-employee's work. He lost consciousness and fell from the wall. The Court, in holding that the evidence was insufficient to support a finding that the injury "arose out of" his employment, pointed out that there appeared no causal relationship between his employment as foreman and the injury he received. The possibility that his exertion produced fatigue causing the fall was not shown.

In *Lewter v. Abercrombie Enterprises, Inc.*,[19] the employee was working as a cashier in a ticket booth of a moving picture theatre when a fire broke out in the theatre. In an excited state, she rushed to warn the patrons to leave. An hour after the fire had been extinguished, she collapsed, and died the following morning of a cerebral hemorrhage. She had been overweight and had suffered from high blood pressure for several years. There was medical testimony that her excitement could have aggravated her condition to such an extent as to cause a cerebral hemorrhage. The Court refused to affirm a holding that the facts were sufficient to constitute an accident aggravating the pre-existing heart disease.[20] After defining the phrase "arising out of" as used in the Act, the Court decided that the evidence was insufficient to show that the employee's death resulted from an injury arising out of her employment, since death from heart disease does not result from an injury arising out of the employment unless it results from an unusual or extraordinary exertion incident to the employment. While the term "exertion" might not ordinarily include excitement, should its meaning in these cases be confined to physical acts? As the Court points out, the Workmen's Compensation Act is not an accident and health insurance act; yet it does not seem that enlarging the scope of the word "exertion" to include unusual mental exertion or excitement incident to the employment would defeat the purpose and spirit of the Act. Even if the word be confined to physical exertion, it would seem that this case could have been brought under the statute. The employee's job was to sit quietly in a booth and sell tickets, but on this occasion she was required to rush to warn patrons of the danger. That physical exertion certainly was unusual in relation to her normal duties, and, coupled with her excitement,

[19] 240 N. C. 399, 82 S. E. 2d 410 (1954).

[20] *But see* Wyatt v. Sharp, 239 N. C. 655, 80 S. E. 2d 762 (1954) where a fall was found to have aggravated a pre-existing heart condition.

seems to create a situation which the Act contemplated as an injury "arising out of" her employment.[21]

Occupational Disease

While the Act contemplates that employees who reach the third stage of silicosis should be removed from exposure to the disease, paid temporary compensation, and rehabilitated,[22] in the case of *Willingham v. Bryan Rock and Sand Co.*[23] the employee was given notice by the Medical Committee for the Industrial Commission that he had silicosis in the third stage and would not be issued the usual work card, but he continued work in this dusty trade for a new employer and became incapacitated. Nevertheless, compensation was awarded from his last employer for whom he had worked only five months, and the Court affirmed.

Rights and Remedies Exclusive

In *McNair v. Ward*[24] G. S. § 97-10, making a proceeding for compensation the sole remedy for industrial injuries, was held applicable to a minor whether lawfully or unlawfully employed.

CIVIL PROCEDURE

PARTIES

In *McPherson v. First & Citizens National Bank*[1] an action was brought for interpretation and reformation of a trust instrument. In the view of the Court, the rights of children not yet conceived were involved.[2] It was held that, in the absence of express statutory authority, unborn persons may not be represented by a guardian ad litem, and no such statute applies to the situation involved in this case.[3] Since no parties *in esse* had interests substantially identical with the interests of the unborn children (thus eliminating the doctrine of vir-

[21] This case seems to be inconsistent with prior application of the "unusual exertion" rule. West v. N. C. Department of Conservation and Development, 229 N. C. 232, 49 S. E. 2d 398 (1948); Gabriel v. Newton, 227 N. C. 314, 42 S. E. 2d 96 (1947); Neely v. Statesville, 212 N. C. 365, 193 S. E. 664 (1937).
[22] N. C. GEN. STAT. § 97-61 (1950).
[23] 240 N. C. 281, 82 S. E. 2d 204 (1954).
[24] 240 N. C. 330, 82 S. E. 2d 68 (1954).

[1] 240 N. C. 1, 81 S. E. 2d 386 (1954).
[2] In arriving at this conclusion the Court rejected a finding by the lower court that it was physically impossible for the potential father to have additional children. Conceding that the question has been reexamined in many jurisdictions, the Court said that it has not been presented with a situation sufficiently compelling to warrant relaxation of the common law's irrebuttable presumption that a person may have issue so long as life lasts.
[3] N. C. GEN. STAT. § 41-11.1 (1950) was held to be confined to proceedings for sale, lease or mortgage of property. See 27 N. C. L. REV. 415 (1949), pointing out that this section was itself enacted because Section 41-11 had been held inapplicable to situations in which class gifts were involved.

tual representation), the Court held that the judgment could not purport to adjudicate the rights of the unborn children.

The case serves to emphasize the desirability of a general statutory provision authorizing some method by which such unborn persons may be represented where property rights of any kind are involved.

The impossibility of joining the unborn persons did not prevent the adjudication of the rights of parties *in esse* as between themselves. Similarly, in *Hine v. Blumenthal*,[4] the Court, in a proceeding brought under the Declaratory Judgment Act[5] to determine whether an alley might be closed, adjudicated the rights of the parties before it, as between themselves, even though persons regarded by the Court as *necessary* parties were not parties in fact. The case was remanded to allow the absent parties to come in voluntarily or be brought in to show cause why the judgment should not be declared binding as against them. The practical conclusion to be drawn from the case is that in North Carolina when the "necessary" label is applied to a party, some further search for its meaning must be made. It may mean that, without the person's presence, plaintiff can secure no relief. Or, as in the instant case, it may mean that without his presence, plaintiff may not secure complete relief, good against the world.

Other decisions worth passing mention were to the effect that: (1) In a proceeding to probate in solemn form an alleged lost will, failure of the record to show service of process on some interested persons or appointment of guardian ad litem for those under disability did not warrant quashal of the proceeding (though, in effect, the lower court was admonished to correct the defects before trial).[6] (2) Where the complaint in a wrongful death action alleged that plaintiff was "the duly qualified and acting Administrator of the estate" of a named decedent, "having been duly appointed" by a specified clerk, demurrer for failure to allege specifically that the action was brought in plaintiff's representative capacity was properly overruled.[7]

AMENDMENT

Several cases deal with the common, but still troublesome problem of when a complaint so clearly indicates that the plaintiff has no cause of action that, upon demurrer, the action should be dismissed without leave to amend. In them, those weary shibboleths, "a defective statement of a good cause of action" and "a statement of a defective cause of action"; are once more explained, refined, and supposedly applied. In *Scott v. Statesville Plywood & Veneer Co.*,[8] the action was for libel.

[4] 239 N. C. 537, 80 S. E. 2d 458 (1954).
[5] N. C. GEN. STAT. §§ 1-253 *et seq.* (1953).
[6] *In re* Will of Wood, 240 N. C. 134, 81 S. E. 2d 127 (1954).
[7] Midkiff v. Auto Racing Inc., 240 N. C. 470, 82 S. E. 2d 417 (1954).
[8] 240 N. C. 73, 81 S. E. 2d 146 (1954).

The complaint affirmatively disclosed that the libel, if any, was contained in the complaint and other papers in a judicial proceeding and that the allegations there contained were relevant in that litigation.[9] The Court held that this disclosed a defense of absolute privilege and also disclosed that no amendment could overcome that defense. Hence, the judge below properly dismissed the action when he sustained the demurrer. The complaint was characterized as "a statement of a defective cause of action which cannot be made good by amendment."

In *Mills v. Richardson*,[10] a negligence action, the defendant demurred to an amended complaint on the ground that the complaint failed to allege facts showing the existence of a legal duty on the part of defendant to plaintiff. The demurrer was sustained and the action dismissed. Notice of appeal was given by plaintiff, but thereafter and at another term plaintiff moved to have the dismissal order in the prior judgment set aside, to be allowed to withdraw the appeal, and for permission to file an amended complaint. The motion was granted by the same judge who had entered the judgment of dismissal. The Supreme Court held that the judge was without jurisdiction to grant the motion as the judgment of dismissal was at worst erroneous, rather than void or irregular, and, therefore, the judge had no power to set it aside after the end of the term at which it was entered.

In the opinion it is asserted that if there is a "defective statement" amendment may be permitted; but where there is "a statement of a defective cause," final judgment of dismissal should be entered.

Probably these two opinions are no more successful in attempting to define these phrases than any of the numerous earlier opinions which have struggled with the problem. In the *Scott* case there is an effort to draw the line between omission of an essential element (defective statement) and a positive allegation of facts which affirmatively disclose that plaintiff cannot recover (defective cause). However, the fundamental problem is not that simple. Conceivably, the omission of an essential element cannot be supplied. Conceivably, the positive allegations which negative a cause of action may be inadvertent or inaccurately stated. Neither possibility can be ruled out by examining the pleadings alone and giving them a label.

A much superior rule would be that, upon sustaining a demurrer, the court should give plaintiff an opportunity to amend upon representations by plaintiff's attorney that he can, in good faith, restate the complaint in such a way as to allege a good cause of action. In all likelihood such a rule would not have changed the result of the *Scott*

[9] In passing, the Court pointed out that the complaint improperly failed to state the libel in the original language, but this was not the fatal weakness found.
[10] 240 N. C. 187, 81 S. E. 2d 409 (1954).

case. But the suggested rule would relieve trial judges of the necessity of drawing a distinction which is at best difficult and at times impossible.

A much less technical approach to another amendment problem is reflected in *Wheeler v. Wheeler*.[11] There the Court sustained the action of the trial judge in permitting amendment, after verdict, to strike an allegation that defendants agreed to convey a building to plaintiff and substitute an allegation that defendants promised to repay plaintiff the cost of construction.[12] The Court recognized the rule that such an amendment is not permissible if it changes the cause of action, but wisely held that it did not under the circumstances of this case.

Finally, as to amendments, *Graham v. Atlantic Coast Line R. R.*[13] deals with relation back for purposes of the statute of limitations. The original complaint ostensibly presented a wrongful death action under state law. At the trial, more than two years after the action was begun, and more than three years after intestate's death, it developed that plaintiff's sole remedy was under the Federal Employers' Liability Act. The trial judge permitted the plaintiff to amend to state the jurisdictional facts under that Act. This was sustained on the ground that the matter was governed by federal law, which permits relation back. Unfortunately, had state law governed, the result would probably have been different.[14]

MOTIONS TO STRIKE

Once again the Court has felt it desirable to restate the rules governing appeals from lower court decisions on motions to strike.[15] In *Daniel v. Gardner*,[16] no less than nine rules are stated. The decision was to strike, as prejudicial, some three allegations, leaving a number

[11] 239 N. C. 646, 80 S. E. 2d 755 (1954).

[12] The judgment was reversed on other grounds. Compare Brown v. Guaranty Estates Corporation, 239 N. C. 595, 80 S. E. 2d 645 (1954), discussed, in other respects, under "Joinder of Parties and Causes." There plaintiff sued a trustee and an administrator in their representative capacities, for malicious and wrongful attachment. The Court held that such a suit could only be maintained against them as individuals. The Court questioned, without deciding, whether this could be cured by amendment without substantially changing the claim.

[13] 240 N. C. 338, 82 S. E. 2d 346 (1954).

[14] Chief Justice Barnhill, dissenting on other grounds, agrees that "the original complaint constitutes a defective statement of a good cause of action, and that the order allowing amendment thereof rested within the sound discretion of the trial judge." This being true, the amendment would probably relate back under state law. Davis v. Rhodes, 231 N. C. 71, 56 S. E. 2d 43 (1949). However, the majority opinion apparently does not subscribe to this thesis, and Capps v. Atlantic Coast Line R. R., 183 N. C. 181, 111 S. E. 533 (1922), seems to hold that, under state law, there can be no relation back in this situation.

[15] See Brandis and Bumgarner, *The Motion to Strike Pleadings in North Carolina*, 29 N. C. L. Rev. 3 (1950).

[16] 240 N. C. 249, 81 S. E. 2d 660 (1954). See also Heath v. Kirkman, 240 N. C. 303, 82 S. E. 2d 104 (1954), discussed under "Joinder of Parties and Causes," *infra*.

of others, as non-prejudicial, even though some of these were described as "somewhat decorative and evidential." The case presents one more illustration (though none is needed) of the kind of pleading which results from the unfortunate practice of reading pleadings to the jury.

AFFIRMATIVE DEFENSES

The Court held: (1) Waiver or estoppel, under the circumstances presented, is an affirmative defense to be pleaded and proved by defendant.[17] (2) Assumption of risk is "ordinarily" an affirmative defense to be raised by answer rather than by demurrer.[18] (3) Absolute privilege is a defense to libel which may be raised by demurrer when it appears on the face of the complaint.[19]

Probably the cases dealing with waiver, estoppel and assumption of risk do not, standing alone, preclude use of demurrer when such defenses plainly appear on the face of the complaint.[20]

JOINDER OF PARTIES AND CAUSES

The most interesting joinder decision is *Hobbs v. Goodman*,[21] involving third-party practice. Plaintiff sued the lessee of a building, alleging that a sign erected by the lessee fell and injured her. Defendant's answer alleged that plaintiff was injured when a metal awning cover, attached to the building prior to defendant's occupancy, fell causing plaintiff's injury. It asked that the lessor be made a defendant and that, if plaintiff recovered from the lessee, a judgment for contribution be rendered against the lessor. Upon demurrer by the lessor the Court held that the facts alleged in the answer, when compared with plaintiff's allegations, did not reveal a possible joint tortfeasor or primary-secondary liability situation; that the third-party claim involved facts entirely different from those alleged in the complaint. It followed that the lessee had no proper third-party claim and the demurrer was sustained. The Court expressly refused to decide the matter on the assumption that plaintiff might amend to allege that the awning cover was the cause of her injury and also refused to say whether the third-party claim would be proper if such amendment should be made.

In *Brown v. Guaranty Estates Corporation*,[22] the Court said that a plaintiff may not join in one suit (1) a cause of action against an

[17] Hall v. Odom, 240 N. C. 66, 81 S. E. 2d 129 (1954); Turnage Company, Inc. v. Morton, 240 N. C. 94, 82 S. E. 2d 135 (1954).
[18] Midkiff v. Auto Racing Inc., 240 N. C. 470, 82 S. E. 2d 417 (1954).
[19] Scott v. Statesville Plywood & Veneer Co., 240 N. C. 73, 81 S. E. 2d 146 (1954).
[20] For general discussion of defenses which may be raised by demurrer, see 14 N. C. L. Rev. 396 (1936).
[21] 240 N. C. 192, 81 S. E. 2d 413 (1954).
[22] 239 N. C. 595, 80 S. E. 2d 645 (1954).

attachment plaintiff for malicious and wrongful attachment and (2) a cause of action against the surety for enforcement of liability on the attachment bond. The reason is that the surety has no liability for the tort of the attachment plaintiff in maliciously suing out the order of attachment. Hence, the surety would not be affected by all causes.[23] However, there was no misjoinder in the instant case, as the Court found that the only cause stated was for malicious and wrongful attachment. Thus, though the surety was named as a party, no cause of action was stated against it, there could be no misjoinder of causes, and the surety was merely a surplus party.[24]

Likewise, in *Wetherington v. Whitford Motor Company, Inc.*[25] the Court found no misjoinder when only one of four plaintiffs states a cause of action. There plaintiff corporation *A* desired to purchase new automobiles in quantity, and at a discount, from defendant, an authorized dealer. Defendant advised *A* that such a purchase could only be made by someone having reasonable and ordinary use for a large number of automobiles, thus being eligible for a "fleet purchase plan." To the knowledge of the defendant, and for a consideration, *A* procured plaintiff corporation *B,* a cab company, to make the contract of purchase. Defendant failed to deliver and action for breach of the contract was begun by *A, B* and an officer of each. The Court held that under the circumstances, *A* was the real party in interest and the only plaintiff stating a cause of action.[26]

The remaining joinder case is *Heath v. Kirkman.*[27] There defendant demurred to a very prolix complaint for improper joinder of causes.[28] The Court held that the complaint stated only a single cause of action for negligent injury. Allegations which tended to show false arrest or malicious prosecution were irrelevent and were stricken.[29] In the course of the opinion it is stated that demurrer for misjoinder of causes is a proper way to attack a complaint which states two or more causes of action but fails to state them separately. Theoretically, a motion to make more definite and certain would seem more appro-

[23] N. C. GEN. STAT. § 1-123 (1953).

[24] Under the procedure followed by the defendants in this case, had there been misjoinder it probably would have been waived.

[25] 240 N. C. 90, 81 S. E. 2d 267 (1954).

[26] Compare Quarry Co. v. West Construction Co., 151 N. C. 345, 66 S. E. 217 (1909).

[27] 240 N. C. 303, 82 S. E. 2d 104 (1954).

[28] N. C. GEN. STAT. § 1-127 (1953).

[29] The opinion states that if plaintiff has a cause of action for false arrest or malicious prosecution he may bring an independent action therefor. It is not clear whether this is intended to mean that, even though all parties are affected, such a cause of action may not be joined with a cause of action for negligent injury. See N. C. GEN. STAT. § 1-123 (1953) (the joinder of causes statute), listing "injuries to character" as a separate class from "injuries with or without force to person or property."

priate.[30] However, if amendment is permitted when a demurrer is sustained, it perhaps makes little practical difference which form of attack is used.

REAL PARTY OF INTEREST

The obligee in a surety bond was held to remain the real party in interest, despite a purported assignment of the bond, where the bond itself required the surety's consent to any assignment and such consent had not been given.[31]

VENUE

In a case of first impression, it was held that when a tenant in common in personal property brings a special proceeding for partition, the proceeding must be tried in the county in which the property, or some part thereof, is situated.[32]

CONSTITUTIONAL LAW

REVIEW OF CONSTITUTIONALITY OF CRIMINAL TRIALS

The Court in *State v. Hackney*[1] had occasion for the third time[2] to consider procedure under the North Carolina Post-Conviction Hearing Act.[3] This statute was designed to meet the inadequacies of habeas corpus and the writ of error coram nobis in cases where a defendant claims that there was a denial of his constitutional rights at the trial at which he was convicted, and where the constitutional question was not raised at that time.[4]

[30] See McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 433 (1929). See also N. C. GEN. STAT. § 1-132 (1953), prescribing division of the action as the proper relief to be granted for misjoinder of causes alone. This seems to raise a question as to whether the provision of Section 1-127 authorizing demurrer for misjoinder of causes was intended to refer to improper commingling of causes.

[31] Edgewood Knoll Apartments, Inc. v. Braswell, 239 N. C. 560, 80 S. E. 2d 653 (1954). For another real party in interest case, see Wetherington v. Whitford Motor Company, Inc., 240 N. C. 90, 81 S. E. 2d 413 (1954), discussed under "Joinder of Parties and Causes," *supra*.

[32] DuBose v. Harpe, 239 N. C. 672, 80 S. E. 2d 454 (1954).

[1] 240 N. C. 230, 81 S. E. 2d 778 (1954). Petitioner had been tried and convicted in 1950 of robbery with firearms and sentenced to 20 years in the State Prison.

[2] The other two cases are: Miller v. State, 237 N. C. 29, 74 S. E. 2d 513, *cert. denied*, 345 U. S. 930 (1953) (exclusion of members of defendant's race from jury) and State v. Cruse, 238 N. C. 53, 76 S. E. 2d 320 (1953) (right to counsel).

[3] N. C. GEN. STAT. §§ 15-217 through 15-222 (1953).

[4] *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 351, 390-393 (1951). The Act allows a prisoner "who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction. . . ." to institute a proceeding under it. N. C. GEN. STAT. § 15-217 (1953).

The Court placed on petitioner the burden of proving a deprivation of a substantial constitutional right.[5]

At this point, however, the Court put a heavier burden on the defendant when it quoted the doctrine of prejudicial error from *State v. Beal*.[6] As a result, not only must petitioner show the deprivation of a constitutional right, but he must also show that he was prejudiced thereby—that but for this deprivation "a different result would likely have ensued." The effect of this is to recognize, on the one hand, the basic constitutional right, and, on the other hand, to deny it to the accused unless he can prove that he will be benefited by its exercise.[7] Of course, with the exception of *State v. Farrell*,[8] this has been the general position of the North Carolina Court in ordinary appeal cases.[9] It is submitted, however, that constitutional guaranties should be accorded more dignity than matters of technical procedure.[10]

DUE PROCESS

Right to Counsel

Petitioner in *State v. Hackney* claimed that his rights under North Carolina Constitution, Article I, Sections 11[11] and 17,[12] and the Due Process Clause of the Fourteenth Amendment to the United States Constitution were violated by the refusal of the trial judge to appoint counsel for him. The evidence was that defendant was a mature person and had previously been tried and convicted of a felony. There was no showing of ignorance, incompetence, or any other special circumstance. The Court applied the established North Carolina rule that in non-capital cases, the accused has a right to have counsel assigned only if "the circumstances are such . . . as to show the apparent necessity of counsel for the protection of the defendant's rights."[13]

[5] People v. Hall, 413 Ill. 615, 110 N. E. 2d 249 (1953); *cf.* People v. Reeves, 412 Ill. 555, 560, 107 N. E. 2d 861, 864 (1952) ("a substantial showing of a violation of constitutional rights").

[6] 199 N. C. 278, 303, 154 S. E. 604, 618 (1930): "The foundation for the application of a new trial is the allegation of injustice arising from error, but for which a different result would likely have ensued, and the motion is for relief upon this ground. Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible, and not merely theoretical."

[7] Note, 28 N. C. L. REV. 205, 213-215 (1950). However, it could be argued that the requirement in the statute of a "substantial" denial of a constitutional right indicates that the legislature intended this result to follow.

[8] 223 N. C. 321, 26 S. E. 2d 322 (1943).

[9] *E.g.*, State v. Gibson, 229 N. C. 497, 50 S. E. 2d 520 (1948). Note, 27 N. C. L. REV. 544 (1949).

[10] Reasons for this position are well stated in Note, 28 N. C. L. REV. 205, 213-215 (1950).

[11] "[E]very person charged with crime has the right . . . to have counsel for defense. . . ."

[12] "No person ought to be taken, imprisoned . . . or in any manner deprived of his life, liberty or property, but by the law of the land."

[13] State v. Hedgebeth, 228 N. C. 259, 265-6, 45 S. E. 2d 563, 567 (1947); State v. Cruse, 238 N. C. 53, 76 S. E. 2d 320 (1953); Note, 32 N. C. L. REV. 331 (1954).

Right of Confrontation

The right of confrontation guaranteed by Article I, Section 11 of the North Carolina Constitution[14] requires that defendant be given a reasonable time to prepare his defense.[15]

Petitioner in *Hackney* was indicted by the grand jury on Monday; he was brought into court from a prison camp (where he was serving a sentence for a previous conviction) at 2:30 p.m. that day; his request for "time to get some witnesses, and prepare for trial" was denied; the trial began Monday afternoon and was finished Tuesday morning. However, at that time petitioner could name no witnesses he wanted and could still think of none three and one-half years later at this proceeding. The Court saw no sufficient grounds for a continuance here—it would not have "enabled [defendant] to obtain additional evidence or otherwise present a stronger defense."[16] As noted above, this incorporates the requirement of prejudicial error into the constitutional guaranty. It would seem that the better test was followed in *State v. Farrell:* "Did the refusal of the trial court to grant petitioner's motion for a continuance [deny] him a reasonable time within which to prepare his defense?"[17]

PROHIBITION AGAINST SPECIAL PRIVILEGES AND MONOPOLIES

Chapter 541 of the 1949 Session Laws of North Carolina—known as the "1949 Currituck Act"—created the Currituck County Racing Commission and vested it with authority to grant a franchise to a single person, association, or corporation, to be irrevocable for a period not exceeding 25 years, for the purpose of conducting a race track for horse or dog races; the franchise holder was to have authority to operate on the premises a pari-mutuel betting system, in the operation of which any person over 21 years of age could legally participate. The Act was to become effective upon ratification by a majority of the qualified voters of Currituck County, and it was so ratified.

This Act was held unconstitutional in *State v. Felton*[18] as violating

[14] "[E]very person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony...."

[15] Thus, a motion for continuance, although ordinarily directed to the discretion of the trial judge, presents a question of law, which is reviewable on appeal, when the motion is based on such a constitutional right. State v. Farrell, 223 N. C. 321, 26 S. E. 2d 322 (1943); Note, 28 N. C. L. Rev. 205, 209 (1950).

[16] State v. Gibson, 229 N. C. 497, 502, 50 S. E. 2d 520, 524 (1948).

[17] State v. Farrell, 223 N. C. 321, 328, 26 S. E. 2d 322, 326 (1943). See Commonwealth v. O'Keefe, 298 Pa. 169, 148 Atl. 73 (1929).

[18] 239 N. C. 575, 80 S. E. 2d 625 (1954), and its companion cases: State v. Stewart, 239 N. C. 589, 80 S. E. 2d 636 (1954) and State v. Truitt, 239 N. C. 590, 80 S. E. 2d 637 (1954). Defendants were charged with unlawfully placing bets on a game of chance. The case is the subject of a Note in 33 N. C. L. Rev. 109 (1954).

Article I, Sections 7[19] and 31[20] of the North Carolina Constitution.

The decision was based primarily on Article I, Section 7.[20a] The Court found that this was not a grant of an exclusive privilege to the *county,* as was argued, but rather to one corporation. Only that corporation, with its patrons, could violate the general laws of the state forbidding gambling. This was a violation of the fundamental democratic principle: "Equal rights and opportunities to all, special privileges to none."[21]

However, some interesting questions raised by this decision were left unanswered: Can the General Assembly enact a statute legalizing gambling in a single county, or legalizing a particular type of gambling in a single county, applicable to all persons within the county,[22] or a statute which permits counties themselves to operate such an establishment as was involved in the instant case? It would seem that some such enactments might be valid because of authority[23] that political subdivisions are not "persons" within the meaning of Article I, Section 7. If counties and other subdivisions of the state do fall within the prohibitions of this section, what is the status of the great quantity of local and local-option legislation which has been passed in North Carolina?[24] How much weight is to be attached to the Court's somewhat questionable dictum in *Felton* that "it is not only within the scope of the state's police power to suppress gambling in all its forms, but its duty to do so"?[25]

RAISING CONSTITUTIONALITY OF STATUTE IN INJUNCTION PROCEEDING

Another case[26] growing out of the 1949 Currituck Act, discussed

[19] "No person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

[20] "Perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed." Several features of the Act were found which violate this section: (1) there was the possibility of a self-perpetuating membership on the Racing Commission; (2) no provision was made for voting the Act out once it was voted in; and (3) the franchise was irrevocable, for the period provided, except for failure to pay the county its percentage of receipts or for violation of "reasonable rules and regulations" made by the Racing Commission. State v. Felton, 239 N. C. 575, 585-6, 80 S. E. 2d 625, 633 (1954).

[20a] See MUNICIPAL CORPORATIONS, p. 204 *infra.*

[21] State v. Felton, 239 N. C. 575, 587, 80 S. E. 2d 625, 634 (1954). *See* Newman v. Watkins, 208 N. C. 675, 679, 182 S. E. 453, 455 (1935) (dissenting opinion).

[22] The cases of State v. Fowler, 193 N. C. 290, 136 S. E. 709 (1927) and Plott v. Ferguson, 202 N. C. 446, 163 S. E. 688 (1932) might be considered to prohibit such enactments; they were sharply criticized by defendant in the principal case, but the Court did not find it necessary to reconsider their validity. State v. Felton, 239 N. C. 575, 585, 80 S. E. 2d 625, 632 (1954).

[23] *E.g.,* Salsburg v. Maryland, 346 U. S. 545 (1954).

[24] This problem is discussed in Note, 33 N. C. L. REV. 109 (1954).

[25] Quoted from 24 AM. JUR., *Gaming and Prize Contests* § 3 (1939).

[26] State *ex rel.* Summerell v. Carolina-Virginia Racing Ass'n, Inc., 239 N. C. 591, 80 S. E. 2d 638 (1954). The action was brought by a citizen of Currituck County to enjoin as a nuisance defendant's operation of certain premises for the

above, involved the raising of the constitutionality of a statute in an action for injunction brought under G. S. § 19-1 *et seq.*[27] The Court noted the general rule that a citizen cannot enjoin the putting into effect of an unconstitutional statute in the absence of a showing that he will suffer some direct injury to personal or property rights.[28] However, this action was not founded on general principles of equity, but rather on G. S. § 19-1 *et seq.* Therefore, plaintiff had only to prove that defendant was in fact maintaining a gambling establishment in order to obtain relief.

The trial court dismissed the action as an improper one in which to raise the question of the constitutionality of the Act, relying on *Amick v. Lancaster.*[29] That case held that a proceeding under G. S. § 19-1 *et seq.* could not be brought against an "alcoholic control board set up under color of legislative authority. . . ."[30]

The 1949 Currituck Act was held unconstitutional[31] after this action was instituted, but before it reached the Court; therefore, there was no necessity to decide whether the question of its constitutionality could be raised in this type of proceeding. The Court did say, however, that "Whether the rationale of the [*Amick*] decision would apply equally to a private person, firm, association, or corporation is open to serious question."[32] Subsequently, the Court has decided specifically that the operations of private persons, etc., acting "under color of legislative authority," can be enjoined in this type of proceeding.[33]

CONTRACTS

CONTRACTS UNDER SEAL

A recent case could possibly lead to confusion in this area of the law. In *Mills v. Bonin*[1] the lower court directed a verdict for the

purpose of gambling. Although the undisputed proof was that defendant was maintaining a gambling establishment, it operated under authority of N. C. SESS. LAWS 1949, c. 541 (the 1949 Currituck Act). Whether its acts were lawful, therefore, depended upon the validity of that statute.

[27] N. C. GEN. STAT. § 19-1 (1953): "Whoever shall . . . maintain . . .[a] place used for the purpose of . . . gambling . . . is guilty of nuisance . . . and shall be enjoined...as hereinafter provided." N. C. GEN. STAT. § 19-2 (1953): "Whenever a nuisance . . . exists as defined in this chapter, . . . any citizen of the county may maintain civil action in the name of the State of North Carolina upon the relation of such . . . citizen, to perpetually enjoin said nuisance...."

[28] 28 AM. JUR., *Injunctions* § 182 (1940).

[29] 228 N. C. 157, 44 S. E. 2d 733 (1947).

[30] *Id.* at 158, 44 S. E. 2d at 734.

[31] State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954).

[32] State *ex rel.* Summerell v. Carolina-Virginia Racing Ass'n, Inc., 239 N. C. 591, 595, 80 S. E. 2d 638, 641 (1954).

[33] State *ex rel.* Taylor v. Carolina Racing Ass'n, Inc., 241 N. C. 80, 86 (1954). This case was decided at the Fall Term, 1954, and is not within the scope of this *Survey.*

[1] 239 N. C. 498, 80 S. E. 2d 365 (1954).

plaintiff in an action on promissory notes under seal where the defense was failure of consideration. The Court, in concluding that the defense should have been submitted to the jury, stated the oft-quoted and possibly confusing rule that a seal "purports a consideration, but such presumption is rebuttable."

At common law a sealed promise was binding without consideration, and proof that no consideration was given was not a defense.[2] Except for certain statutory situations this is the rule in North Carolina. Failure, as distinguished from lack, of consideration has always been a good defense to all instruments under seal.[3] As to negotiable instruments, the common law rule was changed by statute so that lack of consideration may be a defense to a negotiable instrument under seal.[4] Therefore, the rule as stated by the Court is correctly applicable to negotiable instruments under seal; and where the defense is failure of consideration, it is applicable to simple contracts under seal. The difficulty arises when we attempt to apply the rule to simple contracts under seal where the defense is lack of consideration. In stating the rule, the Court makes no distinction between the two defenses. If it is intended to be applicable to all instruments under seal, no matter what the defense, then there would seem to exist genuine confusion; for if taken literally, with no limitation, it would seem to be in direct contradiction to the established rule that lack of consideration is not a defense to an instrument under seal except by statute.

This case and rule are fully discussed in a prior note in this *Law Review*.[5]

BREACH OF CONTRACT

In *Crowell v. Eastern Air Lines*[6] the plaintiff had been injured through the negligence of the Airlines after buying a flight ticket, the ticket folder bearing this notation: "The time limits for giving notice of claim and the institution of suits are set forth in Carrier's tariffs." The Court held that plaintiff was not bound by this reference as there was no reasonable notice of the limitation, and the fact that it was a provision in a tariff filed with the Civil Aeronautics Board did not constitute constructive notice to plaintiff. The Court took the position that the Civil Aeronautics Act does not require or authorize such a time limitation in the filed tariff, citing conflicting authorities as to this.

The Court also held that the fact that the city agreed in the lease

[2] CORBIN, CONTRACTS, § 252 (1952).
[3] *Ibid.*
[4] N. C. GEN. STAT. § 25-29 (1953).
[5] Note, 32 N. C. L. REV. 556 (1954).
[6] 240 N. C. 20, 81 S. E. 2d 178 (1954).

to the Airlines to keep the airport property in good repair did not constitute an agreement on the part of the city to indemnify the Airlines from liability for the Airline's negligence.[7]

Unusual facts set the case of *Thompson v. Foster*[8] apart from the ordinary brokerage contract cases. The contract provided for a net price of $50,000 to be paid the defendant owner for certain property, with the plaintiff broker receiving whatever excess, if any, he was able to obtain. The broker, having negotiated with the buyer, was informed by the owner that the owner, had received an offer of $55,000. This offer had been by the same person with whom the broker was dealing. The owner sold for $50,000 rather than the higher price offered. The Court held that the allegations in the complaint were sufficient to state a cause of action on the theory that the plaintiff was the procuring cause of the sale in the sense that he first called the purchaser's attention to the property and started the negotiations which culminated in the sale, and that he was prevented by fault of the defendant from making sale at a sum in excess of the stipulated net price; therefore, the defendant's demurrer was improperly sustained.

CONSTRUCTION OF CONTRACTS

In the interest of strengthening the rule that restrictive covenants in a deed shall be strictly construed against limitation on the use of land, the Court in *Stephens Co. v. Lisk*[9] went far in clarifying North Carolina's position on the effect of punctuation in construing contracts. The deed in question contained a covenant binding the grantee to share the cost of street improvements "in the event the party of the first part, or its successors or assigns, owner or owners of a major portion of the lots in said Block 80" should decide to improve the abutting streets. After plaintiff grantor had sold more than half the lots in the block, he paved streets abutting the defendant's property and brought this action to recover a pro rata part of the costs. The defendant contended that the covenant authorized plaintiff to make improvements only with the consent of owners of a majority of the lots in the block.

The Court affirmed a recovery, saying that the intent of the parties, clarified by the punctuation, was that the plaintiff was authorized to make improvements without the consent of a majority of the owners;

[7] *Id.* at 33, 81 S. E. 2d at 188. "An exculpatory clause 'will never be so construed as to exempt the indemnitee from liability for his own negligence or the negligence of his employees in the absence of explicit language clearly indicating that such was the intent of the parties.'" See MUNICIPAL CORPORATIONS, p. 205 *infra*, and TORTS, p. 213 *infra*.

[8] 240 N. C. 315, 82 S. E. 2d 109 (1954).

[9] 240 N. C. 289, 82 S. E. 2d 99 (1954).

that the consent of a majority was required only in the event the grantor's successors or assigns undertook to make the improvements.[10] The Court made it very clear that while punctuation would be ineffective as against the plain meaning of the language used, still the rules of punctuation might be used to assist in determining the intent of the parties.[11] Thus the case puts North Carolina clearly in accord with the prevailing view of the text authorities[12] and the American Law Institute.[13]

MENTAL INCAPACITY.

The Court, in *Lawson v. Bennett*,[14] throws a searching light upon the effects of mental incompetency of a party to a contract.

Plaintiff brought suit for absolute divorce on the ground of two years' separation, and defendant crossclaimed for alimony pendente lite. Upon plaintiff's setting up a deed of separation as a bar to the crossclaim, defendant pleaded that at the time of the execution of the deed of separation she was mentally incompetent to understand the consequences of her act.[15]

The Court, after pointing out that a contract entered into by a person who is mentally incompetent is not void, but voidable at the election of the incompetent, further emphasized that such contract will not be avoided in all cases, repeating five requisites laid down in an earlier case[16] that must be shown for such contracts to be enforceable. In the language of the Court, where the defendant, the competent party, claims under the contract, " 'the contract will be annulled unless it be made to appear—the burden being on the defendant—that the defendant (1) was ignorant of the mental incapacity; (2) had no notice thereof such as would put a reasonably prudent person upon inquiry; (3) paid a fair and full consideration: (4) took no unfair advantage of plaintiff; and (5) that the plaintiff has not restored and is not able to restore the consideration or to make adequate compensation therefor.' "[17]

[10] *Id.* at 295, 82 S. E. 2d at 103. "Grammarians say ordinarily put a comma before clauses introduced by such conjunctions as 'and,' 'but,' 'or,' 'nor,' if a change of subject takes place. But that such connectives between words or phrases used in conjunction do not require a comma. Therefore, the comma after the words 'the party of the first part' and before the next word 'or' correctly separates 'the party of the first part' as one class, from the class which follows."

[11] For further treatment of the case, see REAL PROPERTY, p. 209 *infra*.

[12] CORBIN, CONTRACTS, § 552 (1952); WILLISTON, CONTRACTS, § 619 (Rev. ed. 1938).

[13] RESTATEMENT, CONTRACTS, § 236 (b) (1932).

[14] 240 N. C. 52, 81 S. E. 2d 162 (1954).

[15] See DOMESTIC RELATIONS, p. 196 *infra*.

[16] Carawan v. Clark, 219 N. C. 214, 216, 135 S. E. 2d 237, 238 (1941).

[17] Lawson v. Bennett, 240 N. C. 52, 59, 81 S. E. 2d 162, 168 (1954).

CORPORATIONS

North Carolina follows the general rule[1] that in minority stockholder suits, a demand that the corporation itself bring an action is not necessary if it appears that such demand would be fruitless. The Court recognized the foregoing rule in *Hill v. Erwin Mills*,[2] which was on appeal on the pleadings after a demurrer had been sustained below. It would seem that, even though a minority stockholder is not required to demand that the corporation take action, he would be wise to do so to obviate any possible doubt as to the existence of a cause of action and to preclude the chance of an appeal merely on the pleadings. If the plaintiff here had gone through the formalities of making a demand, ineffectual as it may have been, it is entirely possible that the principal case would have been tried on its merits in the first instance.

Though the case was on appeal on demurrer, the Court, "for the purpose of showing the right to maintain an action of this character" and following well established precedents, set out as the applicable North Carolina law that when a transaction between a corporation and those dominating its policies is challenged, the burden of proof is upon the latter to show inherent fairness of the proposed action.[3] It also stated that such contracts are not illegal *per se* but require careful scrutiny to see if they are "arm's length transactions."[4]

In *Seaboard Air Line Railroad Co. v. Atlantic Coast Line Railroad Co.* a rather singular fact situation was presented[5] in which the Court held that where stock ownership is resorted to by operating companies for the purpose of controlling a subsidiary so that it can be used as a mere agency, the Court will, as between the operating companies, view the transaction as if the subsidiary were not a corporate entity.

COURTS

The recurring problem of the relationship between the inferior courts of the state and the superior court was presented in two cases.

Section 12 of Article I of the Constitution of North Carolina requires that an accused shall not be put to answer any criminal charge "but by indictment. . . ." This is qualified by Section 13 of the same Article, which gives the Legislature power to provide other means

[1] Mayflower Hotel Stockholder's Protective Committee v. Mayflower Hotel Corp., 193 F. 2d 666 (D. C. Cir. 1951).
[2] 239 N. C. 437, 80 S. E. 2d 358 (1954).
[3] *Supra* note 2.
[4] See Pepper v. Litton, 308 U. S. 295 (1939).
[5] 240 N. C. 495, 82 S. E. 2d 771 (1954). Here the two railroads formed a separate corporation to build bridges, etc., for their joint use. Each operating company owned 50% of the stock of the subsidiary. The Court held that they were "co-owners of a facility" and not stockholders in the ordinary sense.

of trial for petty misdemeanors,[1] with right of appeal. Acting under this section, the Legislature has conferred on inferior courts the power to try persons accused of a misdemeanor under a warrant, with right of appeal. This is interpreted to mean right of appeal after conviction for the offense charged.[2]

In *State v. Hall*,[3] defendant was convicted in a recorder's court for "possession of non-tax paid whiskey for purpose of sale" under a warrant charging that he "did . . . unlawfully and wilfully have in his possession a quantity of non-tax paid whiskey, and did have said whiskey for purpose of sale."[4] On appeal to the superior court, he was tried under the warrant and found not guilty of possession for sale but guilty of possession, an offense for which he had not been convicted in the inferior court. This necessitated arrest of the judgment by the Supreme Court.

Possession of non-tax paid liquor is a misdemeanor under G. S. § 18-48, and possession for sale a misdemeanor under G. S. § 18-50. Since the two are specific misdemeanors of equal dignity created by separate statutory provisions, an accused may not be convicted of one under a warrant charging the other. Nor could a defendant's conviction in the superior court for possession be upheld on the theory that the conviction in the inferior court for possession of non-tax paid liquor for the purpose of sale includes the lesser offense of possession. It is difficult, however, to imagine a situation in which one might be guilty of possession for sale and not be guilty of possession. The conclusion reached in this case would indicate the necessity for carefully drawn warrants charging the misdemeanors separately, under which the accused, if found guilty, could be convicted on both counts in the inferior courts. Thus the state, on appeal, would be protected should the jury choose the lesser offense.[5]

Another interesting jurisdictional question was raised in a rather unusual manner in the recent case of In re *Will of Woods*.[6] Although the clerk of the superior court unquestionably has exclusive jurisdiction over probate proceedings, he must, when the issue of *devisavit vel non* is raised, transfer the matter to the civil issue docket for trial in the superior court. This issue is normally raised by filing a caveat after a will has been probated in common form. In this case, a peti-

[1] N. C. GEN. STAT. §§ 7-190(3), 7-222 (1953).
[2] State v. Thomas, 236 N. C. 454, 73 S. E. 2d 283 (1952). See *Case Survey*, 32 N. C. L. REV. 379, 417 (1954).
[3] 240 N. C 109, 81 S. E. 2d 189 (1954).
[4] State v. Hall, 240 N. C. 109, 110, 81 S. E. 2d 189, 190 (1954).
[5] As to whether defendant could now be tried in the recorder's court on a charge of possession of non-tax paid whiskey without its constituting double jeopardy, *quaere*.
[6] 240 N. C. 134, 81 S. E. 2d 127 (1954).

tion was filed for probate in solemn form of a lost will, and the clerk issued proper citations to interested parties. Respondents filed an answer denying parts of the petition and later applied to the superior court to quash the petition and dismiss the proceedings on the ground that the court had no jurisdiction to hear the matters in controversy, because the exclusive jurisdiction was in the clerk. The superior court sustained the petition. The Supreme Court held that the superior court obtained and the clerk lost jurisdiction when respondents filed answer denying portions of the petition, thereby raising the issue of *devisavit vel non.*

CREDIT TRANSACTIONS

Suretyship

In one suretyship case it was held that a contractor's bond should be read in the light of the contract it was given to secure.[1] The bond specified that no suit could be maintained after twelve months from the date fixed in the contract for its completion, fixing this date as the time when both parties had fully performed, *i.e.,* at the time of the last payment instead of the time the principal-contractor claimed the work was completed.

In a suit for malicious attachment, the Court in *Brown v. Guaranty Estates Corp.*[2] said that the surety on the attachment bond was not liable in such a tort action. A distinction was drawn between the statutory right to sue on the bond in which the basis is merely failure to maintain the attachment,[3] where both attachment plaintiff and surety could be made defendants, and a common law tort suit, such as here, where only the attachment plaintiff would be liable to the attachment defendant.[4]

Deeds of Trust

The Court, in *Alexander v. Galloway,*[5] restated the old principle that a secured creditor does not have to present his claim to the debtor's administrator in order to preserve his rights to go against the security, but if he seeks payment out of the general assets of the estate, then, of course, he must file his claim with the administrator.

As contrasted with the above situation where the property subject to the lien was a part of the assets of the estate, two cases arose in which property subject to a deed of trust securing certain notes was

[1] Edgewood Knoll Apartments v. Braswell, 239 N. C. 560, 80 S. E. 2d 653 (1954).
[2] 239 N. C. 595, 80 S. E. 2d 645 (1954).
[3] N. C. GEN. STAT. § 1-440.10 (1953).
[4] See TORTS, p. 222 *infra.*
[5] 239 N. C. 554, 80 S. E. 2d 369 (1954).

not an asset of the deceased's estate. In both cases the land was held by a tenancy by the entirety (and therefore the wife became the sole owner upon the husband's death), the deceased husband's estate was insolvent, and the land was worth at least the amount of the debt. In *Underwood v. Ward*,[6] both spouses had signed the secured notes. The Court took the position that if the wife paid the notes, she would be entitled to a general claim against the estate for contribution for the one half of the debt that the husband owed at death.

But in *Montsinger v. White*[7] it was held that a wife, upon paying a secured note on which only her husband was liable, was not entitled to any claim against the husband's estate. The Court, with three judges dissenting, based its opinion on a subrogation theory that the wife, upon paying the debt, was relegated to the rights of the creditor. Since the creditor in this situation must proceed against the security before filing claim against the estate, and since the security would have paid the full amount of the claim, the wife had no claim against the estate.

Thus, the rather odd result is reached whereby a wife who pays a note on which only her husband was liable is denied a claim, whereas a wife who pays a note on which both spouses were liable is allowed a general claim against her husband's estate for one half of the amount paid.

One possible distinction between the two cases is that in the *Underwood* case the plaintiff appealed after being denied a preferred claim under G. S. § 28-105. As the executor did not appeal on the question of whether it was a valid claim at all, the only issue before the Court was the applicability of G. S. § 28-105; but in holding this not to be a preferred claim, the Court seems to be positive that the wife upon paying has a general claim.

The cases could have been consistently decided by holding in both that before the husband's death the spouses owned an equity of redemption, that on the husband's death the entire equity of redemption became the property of the wife as surviving tenant by the entirety, but that she was not by virtue of her husband's death entitled to more than the equity of redemption, which was all the two owned before his death. Therefore, in paying off the deed of trust she does so as sole owner of the equity of redemption in order to protect that interest, and in so doing, does not acquire any rights against her husband's estate.

[6] 239 N. C. 513, 80 S. E. 2d 267 (1954).
[7] 240 N. C. 441, 82 S. E. 2d 362 (1954).

Crop Liens

Two suits arose in which waiver or estoppel was claimed as a defense against the holder of a lien on crops. In both cases it was held that, under the facts presented, the determination of whether there was such a valid defense was a matter for the jury, or for the trial judge when jury trial is waived.

In *Hall v. Odom,*[8] the defendants, tobacco warehousemen, sold tobacco raised by a tenant on the plaintiff's land and paid the proceeds to the tenant. The plaintiff, because rent was unpaid, asserted a landlord's lien on the tobacco and sought recovery from the defendants of the amount already paid to the tenants to the extent of the unpaid rent. The Court reiterated the principle that no written instrument or registration is necessary for such a lien to be valid[9] and held that the landlord's lien was good against the warehousemen unless there was a waiver or estoppel. Here the quota marketing card, which is in effect a permit issued by the federal government enabling one to sell his tobacco, was issued in the name of the tenant with the knowledge of the landlord. The Court, holding that the above facts did not constitute a waiver as a matter of law, reversed the lower court's judgment of involuntary nonsuit.[10]

In *Turnage Co. v. Morton,*[11] the plaintiff had registered agricultural liens and chattel mortgages on tobacco grown by the mortgagor tenant. The plaintiff had made no objection to the sale by the defendant warehouseman for the landlord and tenant and also knew that there had been a previous sale by the defendant for the landlord and tenant of a part of the tobacco. These facts were held insufficient in law to constitute any waiver or estoppel, and therefore, the plaintiff lienholder was allowed to collect from the defendant the amount that the defendant had paid the tenant. It seems that the Court in effect held that a lienholder with notice of an impending sale may wait, and if not paid, then proceed against the warehouseman on the lien.

CRIMINAL LAW AND PROCEDURE

As in former terms, much of the Court's work fell within the sphere of criminal law and procedure. While most of these decisions involved only general and settled rules, a few cases, particularly in the field of

[8] 240 N. C. 66, 81 S. E. 2d 129 (1954).

[9] N. C. GEN. STAT. § 42-15 (1950); Spence v. Pottery Co., 185 N. C. 218, 117 S. E. 32 (1923).

[10] The Court distinguished *Adams v. Growers' Warehouse,* 230 N. C. 704, 55 S. E. 2d 331 (1949), where the judgment of nonsuit was affirmed on a showing that the quota marketing card was issued in the name of the landlord who in turn gave the card to his tenant. The Court held that the landlord plaintiff was estopped to deny the tenant's agency.

[11] 240 N. C. 94, 81 S. E. 2d 135 (1954).

criminal procedure but also in the substantive area of criminal law, reached rather significant results.

CRIMINAL LAW

Self-Defense

In *State v. Cephus*,[1] an assault case, the decisive question involved the following charge to the jury: "The burden of proof as to the plea of self-defense is on the defendant to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy the jury that he was fighting in his own self-defense and used no more force than was reasonably necessary for his protection." This charge was held erroneous in that it shifted the burden of proof beyond a reasonable doubt, which the state should have carried throughout the trial, to the defendant to satisfy the jury that he acted in self-defense. Use of a deadly weapon by the defendant in an assault case does not alter this rule to raise a presumption of malice as it does in homicide cases.[2] As stated by the Court in an earlier case:

> "The rule in certain homicide cases that where the defendant admits, or it is proven, that he slew the deceased with a deadly weapon, there is a presumption of guilt of murder in the second degree and the burden is cast upon the defendant to show to the satisfaction of the jury matters in mitigation, excuse or justification, doubtless had its origin in the necessity arising out of the fact that the deceased's mouth is closed, but such necessity does not exist and such rule does not apply in assault cases."[3]

Insanity

State v. Grayson,[4] a murder case, held that when the lower court placed the burden of proof as to premeditation and deliberation on the state and later put the burden on the defendant to prove that he did not have sufficient mental capacity to premeditate and deliberate upon the nature and consequences of his act, reversible error was committed. When insanity is relied on as a defense in North Carolina, the defendant need only "satisfy" the jury.[5] As the burden is on the state

[1] 239 N. C. 521, 80 S. E. 2d 147 (1954).
[2] See *Case Survey*, 32 N. C. L. REV. 379, 427 (1954).
[3] State v. Carver, 213 N. C. 150, 152, 195 S. E. 2d 349, 350 (1938).
[4] 239 N. C. 453, 80 S. E. 2d 387 (1954).
[5] Wigmore points out that 22 states hold that the accused has the burden of proving insanity, at least by a preponderance of the evidence. 9 WIGMORE, EVIDENCE § 2501 (3d ed. 1940 and Supp. 1951). See Leland v. Oregon, 343 U. S. 790 (1951), which held that an Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt did not violate due process. The United States Supreme Court there noted that the burden was on the defendant only on the issue of insanity as an absolute bar, and that the burden remained on the state to prove beyond a reasonable doubt all the elements of first degree murder.

to prove beyond a reasonable doubt that the defendant killed the deceased with malice and premeditation and deliberation, it is difficult to grasp the tenuous balance that must be maintained while instructing the jury as to the burden on the defendant and the burden on the state regarding the effect of insanity.

When the defense is insanity, the test of responsibility, in the language of the Court, "is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation."[6] While under the "right and wrong" test this defendant may have had sufficient mental capacity to preclude insanity as a complete defense, many jurisdictions recognize that partial insanity, such as low mentality, may negative the specific intent necessary to the particular crime.[7] The Court here does not discuss partial insanity as preventing a finding of the requisite *mens rea* to convict of murder in the first degree, but such factors as low mentality of the defendant may be sufficient to cast "reasonable doubt" on the state's showing of the malice, premeditation, and deliberation necessary for such a conviction.

Manslaughter

In defendant's appeal from a conviction of manslaughter in *State v. Bournais*,[8] the gravamen asserted was error in the following portion of the judge's charge to the jury: "And the court charges you that the crime of involuntary manslaughter for which this defendant is being tried as defined at the comman law is . . . where one kills another without intent to kill in doing a lawful act in an unlawful manner." The Court conceded that it would have been more appropriate and required less explaining as to what was meant by "doing a lawful act in an unlawful manner" if the court below, in lieu of using the words "in an unlawful manner," had used the words "in a culpably negligent manner." However, as the distinction between culpable and non-culpable negligence was emphasized elsewhere, the charge was held free of prejudicial error.

Subornation of Perjury

State v. Sailor[9] involved a prosecution for subornation of perjury in which the evidence showed that the suborned person made conflicting statements under oath in separate trials, but did not show which of the statements was false. The Court held that the defendant could not be convicted, as it had not been shown that perjury had been com-

[6] State v. Grayson, 239 N. C. 453, 461, 80 S. E. 2d 387, 392 (1954).
[7] See Weihoffen and Overholse, *Mental Disorder Affecting the Degree of Crime*, 56 YALE L. J. 959 (1947). Also see, Fisher v. United States, 328 U. S. 463 (1946); and Durham v. United States, 214 F. 2d 862 (D. C. Cir. 1954).
[8] 240 N. C. 311, 82 S. E. 2d 115 (1954).
[9] 240 N. C. 113, 81 S. E. 2d 191 (1954).

mitted, quoting with approval a definition of subornation of perjury as laid down by the Georgia court:

> "The crime of subornation of perjury consists of two elements—the commission of perjury by the person suborned, and willfully procuring him or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element of the crime of subornation of perjury."[10]

Receiving Stolen Goods

Difficulties that confront the state in proving the offenses of larceny and receiving stolen goods are highlighted by *State v. Collins*.[11] Defendants were shown to have been in certain stores during a particular morning, to have stopped their automobile and deposited certain clothing items in a field that afternoon, and to have returned to that field later in the day, at which time they were arrested. The owners of the stores from which the clothing had ostensibly been taken could not, however, state definitely that the clothing recovered, although of the same brand carried by them, had been stolen from them. The jury acquitted the defendants of larceny of the clothing, but held one defendant guilty of receiving stolen goods. The Court reversed on the ground that an essential element of the latter offense is a showing that, at the time of receipt by the defendant, the goods had been previously stolen or taken in violation of statute.[12] Since defendants were acquitted of larceny, this showing had obviously not been made.

Some states have mitigated somewhat the tremendous problem of proof posed by this type of case by the passage of special statutes making it a misdemeanor for persons engaged in certain businesses to receive and conceal property bearing indicia of ownership of another person, without making reasonable inquiry as to the legal right of the person delivering the property.[13]

CRIMINAL PROCEDURE

Arrest Without a Warrant

Probably no decision in a criminal case in recent years has so aroused North Carolina as has *State v. Mobley*.[14] Varying interpretations of the decision have perplexed law enforcement officers and the citizenry, and rumblings of legislative changes in our "arrest with-

[10] Bell v. State, 5 Ga. App. 701, 63 S. E. 860 (1909).
[11] 240 N. C. 128, 81 S. E. 2d 270 (1954).
[12] N. C. GEN. STAT. § 14-71 (1953).
[13] See N. Y. PEN. C. § 1308.
[14] 240 N. C. 476, 83 S. E. 2d 100 (1954). For an extended discussion of the *Mobley* case, see Machen, *Arrest Without Warrant in Misdemeanor Cases*, 33 N. C. L. REV. 17 (1954).

out a warrant" statutes have been heard. Stripped of its dicta, the case held that mere drunkenness unaccompanied by language or conduct which creates, or is reasonably calculated to create, public excitement and disorder amounting to a breach of the peace, will not justify arrest without a warrant. Thus the defendant's conviction for resisting arrest and assault was reversed, since the arrest for public drunkenness without the necessary warrant was illegal.

Former Jeopardy

In considering a plea of former jeopardy, *State v. Crocker*[15] raises a serious question as to the scope of the power of the trial judge to declare a mistrial. During the first trial of the defendant for murder of her husband, several of the jurors became intoxicated in their hotel at night. Upon these findings the court withdrew a juror and ordered a mistrial. The judge made no finding that any juror was not physically able to continue his service when court reconvened. The Court, on appeal, held that the finding was insufficient to support the order for mistrial, and that the defendant's plea of former jeopardy upon the subsequent trial should have been sustained.

The rule in this state is that the necessity justifying an order of mistrial may be one of two kinds, "physical necessity" or "the necessity of doing justice."[16] "Physical necessity" has been said to be physical and absolute as where a juror by sudden attack of illness is wholly disqualified from proceeding with the trial, where the prisoner becomes insane during the trial, or a female defendant is taken in labor during the trial.[17] "Necessity of doing justice" is said to arise from the duty of the court to guard the administration of justice from fraudulent practices, as in the case of tampering with the jury or keeping back witnesses on the part of the prosecution.[18]

In this case, the trial judge did not find any juror to be under any disability due to intoxicants or otherwise at the time court reconvened, but, in the exercise of his discretion, predicated his order on the "necessity of doing justice" and providing the defendant and the state with a fair and just trial. While the facts resulting in the finding of "necessity of doing justice" do not fall within the illustrations listed above, still one may question whether the nature of the jury's behavior was not such that justice could only be done by order of a mistrial.

[15] 239 N. C. 446, 80 S. E. 2d 243 (1954). For a discussion of the *Crocker* case, see Note, 32 N. C. L. REV. 526 (1954).

[16] State v. Crocker, 239 N. C. 446, 80 S. E. 2d 243 (1954); State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930); State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905); State v. Bell, 81 N. C. 591 (1879); State v. Wiseman, 68 N. C. 203 (1873).

[17] State v. Crocker, *supra* note 16; State v. Wiseman, *supra* note 16.

[18] *Ibid.*

Search and Seizure

Interest is aroused by the holding of *State v. Harrison*[19] that when officers, operating under a warrant authorizing only search of the defendant's premises and adjacent buildings, found liquor near the premises of the defendant but actually on the land of another and not within the curtilage of the dwelling of the other, a search warrant was not necessary for its seizure. As a result, the liquor so found was held to be admissible in evidence. Defendant contended that, under G. S. § 15-27,[20] seizure of this evidence was not authorized by the warrant and thus was not admissible. However, as the Court stated: "It seems to be generally held that the constitutional guaranties of freedom from unreasonable search and seizure, applicable to one's home, refer to his dwelling and other buildings within the curtilage but do not apply to open fields, orchards, or other lands not an immediate part of the dwelling site."[21] Therefore, a search warrant was not necessary. The fact that the whiskey was on the land of another did not preclude seizure without a warrant since it was not located within the curtilage of the other landowner.

There was also evidence in this case that other whiskey was found in defendant's home. This was held admissible over the objection that it belonged to two roomers. The Court pointed out that the objection that the whiskey belonged to others is a matter of defense and will not be considered on a motion for nonsuit. The Court did disapprove of the officers "peeping" through a window in defendant's home in an effort to obtain additional evidence before serving the search warrant, but held this assignment of error without sufficient merit to justify a new trial. The Court also stated that evidence as to what an officer armed with a search warrant saw or heard after entering upon the premises may not be excluded merely because the officer obtained such information before serving the warrant.

Indictments

Two cases reaching differing results illustrate proper and improper consolidation of indictments. G. S. § 15-152 authorizes the trial court, in its discretion, to order consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes which are of the same class and so connected in time or place that evidence at the trial on one of the indictments will be competent and ad-

[19] 239 N. C. 659, 80 S. E. 2d 481 (1954).

[20] "No facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action."

[21] 239 N. C. 659, 662, 80 S. E. 2d 481, 484 (1954). See MACHEN, THE LAW OF SEARCH AND SEIZURE 95 (Chapel Hill: Institute of Government, 1950).

missible at the trial on the others. In *State v. Dyer*,[22] the defendants were charged with separate offenses of the same class, receiving stolen goods, but the offenses were committed at different times and places. There was no showing that there had been or was a conspiracy between the defendants, or between them and other parties, but each had purchased goods independently from the same third party. The Court held that separate and distinct offenses were charged, complete in themselves, independent of each other, and not provable by the same evidence. Therefore, consolidation of the indictments was erroneous.

In *State v. Spencer*,[23] indictments against three defendants charged with the murder of the same person were held properly consolidated under G. S. § 15-152. The Court pointed out that the defendants were charged with participating in the same crime as principals and that the state relied on the same set of facts as against each defendant. All the requisites for consolidation being present, such consolidation was held proper to prevent more than one trial involving the same set of facts.

Another interesting aspect of the *Spencer* case involved the Court's discussion of segregation of witnesses, or "putting the witnesses under the rule." The Court stated that this procedure is not a matter of right but of discretion on the part of the trial judge, and that exercise of the discretion is not reviewable except in cases of abuse.

Confessions and the Privilege Against Self-Incrimination

North Carolina is in accord with the general rule that the extrajudicial confession of the accused in a criminal case is admissible against him only if it was, in fact, "voluntarily" made; and the question of admissibility in each instance is one of law for the trial court.[24] As a general rule, the confession is presumed voluntary with the burden on the accused to show the contrary,[25] but where one confession has been obtained under circumstances making it involuntary, any subsequent confession is presumed to proceed from the same vitiating influence. The burden is then on the state to establish the voluntary character of the second confession.[26]

In *State v. Hamer*,[27] the accused confessed to arresting officers and prison camp employees that he had raped the prosecutrix. In the trial

[22] 239 N. C. 713, 80 S. E. 2d 269 (1954).
[23] 239 N. C. 604, 80 S. E. 2d 670 (1954).
[24] See 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940).
[25] State v. Thompson, 227 N. C. 19, 40 S. E. 2d 620 (1946); State v. Biggs, 224 N. C. 23, 29 S. E. 2d 121 (1944); State v. Murray, 216 N. C. 681, 6 S. E. 2d 513 (1939).
[26] State v. Gibson, 216 N. C. 535, 5 S. E. 2d 717 (1939); State v. Godwin, 216 N. C. 49, 3 S. E. 2d 347 (1939); State v. Stevenson, 212 N. C. 648, 194 S. E. 81 (1937).
[27] 240 N. C. 85, 81 S. E. 2d 193 (1954).

hearing in the absence of jury to determine the admissibility of this confession, it became evident that it was wrung from the defendant by threats to deliver him to a mob, allegedly gathering near the scene, unless he confessed. This was held by the trial judge to be sufficient to make the confession involuntary and inadmissible.

However, a second confession had been made to an agent of the State Bureau of Investigation and the county sheriff between twelve and eighteen hours after the first. These officers had first warned the defendant that whatever he said might be used against him and that he did not have to speak unless he so desired. This second confession was admitted by the judge as voluntary. In affirming this action the Court pointed out that, at the hearing on the admissibility of the second confession, testimony of the accused indicated that he had confessed voluntarily. The Court did not discuss the psychological possibility that the coercive circumstances surrounding the first confession may have influenced the second despite its apparent voluntary nature. During the last twenty years, appeals from state courts in this type of case to the United States Supreme Court, on the ground that due process of law has not been accorded the accused, have frequently resulted in reversal.[28]

In *State v. Grayson*,[29] the defendant confessed to the superintendent of a state hospital for the insane and to three other witnesses at different times that he had killed and raped the deceased. The defendant contended that he had the mind of a child less than five years old, was "wide open" to suggestion, and, therefore, that his confession was involuntary and inadmissible. The defendant did not contend that any force or compulsion was used, or that any promises or inducements were made to him. The Court held the confession was properly admitted.

Defendant's main objection was to the testimony of a psychiatrist that, at the time the crime was committed, the defendant knew the difference between right and wrong. The contention was that the psychiatric examination upon which this testimony was based compelled the defendant to give self-incriminating evidence in violation of the North Carolina Constitution. The Court disposed of this by stating:

> "The constitutional privilege against self-incrimination in history and principle seems to relate to protecting the accused from the process of extracting from his own lips against his will an admission of guilt, and in the better reasoned cases it does not extend to the exclusion of his body or of his mental condition as

[28] See Note, 32 N. C. L. Rev. 98 (1953) for a detailed discussion of this problem with citation of cases.

[29] 239 N. C. 453, 80 S. E. 2d 387 (1954).

evidence when such evidence is relevant and material, even when such evidence is obtained by compulsion."[30]

While this may be the general North Carolina rule, it has been held by the United States Supreme Court that due process can be violated by forceful extraction of evidence from the defendant in such manner as to "shock the conscience" or be "offensive to our concepts of ordered liberty."[31] While it could hardly be said that requiring the defendant to submit to a psychiatric examination is offensive to our concepts of justice, the language of the Court in stating that any evidence obtained, even by compulsion, of his body or mental condition is admissible if relevant, is perhaps too broad and sweeping in the light of federal due process requirements.

DOMESTIC RELATIONS

CUSTODY OF CHILDREN

Awarding Custody of Children to Non-residents

Two significant decisions in the field of custody of children have done much to crystallize the law on this subject. *Griffith v. Griffith*[1] and *Wall v. Hardee*[2] involved the question of whether the trial court may grant custody of a child to a parent who intends to remove the child from the state. In the *Griffith* case the plaintiff mother was awarded custody of a three-year-old child in an earlier divorce action. The award specified that the father was to have visitation privileges, and that the mother was not to take the child outside the state. The plaintiff then remarried, her husband secured employment in New Jersey, and she made a motion in the cause that she be permitted to take the child outside the state. The trial judge denied the motion. The Court reversed, stating:

"The judgment below seems to have been entered by the trial judge under the belief that as a matter of law he could not permit the mother to remove the child from the state in the absence of an affirmative showing that the resident father is unfit for custody. While this view is supported by statements appearing in some of the earlier decisions of this Court, the settled law of this State places no such burden on a parent custodian who requests leave to remove the child from the jurisdiction of the

[30] *Id.* at 458, 80 S. E. 2d at 390 (1954).
[31] Rochin v. California, 342 U. S. 165 (1952). For an extended discussion of *Rochin* and the problem of use of illegally obtained evidence in state courts, see Note, 33 N. C. L. Rev. 100 (1954).

[1] 240 N. C. 271, 81 S. E. 2d 918 (1954).
[2] 240 N. C. 465, 82 S. E. 2d 370 (1954).

court. In such cases we apprehend the true rule to be that the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental, and moral faculties."[3]

In *Wall v. Hardee*[4] the mother of a six-year-old illegitimate son, having married and having established a suitable home in Maryland, brought a special proceeding under G. S. 50-13 to obtain custody of her son who had been left in North Carolina with petitioner's sister. The resident judge concluded that petitioner, being the mother, had the primary, natural, and legal right to custody, and that respondent sister failed to carry the burden of showing unsuitability of the petitioner. An award of permanent custody to the mother was remanded by the Supreme Court, because the trial judge found insufficient facts, having neglected to find that permanent removal from the state would be for the best interests and welfare of the child.

Prior to these decisions there were cases[5] which could have been interpreted to mean that an award of custody should not be made to a non-resident, in the absence of a finding that the resident parent or custodian was unfit to have custody. But the Court in the *Griffith* case pointed out that the essence of these decisions was not that non-residence *per se* is a disqualification for custody, but rather that the child's welfare and interests would be better served and promoted with custody awarded to the applicant who "perchance" was a resident of the state. There are also prior decisions[6] which appear to be in accord with the rule of the principal cases but before the *Griffith* and *Wall* opinions were handed down the question was somewhat clouded by the other variant decisions. Now all doubt as to whether the custody of the child may be granted to a non-resident is removed and North Carolina is brought more firmly in line with the overwhelming weight of authority in this country.[7]

Another interesting aspect of the *Griffith* decision is that the Court seemed to be making an implicit distinction between cases in which custody is awarded to a non-resident and cases in which a non-resident seeks to take the child out of the state for visitation purposes under an order of the court. The Court said that "in the absence of unusual

[3] Griffith v. Griffith, 240 N. C. 271, 275, 81 S. E. 2d 918, 921 (1954).
[4] 240 N. C. 465, 82 S. E. 2d 370 (1954).
[5] See Gafford v. Phelps, 235 N. C. 218, 69 S. E. 2d 313 (1952); *In re* De Ford, 226 N. C. 189, 37 S. E. 2d 516 (1946); Walker v. Walker, 224 N. C. 751, 32 S. E. 2d 318 (1944); *In re* Turner, 151 N. C. 474, 66 S. E. 431 (1909).
[6] Clegg v. Clegg, 187 N. C. 730, 122 S. E. 756 (1924); *In re* Means, 176 N. C. 307, 97 S. E. 39 (1918); Harris v. Harris, 115 N. C. 587, 20 S. E. 187 (1909).
[7] See Annotations, 154 A. L. R. 552 (1945) and 15 A. L. R. 2d 432 (1951).

circumstances the courts should not enter an order permitting a child to be removed from the state by one to whom unqualified custody has not been awarded. The reason for this rule rests on practical considerations of procedure."[8]

Father's Right to Custody of Children

In reaching its result in the *Griffith* case the Court had to deal with another prior decision which militated against the "best interests of the child" rule applied by the Court. In *Latham v. Ellis*,[9] the Court had stated that the father "has always been entitled to the custody of his children against the claims of every one except those to whom he may have committed their custody and tuition by deed; or unless he is found to be unfitted to keep their charge and custody by reason of his brutal treatment of them, or his reckless neglect of their welfare and interest, when their care will be committed to some proper person on application to the courts."[10] The Court held that this statement is to be treated as *obiter dicta* and disregarded as being at variance with the established rule[11] that "the welfare of the child is the paramount consideration to which all other factors, including common law preferential rights of the parents, must be deferred or subordinated."[12]

Mother's Right to Custody of Illegitimate

There arose in *Wall v. Hardee*[13] the question of the application of the rule as to custody of an illegitimate child where the mother seeks to regain custody. The Court stated: "It is well settled law in this jurisdiction that the mother of the bastard child is its natural guardian, and, as such, has a legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child."[14] Then the Court declared that this rule was not absolute and that there have been and may be cases where the best interests of the child require that its custody be taken from the mother and placed elsewhere. A 1949 case, In re *Cranford*,[15] indicated that the rule was absolute and that in the absence of a finding that the mother was an unfit person she had legal right to custody, even though another would be a more suitable custodian.[16]

[8] Griffith v. Griffith, 240 N. C. 271, 280, 81 S. E. 2d 918, 924 (1954). *In re* De Ford, 226 N. C. 189, 37 S. E. 2d 516 (1946) points out that when the child is taken out of the state, this state loses jurisdiction over the child and there is no way to enforce an out-of-state visitational order.

[9] 116 N. C. 30, 20 S. E. 1012 (1895).

[10] *Id.* at 33, 20 S. E. at 1013.

[11] See Annotations, 154 A. L. R. 552 (1945), and 15 A. L. R. 2d 432 (1951).

[12] Griffith v. Griffith, 240 N. C. 271, 278, 81 S. E. 2d 918, 923 (1954).

[13] 240 N. C. 465, 82 S. E. 2d 370 (1954).

[14] *Id.* at 466, 82 S. E. 2d at 371.

[15] 231 N. C. 91, 56 S. E. 2d 35 (1949).

[16] For a criticism of *In re* Cranford, See Note, 28 N. C. L. Rev 323 (1950).

Jurisdiction in Custody Cases

From a procedural standpoint, *Wall v. Hardee*[17] is important in recognizing once again (after the Court had failed to do so in a 1953 case, In re *Melton*[18] that the parent may in certain cases bring a special proceeding under G. S. § 50-13 in the superior court to have custody of a child determined. In the *Melton* case, which was discussed in a previous *Survey*,[19] the Court stated that the juvenile branch of the superior court had exclusive jurisdiction in all cases involving custody of infants under sixteen years of age except in cases between undivorced parents living in a state of separation (G. S. § 17-39); or where there is an action for divorce, in which complaint is filed, pending in this state (G. S. § 50-13); or where the parents have been divorced by decree of a court of a state other than North Carolina (G. S. § 50-13). The Court did not mention the other exception under G. S. § 50-13; that is where the controversy over custody is not otherwise provided for in G. S. § 50-13 or G. S. § 17-39. This omission raised a question as to whether a change in the law had been effected, with cases between a parent and a third party to be brought in the juvenile courts. The question thus raised in the *Melton* case is negatived by *Wall v. Hardee,* which was a special proceeding under G. S. § 50-13, but in which no problem of jurisdiction was presented. It becomes apparent that the Court's failure in *Melton* to list the special proceeding as an exception to the juvenile court's jurisdiction is such cases was a mere omission.

In re *McCormick*[20] was a case of first impression under G. S. § 17-39. The question, as stated by the Court, was: "Where there is a controversy between husband and wife, living in a state of separation, without being divorced, in respect to the custody of the children, are the provisions of G. S. § 17-39 available to the parent with whom the children reside?"[21] The Court held that the proceeding was not technically habeas corpus subject to all habeas corpus rules, but was only in the nature of habeas corpus by which custody as between husband and wife, living in a state of separation, might be determined, and that it was immaterial whether the respondent or petitioner had custody at the time.

DIVORCE AND ALIMONY

The only significant decision relating to divorce involved the application for the first time of the statute, G. S. § 50-5 (6), regulating decrees of absolute divorce where the parties have lived separate and

[17] 240 N. C. 465, 82 S. E. 2d 370 (1954).
[18] 237 N. C. 386, 74 S. E. 2d 926 (1953).
[19] *Case Survey,* 32 N. C. L. Rev. 379, 447-448 (1954).
[20] 240 N. C. 468, 82 S. E. 2d 406 (1954).
[21] *Id.* at 469, 82 S. E. 2d at 407.

apart by reason of the incurable insanity of one of them. The plaintiff in *Lawson v. Bennett*[22] filed for divorce on grounds of two years' separation under G. S. § 50-6, but on trial expert testimony indicated insanity of the defendant wife prior to and after the separation. It does not appear that insanity was invoked by defendant to defeat plaintiff's action under G. S. § 50-6. Rather, the defendant, by reason of her insanity, asserted the invalidity of the deed of separation which plaintiff had pleaded in bar of her cross action for alimony pendente lite. The Court held that where the spouse has suffered impairment of the mind to such an extent that she does not have sufficient mental capacity to understand the nature and consequences of her act, the other spouse may not maintain an action against her for divorce on grounds of two years' separation under G. S. § 50-6, but must proceed, if at all, under G. S. § 50-5 (6).

In one other decision[23] involving divorce and alimony, the Court declared that in fixing alimony pendente lite, the plaintiff may be awarded possession of the home owned by the plaintiff and defendant as tenants by the entirety. The decision was in accord with a previous case[24] involving alimony without divorce.

GUARDIANSHIP

In the field of guardianship only one case[25] of significance arose, and it restated two propositions of established North Carolina law. First, under G. S. § 35-2 the clerk of the superior court may appoint either a guardian or a trustee to manage the estate of a person who is found by an inquisition of lunacy to be incompetent to manage his own affairs. A trustee so appointed is subject to the laws enacted for the control and handling of estates by guardians. Second, although a guardian or trustee is personally liable for torts committed in the management of the estate of his ward, as a general rule the estate of the ward is not liable for torts committed by the guardian or trustee in the handling of the estate.

EQUITY

Two cases involving injunctive enforcement of restrictive covenants in deeds are of interest. Both involved the resubdivision of lots which were subject to building restrictions. In one case, *Callaham v. Arenson*,[1] the Court held, as a matter of construction of the deed, that the

[22] 240 N. C. 52, 81 S. E. 2d 162 (1954).
[23] Sellars v. Sellars, 240 N. C. 475, 82 S. E. 2d 330 (1954).
[24] Wright v. Wright, 216 N. C. 693, 6 S. E. 2d 555 (1940).
[25] Brown v. Guaranty Estates Corporation, 239 N. C. 595, 80 S. E. 2d 465 (1954). For a further discussion of this case, See TRUSTS, p. 226 *infra*.

[1] 239 N. C. 619, 80 S. E. 2d 619 (1954). See REAL PROPERTY, p. 208 *infra*.

resubdivision did not violate the restrictive covenants but was in conformity with them. In the other, *Ingle v. Stubbins*,[2] it was held that the resubdivision did violate the restrictive covenants. In this case, the restrictive covenants running with the land specified the minimum size of each lot as to total area and width, restricted the use of each lot to a single-family dwelling, and specified a minimum set back line of fifty feet on the front and ten feet on the side. Two lots facing a street at an intersection were resubdivided to form three lots facing the other street. Defendant began erection of a house on one of these resubdivided lots, and plaintiff sought to enjoin the erection because it was within fifty feet of the street on which the lot originally faced. A temporary injunction was issued with which defendant complied. At time for hearing, plaintiffs asked for a further injunction but were unable to post bond, and the trial court denied the injunction, but without prejudice to either party. Defendant continued the erection and completed the residence and began erection of another residence on the adjoining lot, which he discontinued upon issuance of a warrant for violation of the city building code.

The Court held that the minimum set back lines established in the restrictive covenants meant the front and side of the lots as each existed at the time the covenant was made, and defendant's erection of a dwelling less than fifty feet from the street on which the lot originally faced was an enjoinable violation.[3] He could not treat the side line of the lot as a front line in order to avoid the restriction. The Court balanced the hardships and granted a mandatory injunction to compel defendant to remove the dwelling to conform to the restrictions.[4] In an earlier case, *East Side Builders v. Brown*,[5] not referred to in *Ingle v. Stubbins*, the Court had in effect granted a mandatory injunction compelling defendant to convert a two-family dwelling to a one-family dwelling so as to comply with a restriction.

In reversing the lower court's overruling of a demurrer to a complaint asking for injunction against the maintenance of a pond on defendant's land and the abatement of the pond as an attractive nuisance, the Court again stated the position of the North Carolina Court that "ponds, pools, lakes, streams, reservoirs, and other bodies of water, do

[2] 240 N. C. 382, 82 S. E. 2d 388 (1954).

[3] The Court has repeatedly held that restrictive covenants, in proper cases, are enforceable by injunction. See Craven County v. Trust Co., 237 N. C. 502, 75 S. E. 2d 620 (1953); Maples v. Horton, 239 N. C. 394, 80 S. E. 2d 38 (1953); Raleigh v. Edwards, 235 N. C. 671, 71 S. E. 2d 396 (1952); Starkey v. Gardner, 194 N. C. 74, 138 S. E. 408 (1927); Davis v. Robinson, 189 N. C. 589, 127 S. E. 697 (1925); Johnston v. Garrett, 190 N. C. 385, 130 S. E. 835 (1925); Guilford v. Porter, 167 N. C. 366, 83 S. E. 564 (1914).

[4] See Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521 (1954).

[5] 234 N. C. 517, 67 S. E. 2d 489 (1951).

not *per se* constitute attractive nuisances."[6] Therefore, whether the body of water be artificial or natural, the complaint, to withstand demurrer, must contain sufficient allegations of some unusual condition or artificial feature other than the mere presence of the pond in a neighborhood where there are children who might be attracted to it. This is by no means a departure from previous decisions of the Court,[7] but it seems to be an indication of the tendency of North Carolina, along with other jurisdictions, to limit rather than extend the application of the doctrine of attractive nuisance.[8]

EVIDENCE

Judicial Notice

Perhaps the most important evidence case to appear before the Court during this coverage—and the most tragic fact situation[1]—concerned the addition of yet another item to the growing list of topics to which judicial notice is appropriate. Four children who were playing with cap pistols around a gasoline truck died as a result of the explosion of the truck. The Court had previously taken judicial notice as to the inflammability of gasoline fumes,[2] but here also recognized that it "is common knowledge that the firing of a cap pistol, or the explosion of a cap by such pistol, emits a spark, and that a spark will ignite gasoline or gasoline fumes or vapors."[3]

The following statement of the Court should be examined:

> "Judicial notice is not limited by the actual knowledge of any individual judge or court. Judges may inform themselves, or refresh their memories, from standard works of reference, though

[6] Stribbling v. Lamm, 239 N. C. 529, 80 S. E. 2d 270 (1954). Plaintiffs alleged that defendants had built a high dam on their property causing the water of the stream north of the dam to back up and form a pond several hundred yards long and several hundred feet wide and more than ten feet deep in places; that the pond was located in a thickly populated residential section and that the defendants had failed to erect a fence or other protective device around the pond to prevent children and others from going there for amusement; that there was a likelihood that children and others would be and had been attracted to the pond by its attractive nature; that the condition was uncommon and artificially produced and amounted to an invitation to children; that a small child had been drowned in the pond.

[7] Fitch v. Selwyn Village, 234 N. C. 632, 68 S. E. 2d 255 (1951); Nichols v. Atlantic Coast Line Railroad Co., 228 N. C. 222, 44 S. E. 2d 879 (1947); Hedgepath v. Durham, 223 N. C. 822, 28 S. E. 2d 503 (1944); Boyd v. Atlantic & Charlotte Airline Railway Co., *et al.*, 207 N. C. 390, 177 S. E. 1 (1934); Gurley v. Power Co., 172 N. C. 690, 90 S. E. 943 (1916).

[8] Note, 26 N. C. L. REV. 227 (1948); Wilson, *Limitations on the Attractive Nuisance Doctrine*, 1 N. C. L. REV. 162 (1922).

[1] Hopkins v. Comer, 240 N. C. 143, 81 S. E. 2d 368 (1954). See TORTS, p. 217 *infra*.

[2] See Jennings v. Standard Oil Co. of New Jersey, 206 N. C. 261, 173 S. E. 502 (1934).

[3] Hopkins v. Comer, 240 N. C. 143, 149, 81 S. E. 2d 368, 373 (1954).

it is settled law that the mere appearance of facts therein does not entitle them to judicial notice, unless they are such as to be part of common knowledge."[4]

One can understand the necessity of judicial resort to works of reference for information regarding certain items of historical or geographical nature, which might be unknown to the judge, but which might be common knowledge within the communities intimately connected with the history or affected by the geography in question, but there might be some doubt about the wide dispersal of knowledge as to scientific facts if it should be necessary for a judge to consult an encyclopedia to inform himself.

Qualification of Experts

In the same case, there is laid down the rule that a physician, who has completed two years of college chemistry as part of his pre-medical education, does not qualify as an expert in respect to the cause of the explosion. The Court quotes with approval the statement in *Patrick v. Treadwell*[5] to the effect that "the proper test is whether additional light can be thrown on the question under investigation by a person of superior learning, knowledge or skill *in the particular subject,* one whose opinion as to the inferences to be drawn from the facts observed or assumed is deemed of assistance to the jury under the circumstances."[6]

Scope of Competence of Defendant's Evidence of Good Character

It is important to note that in North Carolina when a defendant in a criminal action testifies in his own behalf and offers evidence of his good character, such testimony may be considered both as substantive evidence on the subject of guilt or innocence and also as affecting his credibility. Failure of the trial court to instruct the jury as to the full scope of the competence of such evidence requires a new trial.[7]

Admissibility of Evidence of Other Crimes

In *State v. McClain*[8] defendant was charged with prostitution and the trial court admitted evidence showing that defendant was guilty of larceny. In reversing the conviction by reason of the admission of this evidence, the Court took pains to outline, with helpful clarity, the law as to the admissibility of evidence, in a trial on one charge,

[4] *Id.* at 150, 81 S. E. 2d at 373.
[5] 222 N. C. 1, 21 S. E. 2d 819 (1942).
[6] *Id.* at 5, 21 S. E. 2d at 821. *Cf.,* Pridgen v. Gibson, 194 N. C. 289, 139 S. E. 443 (1927), where it was said that a general medical practitioner could qualify as an expert witness in respect to the propriety of an operation on the eye.
[7] State v. Wortham, 240 N. C. 132, 81 S. E. 2d 254 (1954).
[8] 240 N. C. 171, 81 S. E. 2d 364 (1954).

of the commission by the accused of another offense. The basic rule is that such evidence is inadmissible. Then the Court sets out the exceptions to the rule, to wit: (1) if two or more offenses are part of the same transaction, or of a common plan, or so connected that one cannot be proved without proof of the other; (2) if evidence necessary to establish intent, motive, disposition or guilty knowledge also discloses the commission of a second offense; (3) if the accused is not identified as the perpetrator of the crime charged, and there is evidence that the crime charged and a second offense were committed by the same person; and (4) if the prosecution is for continuing offenses and evidence of acts other than those charged corroborates or explains the evidence of acts charged. In all these instances the evidence of the other crime or crimes is admissible.

The Court points out that evidence of another offense is almost certain to be prejudicial, and that it should be admitted on the basis of one or another of the exceptions only after the most careful analysis and rigid scrutiny.

FUTURE INTERESTS

RESTRAINT ON ALIENATION

Testator devised a large farm-land estate to his three children share and share alike with a provision that his widow take a dower right therein. By a further provision in his will, the testator expressly directed that the lands be operated jointly by his wife and children, for mutual profit, as executors and devisees, for a period of ten years after the testator's death. Before the lapse of the ten-year period, one of the children brought a special proceeding for the actual partition of the land, asking that the widow's dower interest be set aside and the lands partitioned among the children as tenants in common. The defendants contended that the lands could not be partitioned because of the testamentary restriction. The trial court decreed a partition.

The Court reversed, indicating that the general rule was applicable in this case: that testamentary provisions which prohibit or postpone partition for a reasonable time or until the happening of a designated event are upheld as not involving a restraint on alienation or limitation repugnant to a fee, the courts giving effect to the testator's expressed intention.[1] Thus a partition suit will not lie before the date so fixed or the event named.[2] The testator having financed the lands

[1] Anderson v. Edwards, 239 N. C. 510, 80 S. E. 2d 260 (1954).

[2] Provisions postponing partition during the minority of the devisees are not restraints on alienation or limitations repugnant to a fee and are therefore valid. Greene v. Stadiem, 198 N. C. 445, 152 S. E. 398 (1930); Blake v. Blake, 118 N. C. 575, 24 S. E. 424 (1896).

on an amortization plan, the Court noted that the testator's evident intention was the preservation of the estate to assist in the reduction of the indebtedness.

RULE IN SHELLEY'S CASE

Once again, in the case of *Taylor v. Honeycutt*,[3] the Court was called upon to construe language employed in a devise to determine whether the testator had used the word "heirs" in its technical sense so as to warrant an application of the Rule in Shelley's case. The testator devised real property to his wife and unmarried daughter, the plaintiff, for life with the further provision that if the daughter "has no heirs" the land should go to the testator's son for life, and upon his death to his heirs. The wife of the testator having died, the daughter claimed a fee simple estate by virtue of the operation of the Rule in Shelley's case, contending that the word "heirs" was used by the testator in its technical sense, importing a class of persons to take indefinitely in succession, from generation to generation.

The Court held that this case was governed by a line of North Carolina decisions headed by *Hampton v. Griggs*.[4] The peculiar rule employed therein is that where there is an ulterior limitation over on the death of the first taker without heir or heirs and the ultimate taker is a potential heir general of the first, the term "dying without heir or heirs" on the part of the first taker will be construed to mean, not heirs general, but issue in the sense of children or grandchildren. The Court said that in this limitation the testator plainly referred to the children or issue of the plaintiff, thereby preventing the operation of the Rule in Shelley's case, with result that the plaintiff only acquired a life estate under the will.[5]

INSURANCE

MOTOR VEHICLE SAFETY AND FINANCIAL RESPONSIBILITY ACT[1]

A recent case serves to illustrate an attempt to have read into the Motor Vehicle Safety and Responsibility Act an interpretation not found justified by the Court. In *Graham v. Iowa National Mutual*

[3] 240 N. C. 105, 81 S. E. 2d 203 (1954).

[4] 184 N. C. 13, 113 S. E. 50 (1922) (this is probably the leading North Carolina case dealing with the problem). See also Tynch v. Briggs, 230 N. C. 603, 54 S. E. 2d 918 (1949); Williamson v. Cox, 218 N. C. 177, 10 S. E. 2d 662 (1940); Pugh v. Allen, 179 N. C. 307, 102 S. E. 394 (1920); Puckett v. Morgan, 158 N. C. 344, 74 S. E. 15 (1911); Bird v. Gilliam, 121 N. C. 326, 28 S. E. 489 (1897); Francks v. Whitaker, 116 N. C. 518, 21 S. E. 175 (1894); Rollins v. Keel, 115 N. C. 68, 20 S. E. 209 (1894).

[5] See Block, *The Rule in Shelley's Case in North Carolina*, 20 N. C. L. REV. 49 (1941) (where the Rule in Shelley's Case is fully discussed).

[1] N. C. GEN. STAT. § 20-224 through § 20-279 (1953), *as revised by* N. C. GEN. STAT. § 20-279.1 through § 20-279.39 (Supp. 1953).

Insurance Company[2] in accordance with the insured's application, defendant issued a policy upon an assigned risk under the 1947 Act.[3] The policy covered only one of two motor vehicles owned by insured. The statute provides that no vehicle may continue to be registered in the name of a person required to file proof of financial responsibility unless it is covered by a liability policy,[4] but in this case, apparently through inadvertence, the motor vehicle not covered by the policy remained registered contrary to the statutory provision.

Negligent operation of the uninsured vehicle resulted in a judgment for damages in favor of the plaintiff against the insured. Plaintiff argued that the policy should be read as covering both vehicles on the theory that under the statute the carrier issuing a policy on an assigned risk must include within its coverage all cars registered in the name of the insured The Court rejected this argument, finding nothing in the Act requiring the insurer "to ferret out and include within the coverage of the policy all motor vehicles owned by the insured and registered in his name, irrespective of the omission of some of them from the insured's application for the insurance, and irrespective of the insured's ability or willingness to pay premiums upon all of them,"[5] and further pointed out that the statute declared by "inescapable implication" that a policy issued under the assigned risk plan should restrict its coverage to the vehicles designated in the insured's application to the assigning agency.[6]

The Court also observed that the carrier fulfills its obligation when it issues a policy meeting the statutory requirements as to amount and other items[7] and specifying the motor vehicle covered, and then issues a certificate to be filed with the Commissioner of Motor Vehicles describing the policy and designating all motor vehicles covered.[8] Failure of the Department of Motor Vehicle to cancel the registration of any car owned and registered in the name of the insured but not covered by the policy does not affect this conclusion.

Nothing in the 1953 revision of this Act seems to indicate that a different decision would result under the present statute.

MUNICIPAL CORPORATIONS

MUNICIPAL ELECTIONS

In applying the general rule that an election held without affirmative constitutional or statutory authority is a nullity, the Court ruled

[2] 240 N. C. 458, 82 S. E. 2d 301 (1954).
[3] N. C. GEN. STAT. § 20-224 through § 20-279 (1953).
[4] N. C. GEN. STAT. § 20-252 (b) (1953).
[5] Graham v. Iowa National Mutual Insurance Company, 240 N. C. 458, 461, 82 S. E. 2d 301, 303 (1954).
[6] N. C. GEN. STAT. § 20-276 (1953). [7] N. C. GEN. STAT. § 20-227 (1953).
[8] N. C. GEN. STAT. § 20-252 (a) (1953).

in *Tucker v. A. B. C. Board*[1] that statutory authority to hold a general election for city officials does not imply authority to hold a municipal primary. The issue in the case was whether the holding of such a primary invalidated a local option election to determine whether wine and beer could legally be sold within the county, since the latter election was held within sixty days of the primary.[2] The Court found that since the primary was held without specific authority, it was a nullity and could not invalidate the local option election. "In the absence of specific constitutional or legislative regulation on the subject," the Court declared, "the law commits the nomination of candidates of political parties for public offices to party caucuses, party conventions, or such other unofficial procedures as party rules may establish."[3] This being so, a primary is not a necessary incident of a general election and is not authorized by implication.

SPECIAL PRIVILEGES AND EMOLUMENTS

The Currituck County race track cases,[4] while more properly a subject for discussion in the realm of constitutional law, contained a number of points of interest to local governmental lawyers. The Court found that the establishment by statute of a county racing commission, subject to negligible county control, with power to grant a franchise to a private corporation to operate a dog racing track with a parimutuel gambling system, conferred special privileges and emoluments and constituted a grant of perpetuity and monopoly contrary to Article I, Section 7[5] and Article I, Section 31[6] of the North Carolina Constitution. The argument was raised that grants of monopolistic rights to regulated quasi-public utilities had been upheld as being "in consideration of public services" and that this exception had also been held to include municipal corporations. But the Court stated that the statute under consideration conferred special privileges not upon the county but rather upon a private corporation which was rendering no public services—regarding the racing commission as merely a conduit through which the General Assembly had unconstitutionally en-

[1] 240 N. C. 177, 81 S. E. 2d 399 (1954).

[2] N. C. GEN. STAT. § 18-124 (f) (1953) provides that no local option election on the question of the sale of wine and beer "shall be held . . . in any county within sixty days of the holding of any general election, special election or primary election in said county or municipality thereof."

[3] Tucker v. A. B. C. Board, 240 N. C. 177, 182, 81 S. E. 2d 399, 402 (1954).

[4] State v. Felton, 239 N. C. 575, 80 S. E. 2d 625 (1954); State v. Stewart, 239 N. C. 589; 80 S. E. 2d 636 (1954); State v. Truitt, 239 N. C. 590, 80 S. E. 2d 637 (1954); Summrell v. Racing Association, 239 N. C. 591, 80 S. E. 2d 638 (1954). See CONSTITUTIONAL LAW, p. 175 *supra*.

[5] "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

[6] "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed."

deavored to permit the grant of special privileges to the private racing association.

TORT LIABILITY

To the general doctrine of governmental immunity from liability for torts committed in the exercise of a governmental function, North Carolina has long had an exception: a municipality is liable for injuries proximately caused by its negligent construction or maintenance of a prison.[7] But the Court has rigidly held the line against extension of this exception. In *Hayes v. Billings*,[8] as in an 1887 case,[9] the Court refused to apply the rule to counties, as opposed to municipalities.

In *Crowell v. Eastern Air Lines*[10] the Court highlighted the important role which lease provisions may play in protecting the municipality against tort liability where it leases the operation of a proprietary function to a private corporation. In this case the lease of a municipal airport stipulated that the city would keep the facilities in good repair, but it expressly provided that the lessee air line would be an independent contractor responsible for all its acts or omissions and that it would indemnify and save harmless the city from all claims or losses that might result from negligence of the lessee or its agents and employees in the use of the premises. When a passenger was injured on a defective threshold in the terminal, the Court found that these provisions protected the city against a cross-claim for idemnification filed by the air line in her action for damages.

Johnson v. Winston-Salem[11] pointed out that a municipality does not become liable for damages to land resulting from the obstruction of a drain or culvert constructed by a third person until it legally accepts and assumes control or management of such a drain. This rule is not affected by the city's diverting water through private drains, so long as the capacity of such drains is not exceeded, nor does the city become liable through helping to clean up the damage caused by an obstruction of such a drain.

[7] The exception was first enunciated in *Lewis v. Raleigh*, 77 N. C. 229 (1877). For more recent cases, see Gentry v. Hot Springs, 227 N. C. 665, 44 S. E. 2d 85 (1947); Dixon v. Wake Forest, 224 N. C. 624, 31 S. E. 2d 853 (1944); Parks v. Princeton, 217 N. C. 361, 8 S. E. 2d 217 (1940); Hobbs v. Washington, 168 N. C. 293, 84 S. E. 391 (1915); Nichols v. Fountain, 165 N. C. 166, 80 S. E. 1059 (1914); Coley v. Statesville, 121 N. C. 301, 28 S. E. 482 (1897); Shields v. Durham, 116 N. C. 394, 21 S. E. 402 (1895); Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695 (1889).

[8] 240 N. C. 78, 81 S. E. 2d 150 (1954).

[9] Manual v. Commissioner, 98 N. C. 9 (1887).

[10] 240 N. C. 20, 81 S. E. 2d 178 (1954). See CONTRACTS, p. 178 *supra*, and TORTS, p. 213 *infra*.

[11] 239 N. C. 697, 81 S. E. 2d 153 (1954).

TAXATION AND FINANCE

Double Taxation

In *Wilson v. High Point,*[12] discussed in a previous *Case Survey,*[13] the Court's language raised a question as to whether arrangements between cities and counties for construction and operation of joint projects might be construed as double taxation of residents of the city contrary to Article V, Section 3[14] of the North Carolina Constitution. These doubts were settled in *Jamison v. Charlotte,*[15] where the issue was faced squarely by the Court. It found that an arrangement whereby a city and county were to issue bonds for construction of a city-county library with branch buildings did not effect double taxation upon the citizens of the city, even though they would have to pay a tax both to the city and to the county to support the same institution. The Court stated that "to constitute double taxation both taxes must be imposed on the same property, for the same purpose, by the same state, federal or taxing authority, within the same jurisdiction, or taxing district, during the same taxing period and there must be the same character of tax."[16] It then went on to declare that double taxation as such is not prohibited by either the North Carolina Constitution or the Federal Constitution and pointed out the difficulties of ever attaining absolute equality and uniformity in taxation.

Public Purpose

In addition, in the *Jamison* case discussed above the Court expressly held that the use of funds for the establishment and support of public libraries is a public purpose within the meaning of Article V, Section 3[17] of the North Carolina Constitution, although it is not a necessary expense under Article VII, Section 7.[18]

SCHOOL BUDGET PROCEDURE

A little-used procedure came into prominence in *Board of Education v. Commissioners of Onslow,*[19] in which the Court held that the

[12] 238 N. C. 14, 76 S. E. 2d 368 (1953).
[13] *Case Survey,* 32 N. C. L. REV. 379, 472-473 (1954).
[14] Article V, Section 3 in pertinent part provides: "The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended or contracted away. Taxes on property shall be uniform as to each class of property taxed."
[15] 239 N. C. 682, 80 S. E. 2d 904 (1954).
[16] Jamison v. Charlotte, 239 N. C. 682, 693, 80 S. E. 2d 904, 913 (1954).
[17] Article V, Section 3 in pertinent part provides: "Taxes shall be levied only for public purposes. . . ."
[18] "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose."
[19] 240 N. C. 118, 81 S. E. 2d 256 (1954).

arbitration procedures of G. S. § 115-160 were not repealed by the School Machinery Act[20] but are still available to compromise differences between county boards of education and boards of county commissioners in certain school budget disputes. As enumerated by the Court, the situations covered by G. S. § 115-160 include differences as to (1) the Debt Service Budget; (2) the Capital Outlay Budget; (3) the items of Maintenance of Plant and Fixed Charges in the Current Expense Budget, where there is a deficiency in the funds raised through fines, forfeitures, etc., or where such funds have been transferred through statutory procedures to other Current Expense items. The Court pointed out, however, that where resort is had to these procedures, the determination of the superior court judge is final, in the absence of arbitrariness or abuse of statutory duty.[21]

REAL PROPERTY

ADVERSE POSSESSION

Of the two cases[1] dealing with adverse possession, one merits detailed attention. In *Lindsay v. Carswell*[2] the plaintiff brought an action of trespass against the defendants to recover damages for the cutting and removing of timber from certain lappage which was covered in the respective deeds of the parties. Claiming the land by adverse possession, the defendants presented evidence that their predecessors in title had cut timber from time to time from the land, but failed to give evidence that the timber was cut from the lappage in dispute. Evidence that their predecessors in title sold timber from the land, including the lappage, on two separate occasions, was given by the defendants, but there was no evidence that any of the predecessors in title lived on the land within the lappage. Also, the defendants failed to establish an unbroken chain of title from the original grantee to themselves.

The Court held that the evidence was insufficient to give title to the defendants, or any predecessor in title, by adverse possession under color of title, repeating this well established and familiar rule:

> "Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in

[20] N. C. GEN. STAT. c. 115 (1952). Note that the 1953 General Assembly provided for a commission to study the school laws with a view to making recommendations for revisions to the 1955 General Assembly so as to eliminate inconsistencies and clarify the existing laws.

[21] For a very thorough discussion of the "Onslow County Situation," see Local Finance Bulletin, no. 3 (June 1954) published by the Institute of Government, Chapel Hill.

[1] Newkirk v. Porter, 240 N. C. 296, 82 S. E. 2d 74 (1954); Lindsay v. Carswell, 240 N. C. 45, 81 S. E. 2d 168 (1954).

[2] 240 N. C. 45, 81 S. E. 2d 168 (1954).

making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser."[3]

The Court pointed out that with respect to the title of a disputed area covered by a lappage in deeds, where, as here, neither claimant is in actual possession of any of the disputed area, the law adjudges the possession to be in the one who has the better title.[4] Since the plaintiff offered an unbroken recorded chain of title to the lappage and the defendants failed to establish title by mesne conveyances from the original grantee, the plaintiff had presumptive possession.

BOUNDARIES

The defendants in *Newkirk v. Porter*,[5] an action for trespass, admitted the plaintiffs' title to the land embodied within the description in the plaintiffs' deeds, and disputed only the location of the boundary line between the lands of the plaintiffs and the defendants. This being so, the Court held that the plaintiffs did not have to prove title, but were only required to show by ample testimony that the disputed area lay within the boundaries of their tract.

DEEDS

Two cases[6] emphasize the importance of the Court's application of the general rules employed in interpreting restrictive covenants, *e.g.*, the Court will apply a strict construction, and give the language its natural meaning. Both involved resubdivision of tracts of land subject to certain restrictive covenants, and the Court reached divergent results in interpreting covenants that were "almost parallel in purpose and phraseology."[7]

The facts in *Callaham v. Arenson*[8] illustrate the type of covenant involved in the cases. Defendants, owners of a subdivision, imposed restrictive covenants on the several lots in regard to minimum lot areas, front width, and set-back distances. Although the defendants may have so intended, the restrictions did not expressly prohibit a resubdivision. Plaintiffs purchased four of these lots. Since each of the four lots was considerably larger than the minimum requirements in the restrictive covenants, the plaintiffs worked out a plan to resub-

[3] Lindsay v. Carswell, 240 N. C. 45, 51, 81 S. E. 2d 168, 173 (1954).
[4] See Bostic v. Blanton, 232 N. C. 441, 61 S. E. 2d 443 (1950); Whiteheart v. Grubbs, 232 N. C. 236, 60 S. E. 2d 101 (1950); Penny v. Battle, 191 N. C. 220, 131 S. E. 627 (1926).
[5] 240 N. C. 296, 82 S. E. 2d 74 (1954).
[6] Ingle v. Stubbins, 240 N. C. 382, 82 S. E. 2d 388 (1954); Callaham v. Arenson, 239 N. C. 619, 80 S. E. 2d 619 (1954). See EQUITY, p. 197 *supra*.
[7] Ingle v. Stubbins, 240 N. C. 382, 388, 82 S. E. 2d 388, 394 (1954).
[8] 239 N. C. 619, 80 S. E. 2d 619 (1954).

divide the four lots into smaller units. This could be accomplished by constructing a street along the depth of two of the plaintiff's lots perpendicular to the only existing street and establishing two rows of lots to front on the new street. Each of the resubdivided lots would meet the minimum lot area, front width and set-back distances in the restrictive covenants. Plaintiffs brought an action for removal of cloud on title after the defendants-covenantees asserted a violation of the covenants. The Court held that since the minimum frontage and size restrictions were not violated there was no implied covenant as to the size of the lots or against further subdivision by mere sale of the lots by reference to a recorded map. The Court further stated that ordinarily the opening of a street for better enjoyment of residential property does not, as such, violate a covenant restricting the property to residential purposes.

But the Court in *Ingle v. Stubbins*[9] refused to allow the defendant-purchaser to erect a building located nearer than the prescribed minimum distance from the street upon which the lots originally faced, even though the two lots had been resubdivided so as to form three lots facing another street. The Court referred to the *Callaham* case, saying that the rules for interpretation of restrictive covenants there used were also applicable in the present case. The Court held that the resubdivision did not alter the covenants as to the original front and side lines and the builder could not treat the side line of the lot as a front line and avoid the restrictions, because the minimum set-back lines established meant the front and side as they existed at the time the covenants were entered into.

The further problem of whether a restrictive covenant is personal to the covenantee or runs with the land frequently arises in North Carolina. The covenant in *Julian v. Lawton*[10] provided that no building should be erected on the lot conveyed until the type and exterior lines of the structure had been approved by the covenantee or an architect selected by him. The Court construed the covenant as being personal to the covenantee, and therefore unenforceable by his executors and trustees or by other owners of lots in the development, since it was evidently designed to keep the development within his own aesthetic tastes.[10a]

But in another case, *Stephens Co. v. Lisk*,[11] the Court held that the covenant ran with the land. This was a covenant on the part of

[9] 240 N. C. 382, 82 S. E. 2d 388 (1954).
[10] 240 N. C. 436, 82 S. E. 2d 210 (1954). This case is the subject of a note in 33 N. C. L. REV. 131 (1954).
[10a] For other grounds for the decision, see AGENCY AND WORKMEN'S COMPENSATION, p. 163 *supra*.
[11] 240 N. C. 289, 82 S. E. 2d 99 (1954).

the grantee, his heirs and assigns, to pay a proportionate part of the cost of street improvements which the grantor or its successors or assigns might make along the street abutting the property; therefore the covenant was enforceable against a subsequent purchaser since the grantee by accepting the deed bound himself, his heirs and assigns to the covenant.[11a]

DEDICATION

The Court considered a question of dedication to aid in determining the rights granted under an easement in the case of *Hine v. Blumenthal*.[12]

By reference to a map, the owners of property upon which a private alley was maintained sold tracts of the property on one side of the alley by deeds granting the purchasers and their assigns "the privilege of using the . . . alley . . . leading to . . . [another alley running from street to street] forever; the grantors herein agreeing to perpetually maintain said . . . alley." One end of the alley terminated in a *cul-de-sac* and the other in an alley running from street to street. Defendants purchased one of the lots at the intersection of the alleys. Plaintiffs owned lots nearer the *cul-de-sac* end of the alley with the same easement as that granted the defendants. Plaintiffs brought an action[13] under the Declaratory Judgment Act[14] to determine whether a portion of the alley facing their property at the *cul-de-sac* end of the alley might be closed. Defendants maintained that they had an easement to keep the entire alley open.

The Court repeated the well-settled North Carolina rule that where lots are sold with reference to a map showing streets and alleys, the grantor thereby dedicates the streets and alleys to the use of those who purchase the lots, regardless of lack of acceptance by the municipality.[15] But if the streets and alleys are not opened for a period of fifteen years after dedication, as was the case here, they are conclusively presumed to have been abandoned by the public, provided the dedicator files a certificate withdrawing dedication in accordance with statutory requirements.[16] In such case, the streets and alleys as shown on the map can be disregarded, except those necessary to afford convenient ingress and egress from the tract of land sold by the

[11a] The punctuation involved entered into the decision. See CONTRACTS, p. 179 *supra*.

[12] 239 N. C. 537, 80 S. E. 2d 458 (1954).

[13] *Ibid.*

[14] N. C. GEN. STAT. § 1-253, *et seq.* (1952).

[15] Russell v. Coggin, 232 N. C. 674, 62 S. E. 2d 70 (1950); Evans v. Horne, 226 N. C. 581, 39 S. E. 2d 612 (1946); Home Real Estate Loan & Insurance Co. v. Carolina Beach, 216 N. C. 778, 7 S. E. 2d 13 (1939).

[16] N. C. GEN. STAT. § 136-96 (1952), *as amended by* N. C. SESS. LAWS, c. 1091 (1953). See also Irwin v. Charlotte, 193 N. C. 109, 136 S. E. 368 (1926).

dedicator of such alley or street.[17] The Court proceeded to interpret the easement as giving the defendants the right to have the alley kept open only from the rear of their lot to the alley running from street to street, stating that the easement carried with it only such rights as were reasonably necessary to the fair enjoyment of the easement conveyed. Their easement did not prevent the closing of the *cul-de-sac* end of the alley.

PROVING TITLE

In a proceeding to register a land title under the Torrens Law,[18] the same rules for proving title apply as in actions of ejectment and other actions involving the establishment of land titles.[19] The case of *Paper Co. v. Cedar Works*[20] was a proceeding under the Torrens Law, and the Court had occasion to reiterate several relevant rules for proving title to land: (1) the burden is on the plaintiff to prove a title good against the world, or a title good against the defendant by estoppel; (2) the plaintiff may safely rest his case upon showing such facts and evidences of title as would establish his right to the relief sought by him if no further testimony were offered; (3) the several methods of showing prima facie title to land are enumerated in the famous case of *Mobley v. Griffin*;[21] (4) one of the enumerated methods of proving a prima facie title to land is by tracing title back to the state, and the plaintiff satisfies the requirements of this method when his evidence shows a grant from the state covering the land described in his complaint and mesne conveyances of that land to himself; (5) the plaintiff need not prove a title alleged by him if it is judicially admitted by the defendant; (6) where it appears from the showing of a prima facie title by the plaintiff or the judicial admission of the defendant that the land in dispute is within the external boundaries of the plain-

[17] *Supra* note 15.
[18] N. C. GEN. STAT. § 43-1, *et seq.* (1952).
[19] See Perry v. Morgan, 219 N. C. 377, 14 S. E. 2d 46 (1941).
[20] 239 N. C. 627, 80 S. E. 2d 665 (1954).
[21] 104 N. C. 112, 115, 10 S. E. 142 (1889). "This *prima facie* showing of title may be made by either of several methods. 1. He may offer a connected chain of title or a grant direct from the State to himself. 2. Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought. 3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. 4. He may show, as against the State, possession under known and visible boundaries for thirty years, or as against individuals for twenty years before the action was brought. 5. He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. 6. He may connect the defendant with a common source of title and show himself a better title from that source."

tiff's deed and that the defendant claims it under an exception in such deed, the burden is on the defendant to bring himself within such exception by proper proof.

Applying these rules, the Court found for the petitioner as the defendant admitted that the petitioner held the record title by mesne conveyances from the original grantee of the state, and, therefore, the petitioner had established a prima facie case and the defendant offered no evidence to defeat the prima facie title.

It might be well to note that if a plaintiff in an action of ejectment fails to fit the description contained in the deeds upon which he relies to the land claimed under them, a judgment of nonsuit is proper.[22]

HUSBAND AND WIFE

The common law rule that the husband is entitled to the possession, control, and use of the land held by an estate by the entireties, to the exclusion of the wife, formed the primary basis for the Court's decision in *Nesbitt v. Fairview Farms, Inc.*[23] Petitioners, tenants by the entireties, owned land contiguous to land of the defendant, and pursuant to G. S. § 38-1 brought a processioning proceeding to establishing the true boundary line between the lands. Pending trial, the husband, without the joinder of his wife, entered into an agreement with the defendant to accept a survey made pursuant to the agreement as the true boundary line. The Court held that the common law rule gave the husband the exclusive right to control and use the lands and the wife was not a necessary party to the proceeding; therefore, the husband could agree as to the method of establishing the boundary line. The wife contended that since she had not joined with her husband in the stipulation she was not bound thereby. The Court rejected this contention because the wife's interest in the estate by the entirety was not affected,[24] and though she was not a necessary party to the proceeding, nevertheless she was a proper party, and having joined her husband in instituting the proceeding, she could not claim that she was not bound by the stipulation made by her husband.

WATER AND WATERCOURSES

By the rule of the common law the ebb and flow of the tide was the test of a navigable stream.[25] The Court in *Parmele v. Eaton*[26] again[27] rejected the common law rule and held that the more practical

[22] Skipper v. Yow, 240 N. C. 102, 81 S. E. 2d 200 (1954).
[23] 239 N. C. 481, 80 S. E. 2d 472 (1954).
[24] The Court evidently means that the *quality*, not the *quantity* of the wife's interest in the estate by the entirety, would not be affected.
[25] Resort Development Co. v. Parmele, 235 N. C. 689, 71 S. E. 2d 474 (1952).
[26] 240 N. C. 539, 83 S. E. 2d 93 (1954).
[27] North Carolina, along with a majority of jurisdictions in this country, had previously discarded the common law rule. Home Real Estate Loan & Insurance Co. v. Parmele, 214 N. C. 63, 197 S. E. 714 (1938).

test used in this jurisdiction is whether the water, in its ordinary state, is capable and suitable for the usual purpose of navigation by vessels or boats such as are employed in the ordinary course of water commerce. The Court said: "Briefly stated, the rule with us is that all water courses are regarded navigable in law that are navigable in fact."[28]

TORTS

NEGLIGENCE

The Court has repeatedly defined negligence as a failure to exercise that care which an ordinary prudent man should use under like circumstances when charged with a similar duty.[1] The difficult problem in negligence cases is not the statement of the standard of care but the application of the standard to individual cases. An examination of several cases will serve to illustrate.

Owners and Occupiers of Land

One of the important factors considered by the Court in applying this standard of care is the type of person charged with the negligent conduct. This single standard imposes varying duties upon different classes of persons.

In *Reese v. Piedmont, Inc.*,[2] the Court stated that it was the duty of the owner of leased premises to keep the restroom thereon in a reasonably safe condition for the use of the lessee's invitees and to warn them of any hidden perils or unsafe conditions known to him or ascertainable by him through reasonable inspection and supervision. However, it was held that where the restroom floor was of two levels, and the plaintiff in leaving had fallen because of the different heights, there had been no breach of his duty, even though the room was dimly lighted. The Court pointed out that the plaintiff had stepped from the lower to the higher level in entering, that two-level floors were common enough to be anticipated, and though the room was dimly lighted, there was sufficient light to see.

On the other hand, an airlines company to conform to this standard of care must provide a reasonable and safe passageway from the waiting room of the airport to its airplane for persons who have bought a ticket to board the plane. The company will not be excused from this duty by an agreement between it and the city lessor that the city should keep the airport facilities and premises in good repair.[2a] Where there was a worn and loose threshold board in the doorway leading from

[28] Parmele v. Eaton, 240 N. C. 539, 548, 83 S. E. 2d 93, 99 (1954).

[1] Boone v. North Carolina R. R., 240 N. C. 152, 81 S. E. 2d 380 (1954).

[2] 240 N. C. 391, 82 S. E. 2d 365 (1954).

[2a] See CONTRACTS, p. 178 *supra*, and MUNICIPAL CORPORATIONS, p. 205 *supra*.

the waiting room to the loading platform, and the plaintiff, who had passed through the doorway an average of six to nine times per month for a five-year period, caught her foot on the loose board and fell, it was a question for the jury whether the airline company had breached its duty.[3]

But the owner of a golf course is not liable when one of its patrons steps into a waterhole which is not a part of the playing course but is maintained for hose connections for watering the green. Its responsibility, like that of other owners of places of amusement, is to provide premises which are reasonably safe for the purpose for which they are designed.[4] This includes the duty to exercise ordinary care in promulgating reasonable rules for the protection of persons who rightfully use the course and to use ordinary care to see that these rules are enforced.[5]

Emergency

The application by the Court of the standard of care is not only affected by the type of person whose conduct is being judged, but also by the conditions under which that conduct occurred. For example, in *Henderson v. Henderson*,[6] the Court said that one confronted with a sudden emergency, and who is in no respect at fault in causing the emergency, is not usually held to the same degree of deliberation and care as he would be under ordinary conditions. Such an emergency was found to exist when the defendant's truck, driven on the right side of the road at a moderate speed, was struck by a car traveling in the opposite direction which had come into view rounding a curve on the left side of the road some sixty to one hundred yards away. The car having crossed back to the right side of the road and then into a ditch, swerved across the road again striking the defendant's truck. Only three to four seconds elapsed from the time the car came into view until the collision. The Court held that under these circumstances the defendant was not negligent in failing to stop his truck.

Standard of Care of an Attorney

In a case of importance to all attorneys, the Court for the first time defined the duty of an attorney undertaking to prosecute an action. The Court stated that an attorney must: (1) possess the degree of knowledge and skill ordinarily possessed by others in his profession similarly situated; (2) use reasonable care and diligence in the use of his skill and the application of his knowledge; and (3) exercise in

[3] Crowell v. Air Lines, 240 N. C. 20, 81 S. E. 2d 178 (1954).
[4] Farfour v. Mimosa Golf Club, 240 N. C. 159, 81 S. E. 2d 375 (1954). This case is fully discussed in a note in 33 N. C. L. REV. 142 (1954).
[5] Everett v. Goodwin, 201 N. C. 734, 161 S. E. 316 (1931).
[6] 239 N. C. 487, 80 S. E. 2d 383 (1954).

good faith his best judgment.[7] The Court concluded that an attorney was not liable for a mere error in judgment or for a mistake in a point of law which had not been settled by the court of last resort in his state and on which reasonable doubt might be entertained by well-informed lawyers.

A previous *Case Survey*[8] pointed out that the above rules of liability, originally applied to physicians and surgeons, had been extended to dentists and during the past year to dermatologists. It seems safe to conclude that the Court would apply the same rules to all professional groups.[9]

Violation of Statute

The "ordinary prudent man" test is not the only standard used by the Court to determine whether a person's conduct has been negligent. Violation of a statute enacted for the protection and safety of others is usually held to be negligence *per se*. In such cases the statute prescribes an absolute standard, and the degree of care and prudence exercised is immaterial.[10] Thus it is negligence *per se* not to stop for a red light,[11] or to fail to give warning before passing a car proceeding in the same direction.[12] But where, as in G. S. § 20-158 (full stop before crossing certain through highways), the statute itself provides that a violation shall not be negligence *per se*, the violation of the statute may only be considered with other evidence in determining whether the defendant was negligent.[13]

Foreseeability and Proximate Cause

Regardless of whether the common law[14] or the statutory standard[15] is used in determining whether one's conduct is negligent, North Carolina holds that such negligence must be a proximate cause of the injury and that foreseeability is an essential element of proximate cause. *Boone v. North Carolina Railroad Co.*[16] is an interesting case involving foreseeability. The plaintiff's intestate, with other mill employees who were leaving work, was standing away from the near track waiting for a freight train to pass on the far track. One of the employees, who

[7] Hodges v. Carter, 239 N. C. 517, 80 S. E. 2d 144 (1954).
[8] 32 N. C. L. REV. 379, 504 (1954).
[9] In other jurisdictions these rules of liability have been extended to accountants, Smith v. London Assur. Corp., 109 App. Div. 882, 96 N. Y. Supp. 820 (2d Dep't 1905); architects, Chapel v. Clark, 117 Mich. 638, 76 N. W. 62 (1898); engineers, Cowles v. Minneapolis, 128 Minn. 452, 151 N. W. 184 (1915); and other professional groups, PROSSER, TORTS § 36, p. 236 (1941).
[10] Aldridge v. Hasty, 240 N. C. 353, 82 S. E. 2d 331 (1954).
[11] Troxler v. Motor Lines, 240 N. C. 420, 82 S. E. 2d 342 (1954).
[12] Sheldon v. Childers, 240 N. C. 449, 82 S. E. 2d 396 (1954).
[13] Badders v. Lassiter, 240 N. C. 413, 82 S. E. 2d 357 (1954).
[14] Boone v. North Carolina R. R., 240 N. C. 152, 81 S. E. 2d 380 (1954).
[15] Aldridge v. Hasty, 240 N. C. 353, 82 S. E. 2d 331 (1954).
[16] See note 14 *supra*.

was standing on the near track, was struck by a passenger train coming from the opposite direction and his body was thrown through the air, striking the plaintiff's intestate and fatally injuring him. The Court held that the engineer of the train could not foresee that the employee, in apparent possession of his faculties, would remain on the track until the train had struck him, and that his body would be hurled through the air twenty-five feet and strike the plaintiff's intestate. One is not under a duty to anticipate negligence on the part of others, and in the absence of anything that gives notice to the contrary, may assume that others will exercise ordinary care for their own safety.[17] A party does not forfeit the right to act on this assumption because he himself is not altogether free from negligence.

To hold that the railroad has a right to assume to the very last moment that a third person will step off the tracks, and that such assumption operates to relieve the railroad of the duty of foreseeing danger to innocent persons standing away from the track, even though the engineer sees, or should see, both the person on the track and those by it, seems to go very far. This does more than free the railroad from anticipating the negligence of others; it confers upon the railroad a right to assume that a known negligent person will cease to be negligent, and permits that assumption to cut off its duty to innocent third parties.[18]

Injury by Bottle Explosions

The difficulty in some negligence cases is not in establishing the defendant's duty, but in proving that there has been a breach of that duty. In *Styers v. Winston Coca-Cola Bottling Co.*,[19] defendant's driver had left three crates of carbonated drinks in the hot sun for over three hours and the plaintiff had carried them into a building,

[17] There is a line of decisions in North Carolina that appear to recognize an exception to this general rule. In Moore v. Atlantic Coast Line R. R., 185 N. C. 189, 116 S. E. 409 (1923), the Court said that the ordinary presumption that one who is in possession of his faculties and walking on a railroad track, will step to a place of safety on the approach of a train, does not apply to an employee standing on the track absorbed in the performance of a duty he owes the railroad company. See Doughtry v. Cline, 224 N. C. 381, 30 S. E. 2d 332 (1944); Lassiter v. Raleigh R. R., 133 N. C. 244, 45 S. E. 570 (1903).

[18] It is difficult to distinguish this case from Aldridge v. Hasty, 240 N. C. 353, 82 S. E. 2d 331 (1954), where, under a similar factual situation, it was held that the defendant's negligence was a proximate cause of plaintiff's injury. There the defendant was driving at an excessive speed when a car driven by a third person suddenly turned in front of him, causing a collision. The Court stated that the third party's conduct would insulate the defendant's negligence as to the original collision, but would not do so as to the subsequent striking of the plaintiff. The Court pointed out that the relationship between the defendant and the third party was clearly distinct from that between the defendant and plaintiff. In the *Boone* case the Court appears to have ignored completely any such distinction.

[19] 239 N. C. 504, 80 S. E. 2d 253 (1954).

when a bottle burst, injuring him. The Court held that evidence of explosion of like products filled by the same bottler is sufficient to carry the case to the jury, as such facts and circumstances permit the inference that the bottler has not exercised the degree of care required of him under the circumstances. But "such similar instances are allowed to be shown as evidence of a probable like occurrence at the time of the plaintiff's injury when, and only when, accompanied by proof of substantially similar circumstances and reasonable proximity in time."[20]

Res Ipsa Loquitur

Often, where there is no direct evidence of negligence, the circumstances under which the accident occurred are relied upon to establish negligence under the doctrine of res ipsa loquitur. However, the proof of the occurrence of an accident alone is not sufficient to invoke the doctrine.[21] The doctrine applies where the thing which caused the accident is shown to have been in the exclusive control of the defendant, and the occurrence is such as in the ordinary course of things would not have happened if those who had the management had used proper care.[22]

The doctrine is frequently applied in cases of unexplained gasoline explosions, but in *Hopkins v. Comer*,[23] where four small boys were killed by the explosion of a parked tank truck from which the gasoline had been drained, the Court held the doctrine inapplicable. Plaintiff's evidence showed that two of these boys had cap pistols and were playing in the yard where the truck was parked shortly before the accident; that the truck was parked there with the defendant's approval; and that there had been a failure to inspect safety devices on the truck. The Court said that it is a matter of common knowledge that the firing of a cap pistol emits a spark and that a spark will ignite gasoline vapors.[24] The Court held that under these facts more than one inference could be drawn as to the cause of the explosion, and that the existence of negligence in maintaining and inspecting the truck was not the more reasonable probability. Also, the evidence did not show that the truck was in the exclusive control of the defendant.

Bailments

In another type of prima facie case, peculiar to bailments, the Court

[20] *Id.* at 508, 80 S. E. 2d at 256 (1954).
[21] Styers v. Winston Coca-Cola Bottling Co., 239 N. C. 505, 80 S. E. 2d 253 (1954).
[22] Young v. Anchor Co., 239 N. C. 288, 79 S. E. 2d 785 (1954).
[23] 240 N. C. 143, 81 S. E. 2d 368 (1954).
[24] See EVIDENCE, p. 199 *supra*.

allows proof of negligence by circumstantial evidence under requirements similar to those of the doctrine of res ipsa loquitur. In *Central Mutual Insurance Co. v. Atkinson Motors, Inc.*[25] the Court, in applying this doctrine, held that where the purchaser of an automobile returned it to the dealer for a five-hundred-mile check up to which he was entitled under the contract of sale, there existed a bailment for mutual benefit, and the bailee had to exercise due care for the protection of the bailor's property. The Court added that when the bailor had shown that he had delivered the property to the bailee in good condition, that the bailee had accepted it and thereafter had retained possession and control, and had failed to return the property or had returned it in a damaged condition, the bailor had made out a prima facie case of actionable negligence, requiring the submission of the issue to the jury.

Duty of Carriers to Consignee's Employees

The Court has previously spelled out the duties of carriers by rail to the consignee's employees who are required to unload the cars. In a recent case the Court was called upon for the first time to extend these duties to trucking carriers.[26] The Court held trucking carriers were subject to these duties and were required, as initial carriers, to supply a vehicle in a reasonably safe condition, so that the consignee's employees could unload with reasonable safety. And when the carrier is a delivery carrier as well as the initial carrier, it must use ordinary care in inspecting the vehicle to determine whether it is reasonably safe for unloading and to repair or give warning of any dangerous conditions in the vehicle discoverable by such inspection.

AUTOMOBILES

The cases dealing with automobiles may be grouped as follows:[27] two involved accidents at intersections;[28] four occurred when a vehicle struck another stopped vehicle,[29] an animal,[30] or a person[31] on the highway; two collisions resulted from automobiles improperly entering the highway from a private drive;[32] two involved collisions between vehicles on a dominant road with vehicles entering from a servient

[25] 240 N. C. 183, 81 S. E. 2d 416 (1954).
[26] Honeycutt v. Bryan, 240 N. C. 238, 81 S. E. 2d 653 (1954).
[27] For a similar classification of last year's automobile cases, see *Case Survey*, 32 N. C. L. REV. 379, 498 (1954).
[28] Troxler v. Central Motor Lines, Inc., 240 N. C. 420, 82 S. E. 2d 342 (1954). Hamilton v. Henry, 239 N. C. 664, 80 S. E. 2d 485 (1954).
[29] Bryant v. Watford, 240 N. C. 333, 81 S. E. 2d 926 (1954); Singletary v. Nixon, 239 N. C. 634, 80 S. E. 2d 676 (1954).
[30] Johnson v. Heath, 240 N. C. 255, 81 S. E. 2d 657 (1954).
[31] Wade v. Jones Sausage Co., 239 N. C. 524, 80 S. E. 2d 150 (1954).
[32] Gantt v. Hobson, 240 N. C. 426, 82 S. E. 2d 384 (1954); Lassiter v. Carolina Coach Co., 240 N. C. 142, 81 S. E. 2d 202 (1954).

road;[33] four concerned collisions between vehicles proceeding in opposite directions;[34] and one occurred when an automobile collided with the rear end of a tractor-trailer.[35]

It seems of great significance that almost one third of all the tort cases covered by this *Survey* involved automobile accidents. With this in mind, we propose to examine the scope of the duty of the operator of a motor vehicle in relation to the above cases. First, as to whom this duty is owed, the Court in effect said in *Aldridge v. Hasty*[36] that the duty of a motorist to observe traffic regulations is a duty owed not only to others using the highway, but also to "every person on or about the highways who may suffer injury to his person or damage to his property as a natural and proximate result of a violation thereof."[37] Secondly, the nature of this duty seems to be twofold, as the Court pointed out in *Henderson v. Henderson:*

> "Apart from *safety statutes* prescribing specific rules governing the operation of motor vehicles, a person operating a motor vehicle must exercise *proper care* in the way and manner of its operation, proper care being that degree of care that an ordinarily prudent person would exercise under the same or similar circumstances and when charged with like duty. Thus, he must exercise due care as to keeping a proper lookout, as to keeping his car under proper control, and generally so as to avoid collision with persons or other vehicles on the highway." (Emphasis supplied.)[38]

Two cases considered the duty of the motorist under G. S. § 20-158. In *Badders v. Lassiter,*[39] the Court stated that the purpose of the statute was to enable the driver of a motor vehicle to have an opportunity to observe the traffic conditions on the highway before driving onto it. It then added that one who is required to stop should not proceed from the stopped position until he can do so with reasonable assurance of safety. The position of the driver on the main highway was considered in *Blalock v. Moore.*[40] He, in the absence of notice to the contrary, is entitled to assume, even to the last moment, that the opera-

[33] Badders v. Lassiter, 240 N. C. 413, 82 S. E. 2d 357 (1954); Blalock v. Hart, 239 N. C. 475, 80 S. E. 2d 373 (1954).
[34] Harris v. White Construction Co., 240 N. C. 556, 82 S. E. 2d 689 (1954); Aldridge v. Hasty, 240 N. C. 353, 82 S. E. 2d 331 (1954); Henderson v. Henderson, 239 N. C. 487, 80 S. E. 2d 383 (1954); Wrenn v. Graham, 239 N. C. 462, 80 S. E. 2d 378 (1954).
[35] Sheldon v. Childers, 240 N. C. 449, 82 S. E. 2d 396 (1954).
[36] 240 N. C. 353, 82 S. E. 2d 331 (1954).
[37] *Id.* at 358, 82 S. E. 2d at 337.
[38] 239 N. C. 487, 491, 80 S. E. 2d 383, 385 (1954).
[39] 240 N. C. 413, 82 S. E. 2d 357 (1954).
[40] 239 N. C. 475, 80 S. E. 2d 373 (1954).

tor of a car along the intersecting servient highway will stop before entering the intersection. However, the Court cautioned that he does not have the absolute right of way in the sense that he is not bound to exercise care toward traffic approaching on the unfavored highway. It is his duty, notwithstanding his favored position, to use ordinary care.

Another important statute setting out the duty of the operator of a motor vehicle is G. S. § 20-141, which provides that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. This refers to existing conditions as to traffic, weather, and other special hazards.[41] An interesting application of this statute is found in *Aldridge v. Hasty*.[42] There the Court stated that the plaintiff, who was struck by defendant's car after it had collided with another car, could not recover on the theory that the defendant's excessive speed was a proximate cause of the collision between the automobiles driven by him and his co-defendant, as the negligence of the latter insulated the defendant's negligence as to that collision. But the Court held that the defendant's excessive speed could have been the cause of his loss of control of the car after the first collision and on that ground be a basis for recovery.

The statute also prohibits any person from driving at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with the law.[43]

A group of cases involving contributory negligence clearly show that the plaintiff, as well as the defendant, is subject to these duties. In *Badders v. Lassiter*,[44] the Court said that a motion for involuntary nonsuit on the grounds of the plaintiff's contributory negligence will not be sustained unless the evidence is so clear on that issue that no other logical inference can reasonably be drawn therefrom even though considered in the light most favorable to the plaintiff. Yet in five of seven cases in which the issue was raised, the Court found contributory negligence as a matter of law.[45]

Typical of this group of cases is *Sheldon v. Childers*.[46] The plaintiff introduced evidence that he had blown his horn when four hundred

[41] Singletary v. Nixon, 239 N. C. 634, 80 S. E. 2d 676 (1954).
[42] 240 N. C. 353, 82 S. E. 2d 331 (1954).
[43] Gantt v. Hobson, 240 N. C. 426, 82 S. E. 2d 384 (1954); N. C. GEN. STAT. § 20-141(h) (1953).
[44] 240 N. C. 413, 82 S. E. 2d 357 (1954).
[45] Sheldon v. Childers, 240 N. C. 449, 82 S. E. 2d 396 (1954); Badders v. Lassiter, 240 N. C. 413, 82 S. E. 2d 357 (1954); Johnson v. Heath, 240 N. C. 255, 81 S. E. 2d 657 (1954); Lassiter v. Carolina Coach Co., 240 N. C. 142, 81 S. E. 2d 202 (1954); Singletary v. Nixon, 239 N. C. 634, 80 S. E. 2d 676 (1954).
[46] Sheldon v. Childers, *supra* note 45.

feet behind a slow moving tractor-trailer, and had pulled into the left lane in preparation to pass; that when he was two hundred feet from the tractor-trailer, it pulled into the left lane and stopped, attempting to turn onto a side road; and that his car collided with the rear end of the trailer. This evidence was held to show contributory negligence as a matter of law in a failure to keep a proper lookout, and in traveling at an excessive speed under the circumstances.

Two cases which dealt with the sufficiency of the warnings given by construction contractors to travelers on the highway, seem important. In *Wrenn v. Graham*,[47] there was a detour around the part of the road under immediate construction, with a sign one and one-quarter miles from the beginning of the detour, another about 200 feet from the detour, and a striped barricade just in front of it. The Court held under these facts that there was no evidence that any negligence of the construction contractor was a proximate cause of the accident. In the other case, *Harris v. White Construction Co.*,[48] where the signs were spaced in a somewhat similar manner, the Court stated that even if this were negligent, such negligence was not a proximate cause of the accident, as the evidence showed that the plaintiff had traveled the road several times since the construction activity had begun and was familiar with the nature of it.

Agency rules often play an important role in automobile accident cases, and G. S. § 20-71.1, which raises a presumption of agency based upon ownership of the automobile, is of especial importance. The cases arising under this statute are treated under the Agency section of this *Survey*.[49]

LIBEL

In two cases[50] the Court set out the scope of the immunity from liability for libelous statements made in the course of judicial proceedings. The general rule is that a defamatory statement made in the due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice.

Plaintiff in *Scott v. Statesville Plywood and Veneer Co.*[51] alleged that defendant had included defamatory statements about him in his pleadings in a previous action. The Court, in sustaining the defendant's demurrer, recognized that the above general rule is limited to those statements which are relevant or pertinent to the subject matter

[47] 239 N. C. 462, 80 S. E. 2d 378 (1954).
[48] 240 N. C. 556, 82 S. E. 2d 689 (1954).
[49] See p. 163 *infra*.
[50] Scott v. Statesville Plywood and Veneer Co., 240 N. C. 73, 81 S. E. 2d 146 (1954); Jarman v. Offutt, 239 N. C. 468, 80 S. E. 2d 248 (1954).
[51] Scott v. Statesville Plywood and Veneer Co., *supra* note 49.

of the action. In finding the statements relied upon here were relevant, the Court pointed out that the question of relevancy is a question of law for the trial court, and that the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man could doubt its irrelevancy. And if it is so related to the subject matter that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling.

The Court in *Jarman v. Offutt*[52] further clarified the aforementioned general rule by defining the "judicial proceeding" to which the immunity of the rule attaches. The application of the rule is not restricted to trials in civil actions and criminal prosecutions, but includes every proceeding of a judicial nature before a competent court, administrative agency, or officer clothed with judicial or quasi-judicial powers. It embraces statements made in an affidavit pertinent to a judicial proceeding or which the affiant has reasonable grounds to believe are pertinent. Thus the statements of a doctor made in an affidavit incident to a lunacy proceeding instituted by a husband against his wife were privileged.

LAST CLEAR CHANCE

For an injured plaintiff who has been guilty of contributory negligence to invoke the doctrine of last clear chance, he must establish four elements: (1) that he could not by the exercise of reasonable care escape from the peril in which he had negligently placed himself; (2) that defendant knew, or by the exercise of reasonable care could have discovered, plaintiff's perilous position and his incapacity to escape from it; (3) that defendant had time and means to avoid the injury by the exercise of reasonable care after he discovered, or should have discovered, plaintiff's peril; and (4) that defendant negligently failed to use the available time and means to avoid injury to plaintiff.[53]

Several difficult problems have arisen in North Carolina in connection with the doctrine of last clear chance. These problems are discussed in two notes in this *Law Review*. One of these notes considers the procedural problems involved in pleading the doctrine of last clear chance;[54] the other treats the substantive problems connected with the application of the doctrine.[55]

WRONGFUL AND MALICIOUS ATTACHMENT

In *Brown v. Guaranty Estates Corp.*,[56] the Court indicated that

[52] 239 N. C. 468, 80 S. E. 2d 248 (1954).
[53] Wade v. Jones Sausage Co., 239 N. C. 524, 80 S. E. 2d 150 (1954).
[54] See p. 301 *infra*.
[55] Note, 33 N. C. L. Rev. 138 (1954).
[56] 239 N. C. 595, 80 S. E. 2d 645 (1954). See Credit Transactions, p. 183 *supra*.

there are two tort remedies available to a person against whose property an order of attachment has been improperly obtained or tortiously employed. First, he may maintain an action for abuse of process if the attachment plaintiff employs a regularly issued order of attachment to accomplish a result not lawfully or properly obtainable under it.[57] Secondly, when the attachment plaintiff has caused the order of attachment to issue without justification, an action will lie for malicious and wrongful attachment.

The Court listed the essential elements of malicious and wrongful attachment: (1) that the attachment plaintiff sued out an order of attachment against the property of the attachment defendant without probable cause for believing that the alleged grounds for attachment existed; (2) that the order was sued out maliciously; (3) that the order of attachment was actually levied on the property of the attachment defendant, who was thereby deprived of his rights to use his property for any legitimate purpose; (4) that the attachment proceeding has legally terminated in favor of the attachment defendant; and (5) that the attachment defendant suffered damages as a result of the order of attachment upon his property. The Court emphasized that malice is a necessary element of the tort, declaring that statements to the contrary made in *Kirkman v. Coe*[58] and *Tyler v. Mahoney*[59] are not prevailing law. The malice required may be either actual or legal.

The plaintiff may recover the actual damages suffered by reason of the attachment, including compensation for injury to his credit, business, or feelings. He may recover punitive damages if he alleges and proves that the attachment plaintiff was motivated by actual malice, as distinguished from legal malice.

TRESPASS

That one may be liable for trespass, though he never goes upon the land, has long been established in the case where he causes a third person wrongfully to enter upon the land of another. This idea of a trespass without a personal entry was considerably extended by the Court in *Pegg v. Gray*,[60] where defendant was held liable for an entry upon another's land by his hunting dogs. The Court held that the

[57] The essential elements of abuse of process are: (1) an ulterior motive, and (2) a wilfull act in the use of process not proper in the regular prosecution of the proceeding. Ledford v. Smith, 212 N. C. 447, 193 S. E. 722 (1937), 16 N. C. L. REV. 277 (1938). Neither want of probable cause, Pittsburg, Johnstown, Edenburg and Eastern R. R. v. Wakefield Hardware Co., 143 N. C. 54, 55 S. E. 422 (1906); malice, Klander v. West, 205 N. C. 524, 171 S. E. 782 (1933); nor termination of the proceeding, Sneedin v. Harris, 109 N. C. 349, 13 S. E. 920 (1891) is a necessary element to an action for abuse of process.

[58] 46 N. C. 423 (1854).

[59] 168 N. C. 237, 84 S. E. 362 (1915).

[60] 240 N. C. 548, 82 S. E. 2d 757 (1954).

owner of dogs for the purpose of sport, who, without prior permission from the landowner, intentionally sends them upon the land of another or releases them with knowledge, actual or constructive, that they will in all likelihood go upon the lands of another in pursuit of game, is liable for trespass, even though he himself does not enter upon the lands. This question has been before American courts only a few times, and the North Carolina Court in deciding it for the first time relied largely upon old English decisions.[61]

TRIAL PRACTICE

G. S. § 1-180 has again proven to be the pitfall for certain of our trial judges. By that statute the trial judge is forbidden "in giving a charge to the petit jury" to "give an opinion whether a fact is fully or sufficiently proven. . . ." Although the statute expressly refers to the giving of an opinion in charging the jury, the Court has repeatedly ruled that the statute forbids any expression of opinion on the facts by the trial judge be it in his charge or otherwise. Thus in *State v. McRae*,[1] the Court found that the type of questions asked of a witness by the judge indicated an opinion on the facts which was adverse to the defendant. Because of the hazard a trial judge runs in questioning a witness it will not be amiss to state here in detail the questions asked by the court. The witness was a deputy sheriff who had testified that he knew the defendant and that the defendant had a reputation of making and selling whiskey. After both counsel concluded their examination the judge asked the witness the following questions:

> "Q. Have you made raids on this place? A. No, sir, haven't searched his house. Q. Does he have a reputation of handling or manufacturing whiskey? A. He has a reputation of manufacturing it. Q. You have never searched his premises? A. No, sir. Q. Know whether other officers have? A. Not that I know of. Q. What does his reputation grow out of? A. Of wholesaling, manufacturing whiskey, reports coming to the office. Q. Does he have the reputation of selling liquor at his residence? Objection—overruled—exception. Exception No. 23. A. No, sir."[2]

In reversing a conviction for unlawfully possessing and transporting liquor the Court said:

"The questions asked by the judge went far beyond an effort to

[61] For a further discussion of this case and the problem with which it is concerned, see Note, 33 N. C. L. Rev. 134 (1954).

[1] 240 N. C. 334, 82 S. E. 2d 67 (1954).
[2] *Id.* at 335, 82 S. E. 2d at 67.

> obtain a proper understanding and clarification of the witness's testimony and . . . we are of the opinion that the conscientious trial judge unintentionally conveyed to the jury an impression that he had an opinion on the facts in evidence adverse to the defendant."[3]

Another case leading to a reversal under G. S. § 1-180 because the trial court asked the defendant questions which the Court said amounted to cross-examination is *State v. Smith.*[4] The trial judge in interrogating the defendant who was being prosecuted for drunken driving tried to find out how much drinking the defendant did. The questioning, said the Court, fell into the category of impeachment of the witness' credibility and hence violated the statute.

Miller v. Norfolk Southern Railway Co.[5] presented a clear violation of G. S. § 1-180, for in that case the trial judge in his charge told the jury that the work done by the plaintiff required more than one person, which was the very issue in the case.

The lack of power of the trial court to vacate a judgment it had entered on a misconception of the law after the term of court has passed is again stated by the Court in *Mills v. Richardson.*[6] At the First February, 1954, Civil Term the trial judge sustained a demurrer to the complaint and dismissed the action. Plaintiff appealed. Then at the Second February, 1954, Civil Term the same trial judge was convinced he had erred in point of law, permitted a withdrawal of the appeal, set aside the judgment of dismissal entered at the preceding civil term, and permitted plaintiff to file an amended complaint. The Court held that the judgment of dismissal at the First February, 1954, Civil Term was a final judgment and the trial court was without authority to vacate it after the expiration of the term at which it was rendered. The only remedy for an erroneous judgment rendered contrary to law is by appeal to the Supreme Court.

The distinction between setting aside a verdict as against the greater weight of the evidence and setting it aside because of insufficient evidence is pointed out in *Roberts v. Hill.*[7] The Court held that after a motion for nonsuit based on the ground of insufficiency of evidence has been denied, the trial court is without authority, after verdict, to set the verdict aside as a matter of law for insufficiency of evidence. On the other hand, notwithstanding the denial of the nonsuit motion, the trial court may, after verdict, in the exercise of its discretionary powers, set the verdict aside as against the greater weight of the evidence.

[3] *Ibid.*
[4] 240 N. C. 99, 83 S. E. 2d 656 (1954).
[5] 240 N. C. 617, 83 S. E. 2d 533 (1954).
[6] 240 N. C. 187, 81 S. E. 2d 409 (1954).
[7] 240 N. C. 373, 82 S. E. 2d 373 (1954).

Although the Supreme Court of this state has repeatedly dismissed appeals because the evidence in the record was set out in question and answer form instead of in narrative form, pursuant to Supreme Court Rule 19 (4), counsel continue on appeal to set out the evidence in its original question and answer form. Thus in *Laughinghouse v. Farm Bureau Mutual Automobile Ins. Co.*[8] and in *State v. MeNeill*[9] the appeals were dismissed for failure to comply with this rule, which is mandatory, may not be waived by consent of the parties, and will be enforced by the Court *ex mero motu.*

TRUSTS

Two general rules were reiterated in *Brown v. Guaranty Estates Corp.*:[1] (1) the estate of a decedent is not liable for torts committed by an administrator or executor in administering the estate, and therefore, an action will not lie against the administrator or executor in his representative capacity for such a tort; and (2) the estate of an insane person is not liable for torts committed by a guardian or trustee in managing the estate, and, therefore, an action will not lie against the guardian or trustee in his representative capacity for such torts. Consequently, the Court sustained a demurrer to a complaint alleging malicious and wrongful attachment prosecuted by defendants in their representative capacities as trustee of the estate of an insane person and administrator of the deceased insane person.

Actions against an administrator, executor, trustee, or guardian in his representative capacity for torts committed by him have rarely been presented to the North Carolina Court. In *Coxe v. Whitmire Motor Sales Co.*,[2] the Court held that the estate of a ward was not liable for false representations made by an agent of the guardian. And in *Mobley v. Runnels*,[3] the Court held that while an executor was personally liable for his wrongful detention of slaves, no liability could attach to the estate of the decedent. However, in *Wright v. Caney River Ry. Co.*,[4] a trustee was held liable as trustee for the negligent killing of an employee. This was a business trust, set up for the protection of the creditors of a corporation, and the beneficiaries were largely in control.

It is interesting to note that no reference was made in the *Brown* decision to the Uniform Trust Act[5] adopted by North Carolina in

[8] 239 N. C. 678, 80 S. E. 2d 457 (1954).
[9] 239 N. C. 679, 80 S. E. 2d 680 (1954).

[1] 239 N. C. 595, 80 S. E. 2d 645 (1954). See DOMESTIC RELATIONS, p. 197 *supra.*
[2] 190 N. C. 838, 130 S. E. 841 (1925).
[3] 14 N. C. 303 (1832).
[4] 151 N. C. 529, 66 S. E. 588 (1909).
[5] N. C. GEN. STAT. § 36-24 through 36-46 (1950).

1939. That Act expressly provides[6] that the injured party may sue the trust estate, without regard to the solvency of the trustee or the state of his accounts, (1) if the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust (such as that in *Wright v. Caney River Ry Co.*), (2) or if not a common incident of such activity then if neither the trustee nor his employee was guilty of personal fault, (3) or if the trust estate was increased in value by the tort. Assuming that the statute would apply to fiduciaries of the types here involved, liability for the alleged tort of malicious and wrongful attachment would probably be excluded by implication from the second clause of the statute,[7] with the same result (the estate's immunity) as that reached in the principal case.

Where a grantor conveys a fee simple title to land to a grantee by deed absolute on its face but with an oral agreement that grantee is to hold the land for grantor, most American jurisdictions allow the grantee to keep the land, basing their decisions on the trust section of the Statute of Frauds. North Carolina has no trust section in the Statute of Frauds but reaches the same result on the basis of the parol evidence rule in *Gaylord v. Gaylord.*[8] This general rule is subject to exceptions, however, one of which was involved in the recent case of *Lamm v. Crumpler.*[9] Here the defendant grantees falsely represented to plaintiff grantor that they needed a part of the property in order to get Federal Housing Administration approval for a subdivision and that they would reconvey to him the portion not needed by them as soon as the amount needed could be ascertained. The Court impressed a constructive trust, citing the *Gaylord* case and holding that this situation fell within the exceptions there listed—fraud, mistake, or undue influence.[10] The principal case seems to be the first case actually applying the fraud exception.

The rights of life cestuis and remaindermen under a trust as to

[6] N. C. GEN. STAT. § 36-37 (1950).

[7] *In re* Hodgson's Estate, 342 Pa. 250, 20 A. 2d 294 (1941).

[8] 150 N. C. 222, 63 S. E. 1028 (1909). Although Mr. Justice Connor, in his concurring opinion, noted that the majority decision rested on a question of delivery of the deed and that the statement of the majority as to the validity of the alleged parol trust was dictum, the North Carolina Court has adopted the dictum in subsequent decisions as controlling authority for refusing to divest the grantee. See Carlisle v. Carlisle, 225 N. C. 462, 35 S. E. 2d 418 (1945); Loftin v. Kornegay, 225 N. C. 490, 35 S. E. 2d 607 (1945); Davis v. Davis, 223 N. C. 63, 25 S. E. 2d 181 (1943); Chilton v. Smith, 180 N. C. 472, 150 S. E. 1 (1920).

[9] 240 N. C. 35, 81 S. E. 2d 138 (1954).

[10] Another exception, breach of confidential relationship, was added by Sorrell v. Sorrell, 198 N. C. 460, 152 S. E. 157 (1930), where the Court said that "a fiduciary relationship existed between the parties and the grantor could engraft a parol trust upon the lands without allegations or evidence of actual fraud." See Crew v. Crew, 236 N. C. 528, 73 S. E. 2d 309 (1952).

principal and income were dealt with in In re *Estate of Bulis*.[11] The Court interpreted the will as providing that the life cestui was entitled to the net income as long as she lived and concluded that income not paid over during her life was an asset of her estate and not to be added to the corpus passing to the remaindermen. The parties were also in dispute as to the proper allocation of a dividend on corporate stock declared before the death of the life cestui but not received by the trustee until after her death. The Court held that ordinary current dividends, in the absence of contrary statutory provisions, are payable to the life cestui if declared during the life. This result, reached by the Court by application of the general rule in other jurisdictions, is in accord with the Uniform Principal and Income Act, adopted in North Carolina in 1937, which governs the ascertainment of principal and income and apportionment of receipts and expenses between cestuis and remaindermen.[12] This statute was not referred to by the Court.

A somewhat novel situation was presented in *McPherson v. First & Citizens National Bank*,[13] an action for interpretation of an irrevocable living trust agreement and for reformation of it for mistake of law. The appealing guardian ad litem challenged the judgment below only as to whether the original trust agreement violated the rule against remoteness of vesting. The Court concluded that the provisions of the original trust relating to the distribution to the heirs of the grandchildren of the settlor were violative of the rule against remoteness of vesting. The case further presented a problem of representation of the rights of children not yet conceived. This phase of the case is discussed in Civil Procedure *supra*.

WILLS AND ADMINISTRATION

CONSTRUCTION

The difficulty in construing an ambiguous and poorly drawn holographic will in order to determine the true intent of the testator or testatrix is well illustrated by the case of *Hubbard v. Wiggins*.[1] The testatrix provided in her will that a named nephew "is to have the

[11] 240 N. C. 529, 82 S. E. 2d 750 (1954).

[12] N. C. GEN. STAT. § 37-5(1) (1950): "Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations, other than the declaring corporation, shall be deemed income. . . ."; N. C. GEN. STAT. § 37-5(5) (1950): "In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of the declaration of the dividend."

[13] 240 N. C. 1, 81 S. E. 2d 386 (1954).

[1] 240 N. C. 197, 81 S. E. 2d 630 (1954).

Bonds & on [one] Hundred Dollars." It was discovered that at her death the testatrix possessed two sets of bonds, one set valued at three hundred dollars and payable to herself or the nephew, found in an unmarked envelope. The other set was in an envelope marked her personal account, payable to the testatrix alone, and valued at six thousand dollars. To add to the uncertainty, a later provision in the will directed, "I want fifteen hundred dollars in saving Bonds for flowers to the graves." Other bequests gave property to forty-five other relatives with substantial equality, expressly excluding four others.

The Court, with three judges dissenting, employed all of the well recognized rules of interpretation of wills to shed light on the muddled language of the testatrix. The Court held that, taking into consideration all of the facts and circumstances surrounding the execution of the will, the proper construction of the devise was to give the nephew three hundred dollars in bonds and one hundred dollars, since a gift of six thousand dollars was not intended by the testatrix because it would be grossly disproportionate to the amounts specifically given to any of the other forty-five beneficiaries. Although the attempted disposition of fifteen hundred dollars in bonds for flowers was held void for ambiguity, the majority seized upon this as another clear indication that the testatrix did not intend the six thousand dollars in bonds to be given to the nephew.

In the case of *Wachovia Bank and Trust Co. v. Green*,[2] the Court applied the rule that the circumstances and conditions existing at the time the will was executed may be considered in placing a proper interpretation on the language used by the testator. The testator created a testamentary trust, with the income to be paid to a nephew and niece and named children of the niece, with the right in "hereafter born" children of either to share in the income, and with provision that if any beneficiary other than the niece or nephew should die leaving "issue," such "issue" should receive the income to which the parent would have been entitled, if living. By a further provision, the corpus was to be distributed at the death of the survivor of the niece or nephew to their "children" then surviving, the issue of any deceased child to receive, *per stirpes*, the share which their parent would have received, if living. At the time of the testator's death, the nephew had completed adoption of two children and was in the process of adopting a third. The adopted children claimed a share in the corpus of the estate, relying principally on two North Carolina

[2] 239 N. C. 612, 80 S. E. 2d 771 (1954).

decisions[3] and the general rule that "where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, the testator knowing of the adoption in ample time to have changed his will so as to exclude such child if he so desired, such adopted child will be included in the word 'children' when used to designate a class which is to take under the will."[4]

The Court, in holding that the adopted children were not entitled to share in the corpus of the trust, distinguished the cases relied on by the adopted children on the ground that there was a "contrary" intention in the present case to limit the beneficiaries to the blood of the testator. The Court indicated that since the testator had provided for children "born" to either his niece or nephew to share in the income, the same meaning must be attached to the word "children" in the latter part of the will.[5]

[3] Bradford v. Johnson, 237 N. C. 572, 75 S. E. 2d 632 (1953); Smyth v. McKissick, 222 N. C. 644, 24 S. E. 2d 621 (1943).

[4] Wachovia Bank and Trust Co. v. Green, 239 N. C. 612, 618, 80 S. E. 2d 771, 775 (1954); Bradford v. Johnson, 237 N. C. 572, 578, 75 S. E. 2d 632, 637 (1953).

[5] "It is a well settled rule of testamentary construction that if it is apparent that in one use of a word or phrase a particular significance is attached thereto by the testator, the same meaning will be presumed to be intended in all other instances of the use by him of the same word or phrase." Carroll v. Herring, 180 N. C. 369, 372, 104 S. E. 892, 894 (1920); Taylor v. Taylor, 174 N. C. 537, 539, 94 S. E. 7, 8 (1917).

The adopted children had previously claimed a share of the *income* of the trust in the case of Wachovia Bank and Trust Co. v. Green, 238 N. C. 339, 78 S. E. 2d 174 (1953). The Court held that the adopted children did not have a right to share in the income because the testator intended to limit it to the beneficiaries of his blood. Since the adopted children would probably be living at the time for distribution of the corpus of the trust, the cause was remanded to the superior court to determine the question decided in the principal case.