NORTH CAROLINA REPORTS

VOL. 236

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1952

FALL TERM, 1952

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1953

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Inasmuch as all the Reports prior to the 63rd have been reprinted by the State, with the number of the Volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

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1 Iredell Law	.....	"	23	"
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7 " "	.....	"	29	"
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10 " "	.....	"	32	"
11 " "	.....	"	33	"
12 " "	.....	"	34	"
13 " "	.....	"	35	"
1 " Eq.	.....	"	36	"
2 " "	.....	"	37	"
3 " "	.....	"	38	"
4 " "	.....	"	39	"
5 " "	.....	"	40	"
6 " "	.....	"	41	"
7 " "	.....	"	42	"
8 " "	.....	"	43	"
Busbee Law	.....	"	44	"
" Eq.	.....	"	45	"
1 Jones Law	.....	"	46	"
2 " "	.....	"	47	"
3 " "	.....	"	48	"
4 " "	.....	"	49	"
5 " "	.....	"	50	"
6 " "	.....	"	51	"
7 " "	.....	"	52	"
8 " "	.....	"	53	"
1 " Eq.	.....	"	54	"
2 " "	.....	"	55	"
3 " "	.....	"	56	"
4 " "	.....	"	57	"
5 " "	.....	"	58	"
6 " "	.....	"	59	"
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Phillips Law	.....	"	61	"
" Eq.	.....	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i.e.*, the original) paging.

The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

From the 7th to the 62d volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence, or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63d to the 79th, both inclusive. From the 80th to the 101st volumes, both inclusive, will be found the opinion of the Court, consisting of three members, from 1879 to 1889. The opinions of the Court, consisting of five members, from 1889 to 1 July, 1937, are published in volumes 102 to 211, both inclusive. Since 1 July, 1937, and beginning with volume 212, the Court has consisted of seven members.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1952—FALL TERM, 1952

CHIEF JUSTICE:

W. A. DEVIN.

ASSOCIATE JUSTICES:

M. V. BARNHILL,
J. WALLACE WINBORNE,
EMERY B. DENNY,
S. J. ERVIN, JR.,
JEFF. D. JOHNSON, JR.,
ITIMOUS T. VALENTINE.[1]

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
RALPH MOODY,
CLAUDE L. LOVE,
I. BEVERLY LAKE,
JOHN HILL PAYLOR,
HARRY W. McGALLIARD.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE AND SUPREME COURT REPORTER

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

---

[1]Succeeded by R. Hunt Parker, 25 November, 1952.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
CHESTER MORRIS	First	Currituck.
WALTER J. BONE	Second	Nashville.
R. HUNT PARKER[1]	Third	Roanoke Rapids.
CLAWSON L. WILLIAMS	Fourth	Sanford.
J. PAUL FRIZZELLE	Fifth	Snow Hill.
HENRY L. STEVENS, JR.	Sixth	Warsaw.
W. C. HARRIS	Seventh	Raleigh.
JOHN J. BURNEY	Eighth	Wilmington.
Q. K. NIMOCKS, JR.	Ninth	Fayetteville.
LEO CARR	Tenth	Burlington.

SPECIAL JUDGES

W. H. S. BURGWYN	Woodland.
WILLIAM I. HALSTEAD	South Mills.
WILLIAM T. HATCH	Raleigh.
HOWARD G. GODWIN	Dunn.

WESTERN DIVISION

JOHN H. CLEMENT	Eleventh	Winston-Salem.
H. HOYLE SINK	Twelfth	Greensboro.
F. DONALD PHILLIPS	Thirteenth	Rockingham.
WILLIAM H. BOBBITT	Fourteenth	Charlotte.
FRANK M. ARMSTRONG	Fifteenth	Troy.
J. C. RUDISILL	Sixteenth	Newton.
J. A. ROUSSEAU	Seventeenth	North Wilkesboro.
J. WILL PLESS, JR.	Eighteenth	Marion.
ZEB V. NETTLES	Nineteenth	Asheville.
DAN K. MOORE	Twentieth	Sylva.
ALLEN H. GWYN	Twenty-first	Reidsville.

SPECIAL JUDGES

GEORGE B. PATTON	Franklin.
A. R. CRISP	Lenoir.
W. K. MCLEAN	Asheville.
SUSIE SHARP	Reidsville.

EMERGENCY JUDGES

HENRY A. GRADY	New Bern.
FELIX E. ALLEY, SR.	Waynesville.

[1]Succeeded by Joseph W. Parker, Windsor, N. C., 1 December, 1952.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. COHOON	First	Elizabeth City.
GEORGE M. FOUNTAIN	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
W. J. BUNDY	Fifth	Greenville.
WALTER T. BRITT	Sixth	Clinton.
WILLIAM Y. BICKETT	Seventh	Raleigh.
CLIFTON L. MOORE	Eighth	Burgaw.
MALCOLM B. SEAWELL	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

WALTER E. JOHNSTON, JR.	Eleventh	Winston-Salem.
CHARLES T. HAGAN, JR.	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
BASIL L. WHITENER	Fourteenth	Gastonia.
ZEB. A. MORRIS	Figteenth	Concord.
JAMES C. FARTHING	Sixteenth	Lenoir.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
C. O. RIDINGS	Fifteenth	Forest City.
LAMAR GUDGER	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, FALL TERM, 1952

Corrected through 1 September, 1952.

The numbers in parentheses following the date of a term indicate the number of weeks the term may hold. Absence of parenthesis numbers indicates a one-week term.

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Judge Parker

Beaufort—Sept. 15* (A); Sept. 22†; Oct. 6†; Nov. 3* (A); Dec. 1†.
Camden—Aug. 25.
Chowan—Sept. 8; Nov. 24.
Currituck—Sept. 1.
Dare—Oct. 20.
Gates—Nov. 17.
Hyde—Aug. 18† (c); Oct. 13.
Pasquotank—Sept. 15†; Oct. 6† (A) (c); Oct. 13† (a); Nov. 3†; Nov. 10*.
Perquimans—Sept. 29† (A) (c); Oct. 27.
Tyrrell—Sept. 29.

SECOND JUDICIAL DISTRICT

Judge Williams

Edgecombe—Sept. 8; Oct. 13; Nov. 10* (2) (s).
Martin—Sept. 15 (2); Nov. 17† (A) (2); Dec. 8.
Nash—Aug. 25; Sept. 15† (A) (c); Sept. 22† (A); Oct. 6†; Nov. 24*; Dec. 1†.
Washington—July 7; Oct. 20†.
Wilson—Aug. 25† (A); Sept. 1; Sept 22* (A); Sept. 29†; Oct. 20* (A); Oct. 27† (2); Dec. 1.

THIRD JUDICIAL DISTRICT

Judge Frizzelle

Bertie—Aug. 25 (2); Nov. 10 (2).
Halifax—Aug. 11 (2); Sept. 29† (A) (2); Oct. 20* (A); Nov. 24 (2).
Hertford—July 28; Oct. 13 (2).
Northampton—Aug. 4; Oct. 27 (2).
Vance—Sept. 22*; Oct. 6†.
Warren—Sept. 8*; Sept. 29†.

FOURTH JUDICIAL DISTRICT

Judge Stevens

Chatham—July 28† (2); Oct. 20.
Harnett—July 28† (2) (s); Sept. 1* (A); Sept. 15†; Sept. 29† (A) (2); Nov. 10* (2).
Johnston—July 7* (s); Aug. 11*; Aug. 18† (2) (s); Sept. 22† (2); Oct. 13 (A); Nov. 3†; Nov. 10† (A); Dec. 8 (2).
Lee—July 14*; July 21†; Sept. 8†; Sept. 15† (A); Oct. 27*; Dec. 8† (A).
Wayne—Aug. 18; Aug. 25† (2); Oct. 6† (2); Nov. 24 (2).

FIFTH JUDICIAL DISTRICT

Judge Harris

Carteret—Oct. 13; Dec. 1†.
Craven—Sept. 1; Sept. 8 (A); Sept. 29† (2); Nov. 10 (A); Nov. 17† (2).
Greene—Dec. 1 (A); Dec. 8; Dec. 15.
Jones—Aug. 11†; Sept. 15; Dec. 8 (A).
Pamlico—Nov. 3 (2).
Pitt—Aug. 18†; Aug. 25; Sept. 8†; Sept. 22†; Sept. 29 (A) (c); Oct. 6 (A); Oct. 20†; Oct. 27; Nov. 17† (A).

SIXTH JUDICIAL DISTRICT

Judge Burney

Duplin—Aug. 25; Sept. 1 (s); Oct. 6; Oct. 13†; Dec. 1† (2).
Lenoir—Aug. 18*; Sept. 8 (A); Sept. 22†; Oct. 27 (A); Nov. 3†; Nov. 10†; Nov. 24 (A).
Onslow—July 14‡; Sept. 29; Nov. 17† (2).
Sampson—Aug. 4 (2); Sept. 8† (2); Oct. 20; Oct. 27†.

SEVENTH JUDICIAL DISTRICT

Judge Nimocks

Franklin—Sept. 15† (2); Oct. 6*; Nov. 24† (2).
Wake—July 7*; Sept. 1* (2); Sept. 15† (A) (2); Sept. 29*; Oct. 13† (3); Nov. 3*; Nov. 10† (2); Nov. 24† (A); Dec. 1* (A); Dec. 8*; Dec. 15†.

EIGHTH JUDICIAL DISTRICT

Judge Carr

Brunswick—Sept. 15; Sept. 29† (A).
Columbus—July 21* (2) (s); Sept. 1* (2); Sept. 22† (2); Oct. 6* (A); Oct. 27† (A) (2); Nov. 17* (2).
New Hanover—July 14* (s); July 21* (c); Aug. 11*; Aug. 18† (2); Sept. 29* (A); Oct. 6† (2); Nov. 3* (2); Dec. 1† (2).
Pender—Sept. 22 (A); Oct. 20† (2).

NINTH JUDICIAL DISTRICT

Judge Morris

Bladen—Aug. 4† (c); Sept. 15*; Oct. 22† (s).
Cumberland—Aug. 25*; Sept. 22† (2); Oct. 6* (A); Oct. 20† (2); Nov. 17* (2).
Hoke—Aug. 18; Nov. 10.
Robeson—July 7†; July 14† (c); Aug. 11*; Aug. 25† (A) (c); Sept. 1* (2); Sept. 22* (A); Oct. 6† (2); Oct. 20* (A); Nov. 3*; Nov. 10† (A); Dec. 1† (2); Dec. 15*.

TENTH JUDICIAL DISTRICT

Judge Bone

Alamance—Aug. 11*; Sept. 1†; Sept. 8†; Oct. 13* (A); Oct. 20* (A); Nov. 3† (A); Nov. 10† (A); Nov. 24*.
Durham—July 14*; July 28 (2) (c); Aug. 25* (A); Sept. 1* (A) (2); Sept. 15† (2); Sept. 29 (A) (c); Oct. 6*; Oct. 13† (A) (2); Oct. 27†; Nov. 3; Nov. 24* (A); Dec. 1*; Dec. 8* (A).
Granville—July 21; Oct. 20†; Nov. 10 (2).
Orange—Aug. 18; Aug. 25†; Sept. 29†; Dec. 8.
Person—Aug. 25 (A); Oct. 13.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Judge Rudisill

Ashe—July 21† (2); Oct. 20*.
Alleghany—Aug. 11; Sept. 29.
Forsyth—June 30* (2); Sept. 1* (2); Sept. 15† (2); Sept. 29† (A) (c); Oct. 6* (2); Oct. 20† (A); Oct. 27†; Nov. 10*; Nov. 17† (2); Dec. 1*.

TWELFTH JUDICIAL DISTRICT

Judge Rousseau

Davidson—Aug. 18; Sept. 8† (2); Sept. 29† (A) (2); Nov. 17 (A) (2).
Guilford, Greensboro Division—July 7† (A) (2); July 7*; July 21* (2); Aug. 25*; Sept. 8† (A) (2); Sept. 8* (A) (2); Sept. 22† (2); Oct. 6† (2); Oct. 6* (A) (2); Oct. 20† (A) (2); Nov. 3* (2); Nov. 17† (2); Dec. 1* (A); Dec. 15*.
Guilford, High Point Division—July 14*; July 28† (A); Sept. 22* (A); Sept. 29* (c); Oct. 20* (2); Nov. 3† (A) (2); Dec. 1†; Dec. 8*.

THIRTEENTH JUDICIAL DISTRICT

Judge Pless

Anson—Sept. 8†; Sept. 22*; Nov. 10†.
Moore—Aug. 11*; Sept. 15†; Sept. 22† (A) (c); Nov. 3† (A).
Richmond—July 14†; July 21*; Sept. 1†; Sept. 29*; Nov. 3†.
Scotland—Aug. 4; Oct. 27†; Nov. 24; Dec. 1 (c).
Stanly—July 7; Sept. 1† (A) (2); Oct. 6†; Nov. 17.
Union—Aug. 18 (2); Oct. 13 (2).

FOURTEENTH JUDICIAL DISTRICT

Judge Nettles

Gaston—July 21*; July 28† (2); Sept. 8* (A); Sept. 15† (2); Oct. 20*; Oct. 27† (A); Nov. 24* (A); Dec. 1†.
Mecklenburg—July 7* (2); July 28* (A); Aug. 4* (A); Aug. 11* (2); Aug. 25*; Sept. 1† (2); Sept. 1† (A) (2); Sept. 15† (A) (2); Sept. 15* (A) (2); Sept. 29† (A) (2); Sept. 29*; Oct. 6† (2); Oct. 13† (A) (2); Oct. 27† (A) (2); Oct. 27† (2); Nov. 10† (A) (2); Nov. 10*; Nov. 17† (2); Nov. 24† (A) (2); Dec. 1* (A); Dec. 8† (A); Dec. 15†.

FIFTEENTH JUDICIAL DISTRICT

Judge Moore

Alexander—Sept. 22; Sept. 29 (c).
Cabarrus—Aug. 18*; Aug. 25†; Oct. 13 (2); Nov. 10† (A); Dec. 1† (A).
Iredell—July 28 (2); Nov. 3 (2).
Montgomery—July 7; Sept. 22† (A) (c); Sept. 29 (A); Oct. 27†.
Randolph—July 14†; July 21; Sept. 1*; Oct. 20† (A) (c); Oct. 27† (A); Dec. 1 (2).
Rowan—Sept. 8 (2); Oct. 6†; Oct. 13† (A) (c); Nov. 17 (2).

SIXTEENTH JUDICIAL DISTRICT

Judge Clement

Burke—Aug. 4 (2); Sept. 22 (2); Oct. 6 (c); Dec. 8 (2).
Caldwell—Aug. 18 (2); Sept. 1† (A) (2); Sept. 29† (A) (c); Oct. 6† (A); Nov. 24 (2).
Catawba—June 30 (2); Sept. 1† (2); Nov. 10 (2); Dec. 1† (A).
Cleveland—July 21 (2); Sept. 8† (A) (c); Sept. 15† (A); Oct. 27 (2).
Lincoln—Oct. 13; Oct. 20†.
Watauga—Sept. 15*; Nov. 10† (A) (2).

SEVENTEENTH JUDICIAL DISTRICTS

Judge Sink

Avery—June 30 (2); Oct. 13 (2).
Davie—Aug. 25; Dec. 1†.
Mitchell—July 21† (2); Sept. 15 (2).
Wilkes—June 30* (A) (s); July 14†; Aug. 4 (3); Sept. 8†; Sept. 29† (2); Oct. 27† (2); Dec. 8 (2).
Yadkin—Aug. 18* (A); Nov. 10†; Nov. 17†; Nov. 25.

EIGHTEENTH JUDICIAL DISTRICT

Judge Phillips

Henderson—June 30† (s); Oct. 6 (2); Nov. 17† (2).
McDowell—July 7† (2); Sept. 1 (2).
Polk—Aug. 18 (2).
Rutherford—Sept. 22† (2); Nov. 3 (2).
Transylvania—July 21 (2); Dec. 1 (2).
Yancey—Aug. 4 (2); Oct. 20† (2).

NINETEENTH JUDICIAL DISTRICT

Judge Gwyn

Buncombe—July 7†* (2); July 14 (A) (2); July 21*†; July 28; Aug. 4†* (2); Aug. 18*†; Aug. 18 (A) (2); Sept. 1†* (2); Sept. 15*; Sept. 15 (A) (c); Sept. 22; Sept. 29†* (2); Oct. 13*†; Oct. 13 (A); Oct. 20; Oct. 27; Nov. 3†* (2); Nov. 17*†; Nov. 17 (A) (2); Dec. 1†* (2); Dec. 15*†; Dec. 15 (A); Dec. 22.
Madison—Aug. 25; Sept. 29 (A) (2); Nov. 24.

TWENTIETH JUDICIAL DISTRICT

Judge Bobbitt

Cherokee—Aug. 4 (2); Nov. 3 (2).
Clay—Sept. 29.
Graham—Sept. 1 (2).
Haywood—July 7 (2); Sept. 15† (2); Nov. 17 (2).
Jackson—Oct. 6 (2).
Macon—Aug. 18 (2); Dec. 1 (2).
Swain—July 21 (2); Oct. 20 (c); Oct. 27.

TWENTY-FIRST JUDICIAL DISTRICT

Judge Armstrong

Caswell—Sept. 29† (A); Nov. 10*.
Rockingham—Aug. 4* (2); Sept. 1† (2); Oct. 20†; Oct. 27* (2); Nov. 24† (2); Dec. 8*.
Stokes—Aug. 18 (c); Oct. 6*; Oct. 13†.
Surry—July 7 (2); Sept. 15; Sept. 22 (2); Nov. 17; Dec. 15.

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*For criminal cases.
†For civil cases.
‡For jail and civil cases.
No designation for criminal and civil cases.
(A) Judge to be assigned.
(s) Special term.
(c) Canceled.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—DON GILLIAM, *Judge*, Tarboro.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—WILSON WARLICK, *Judge*, Newton.

EASTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Raleigh, Civil term, second Monday in March and September; criminal term, fourth Monday after the second Monday in March and September. A. HAND JAMES, Clerk, Raleigh.

Fayetteville, third Monday in March and September. MRS. LILA C. HON, Deputy Clerk, Fayetteville.

Elizabeth City, third Monday after the second Monday in March and September. MRS. SADIE A. HOOPER, Deputy Clerk, Elizabeth City.

New Bern, fifth Monday after the second Monday in March and September. MRS. MATILDA H. TURNER, Deputy Clerk, New Bern.

Washington, sixth Monday after the second Monday in March and September. GEO. TAYLOR, Deputy Clerk, Washington.

Wilson, eighth Monday after the second Monday in March and September. MRS. EVA L. YOUNG, Deputy Clerk, Wilson.

Wilmington, tenth Monday after the second Monday in March and September. J. DOUGLAS TAYLOR, Deputy Clerk, Wilmington.

OFFICERS

CHARLES P. GREEN, U. S. Attorney, Raleigh, N. C.
CICERO P. YOW, Raleigh, N. C., THOMAS F. ELLIS, Raleigh, N. C., FRANK B. BANZET, Raleigh, N. C., Assistant United States Attorneys.
F. S. WORTHY, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

Terms—District courts are held at the time and place as follows:

Durham, fourth Monday in September and fourth Monday in March. HENRY REYNOLDS, Clerk, Greensboro.

Greensboro, first Monday in June and December. HENRY REYNOLDS, Clerk; MYRTLE D. COBB, Chief Deputy; LILLIAN HARKRADER, Deputy Clerk; REID G. LEONARD, Deputy Clerk; MRS. RUTH STARR, Deputy Clerk.

Rockingham, second Monday in March and September. HENRY REYNOLDS, Clerk, Greensboro.

Salisbury, third Monday in April and October. HENRY REYNOLDS, Clerk, Greensboro.

Winston-Salem, first Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro.

Wilkesboro, third Monday in May and November. HENRY REYNOLDS, Clerk, Greensboro; C. H. COWLES, Deputy Clerk.

OFFICERS

BRYCE R. HOLT, United States District Attorney, Greensboro.
R. KENNEDY HARRIS, Assistant United States Attorney, Greensboro.
MISS EDITH HAWORTH, Assistant United States Attorney, Greensboro.
THEODORE C. BETHEA, Assistant United States Attorney, Reidsville.
WILLIAM D. KIZZIAH, Assistant United States Attorney, Reidsville.
HENRY REYNOLDS, Clerk United States District Court, Greensboro.

WESTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Asheville, second Monday in May and November. OSCAR L. MCLURD, Clerk; WILLIAM A. LYTLE, Chief Deputy Clerk; VERNE E. BARTLETT, Deputy Clerk; MRS. NOREEN WARREN FREEMAN, Deputy Clerk.

Charlotte, first Monday in April and October. E. ADRIAN PARRISH, Deputy Clerk, Charlotte.

Statesville, Third Monday in March and September. ANNIE ADERHOLDT, Deputy Clerk.

Shelby, third Monday in April and third Monday in October. OSCAR L. MCLURD, Clerk.

Bryson City, fourth Monday in May and November. OSCAR L. MCLURD, Clerk.

OFFICERS

THOS. A. UZZELL, JR., United States Attorney, Asheville.
*FRANCIS H. FAIRLEY, Assistant United States Attorney, Charlotte.
JAMES B. CRAVEN, JR., Assistant United States Attorney, Asheville.
JACOB C. BOWMAN, United States Marshal, Asheville.
OSCAR L. MCLURD, Clerk United States District Court, Asheville.

*Resigned February 28th, successor not yet appointed.

LICENSED ATTORNEYS

FALL TERM, 1952.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of the 19th day of August, 1952:

AGAPION, WILLIAM STEVE.....Greensboro.
ALEXANDER, LELIA M.....Charlotte.
ALSTON, EDGAR LEONIDAS, JR.....Greensboro.
ANDERSON, CHARLES EDWIN.....Wake Forest.
ANDREWS, IKE FRANKLIN.....Bonlee.

BEAM, GAITHER MACINTYRE, JR.....Louisburg.
BECK, ADAM WAYNE.....Wake Forest.
BEECH, HARVEY ELLIOTT.....Kinston.
BERRY, HARRY ANDERSON, JR.....Charlotte.
BLACKWELL, ROBERT ROSS.....Reidsville.
BLOUNT, JAMES DAVIS, JR.....Wilson.
BOBBITT, WILLIAM HAYWOOD, JR.....Charlotte.
BOGER, JOHN RAY, JR.....Concord.
BOWEN, JOSEPH FRANCIS, JR.....Greenville.
BOWERS, ROBERT GREEN.....Winston-Salem.
BRASWELL, ROLAND CLIFTON.....Goldsboro.
BRIDGER, EDGAR HOBBS.....Bladenboro.
BRITT, SAMUEL EMERSON.....Lumberton.
BROCK, DONALD PATRICK.....Trenton.
BROOKS, JAMES HARDEE.....Kinston.
BROWNING, JAMES RICHARDSON.....Wilson.
BULLOCK, JAMES FOSTER.....Lumberton.

CARPENTER, BERLIN HOMER, JR.....Crouse.
CASHWELL, WALTER JAMES, JR.....Laurinburg.
CHAFFIN, JOHN TAYLOR.....South Mills.
CLARK, GEORGE THOMAS, JR.....Wilmington.
COOPER, THOMAS DUNCAN, JR.....Burlington.
COXE, WILLIAM FOTTERALL POTTER, JR.....Biltmore.
CURRIN, ERNEST LUCIUS, JR.....Olivia.

DAUGHTRIDGE, VERNON FLETCHER, JR.....Rocky Mount.
DAVENPORT, JOHN EDWIN.....Nashville.
DELANEY, ERNEST STANHOPE, JR.....Chapel Hill.
DIXON, CHARLES DENNIS.....Belmont.
DUNN, RAYMOND EARL.....New Bern.
DWYER, JOHN ANDREW.....Whiteville.

EAKER, WILLIAM JOSEPH.....Charlotte.
EDENS, HUBERT BRYAN.....Wilmington.
EDENS, JOSEPH PIERCE, JR.*.....Wake Forest.
ELAM, HARPER JOHNSTON, III.....Chapel Hill.
ERVIN, WINFRED REYNOLDS.....Cramerton.
EVANS, JOE HOWARD.....Hickory.

FITZGERALD, THOMAS CLARK, JR.....New Bern.
FOLGER, FRED, JR.....Mount Airy.

*License not issued or to issue until compliance with rules of the Board.

FORTESCUE, HUGH PERRY, JR. ..... Washington.
FRIDAY, HOMER BENJAMIN, JR. ..... Salisbury.

GADSDEN, MITCHEL EDWARD ..... Durham.
GILES, JOHN EDWARD ..... Glen Alpine.
GILES, ROBERT EDWARD ..... Chapel Hill.
GODWIN, NATHAN HENRY ..... Durham.
GOSLEN, FRANK ODELL ..... Kernersville.
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Given over my hand and the seal of the Board of Law Examiners, this 31st day of December, 1952.

EDWARD L. CANNON,
Secretary, Board of Law Examiners,
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1952

STATE v. WILLIAM G. SCOGGIN, JR.

(Filed 22 August, 1952.)

1. Appeal and Error § 40l—

The rule that the Supreme Court will not decide a constitutional question when the appeal may be decided upon a question of lesser moment applies only to acts of the General Assembly and not to the validity of a municipal ordinance.

2. Appeal and Error § 1—

The Supreme Court will overlook nonfatal deficiencies in the record in order to exercise its existing jurisdiction at the first opportunity when the appeal presents a grave problem of general public concern.

3. Constitutional Law § 14½—

The General Assembly has the power to regulate parking of automobiles in congested areas in the exercise of the State's police power to promote peace, comfort, convenience, and prosperity of its people.

4. Municipal Corporations § 36—

The General Assembly may delegate to a municipality, as a governmental agency or arm of the State, authority to enact ordinances in the exercise of the police power for the government of those within its limits, including the right to prescribe rules or standards of conduct, the violation of which shall constitute a criminal offense.

5. Constitutional Law § 11: Municipal Corporations § 36—

The police power is subordinate to the constitutional guarantee of equality of privilege and of burden, and any attempted exercise thereof which results in the denial of equal protection or application of the law is invalid. Fourteenth Amendment to the Federal Constitution.

6. Municipal Corporations § 36—

An ordinance adopted by a municipality in the exercise of delegated police power must be uniform and apply alike to all within a designated class and must have a reasonable relation to the evils sought to be remedied.

7. Municipal Corporations § 5—

A municipality is a mere creature of the Legislature with only such powers as are delegated to it, which delegated powers must be exercised strictly within the limitations prescribed by the General Assembly.

8. Municipal Corporations § 38½—

A municipality in the exercise of the police power delegated to it by G.S. 160-200 (31) may require a motorist who parks his vehicle in a parking meter zone to set the meter in operation by depositing a coin, provided that the deposit of the coin is the method selected by its governing body in the exercise of its discretion for the purpose of regulating parking in the interest of the public convenience and not as a revenue raising measure.

9. Statutes § 11—

Penal statutes are construed strictly against the State and liberally in favor of the private citizen with all conflicts and inconsistencies resolved in his favor.

10. Municipal Corporations § 38½—

Where a municipal ordinance prescribes that parking in a designated zone should be limited to one hour, a motorist cannot be convicted of overtime parking when he parks in such zone for less than the prescribed one hour period, and a provision of the ordinance that a motorist should be subject to criminal prosecution if he parks in the one hour zone for longer than twelve minutes upon the deposit of a one-cent coin, or twenty-four minutes upon the deposit of two one-cent coins for successive periods, *is held* unconstitutional as being discriminatory and as making the period of time dependent not upon public convenience but upon the amount of money deposited.

11. Same—

Where a municipal ordinance prescribes one-hour and two-hour parking meter zones upon the deposit of a five-cent coin, the ordinance may permit by nonpenal provisions that a motorist may deposit a one-cent coin for a shorter length of time, provided the motorist may, by depositing additional pennies, not to exceed a total of five, remain in the parking space for the total length of time prescribed by the ordinance for such zone.

12. Criminal Law § 81c (4)—

Where a general verdict of guilty is returned upon a warrant charging two counts and there is no error in the trial in respect to one of the counts, defendant is not entitled to a new trial.

ERVIN, J., concurring in result.

APPEAL by defendant from *Carr, J.*, March Term, 1952, WAKE.

Criminal prosecution under warrant issued out of the City Court of the City of Raleigh in which it is charged that defendant violated a city parking ordinance by (1) leaving his automobile standing in a meter-controlled parking space without setting said meter in operation by depositing "a coin of any sort" therein, and (2) parking overtime.

The City of Raleigh has adopted and there is now in force in said city an ordinance declaring that certain areas of the city, mainly in the business section, are so congested by vehicular traffic that "public convenience and safety demand" regulation, and dividing said congested areas into twelve-minute, one-hour, and two-hour limited parking zones between 8:00 a.m. and 6:00 p.m. during weekdays with certain exceptions not material here.

Some of the zones are meter controlled. Others are not. It is necessary for us to summarize the sections of the ordinance, the provisions of which are essential to an understanding of the questions involved on this appeal.

Section 19 provides that "when signs are erected in each block giving notice thereof," no person shall park a vehicle for a longer period than the time specified for the respective areas thereinafter designated and defined on any day between 8:00 a.m. and 6:00 p.m. except on Sundays and certain holidays. It then zones the congested areas in part as follows:

"*One Hour Parking.* No person shall park any vehicle for longer than ONE HOUR at any one time along the following streets . . .

"(a) . . .

"(b) Along Fayetteville Street between Morgan Street and Cabarrus Street."

The necessary finding as to the demands of public convenience and safety and the declared policy of the city in respect to areas congested by vehicular traffic required by G.S. 160-200 (31) are contained in Section 66. This section likewise establishes meter parking zones. Fayetteville Street from Morgan to Cabarrus is included, and parking thereon is limited to one hour between 8:00 a.m. and 6:00 p.m. except on Sundays and certain holidays and except at the Post Office and three spaces on the east side just south of Martin where parking is limited to twelve minutes both day and night.

Signs have been erected in each block of this area as required by Section 19. These signs are printed on metal in green letters on a white background and read as follows:

"One Hour Parking from 8 A.M. to 6 P.M."

Defendant's automobile was parked in a one-hour parking space within this zone.

Section 67 makes provision for the installation of parking meters for the purpose of regulating parking within the zones established by Section 66. It requires individual parking spaces to be marked off and desig-

nated and that a parking meter be installed "upon the curb alongside of or next to, individual parking places . . ." It further provides that "Each parking meter shall be so set as to display a signal showing legal parking upon the deposit of a five-cent coin . . . therein for a period of one hour, or a one-cent coin therein for a period of twelve minutes . . . for parking within a one-hour parking meter zone . . ." "Each parking meter shall also be so arranged that upon the expiration of said parking limits it will indicate by mechanical operation and proper signal that the lawful parking periods as fixed by this section have expired." It also makes similar provisions for the twelve-minute and the two-hour parking zones.

Section 68 provides that "when any vehicle is parked in any space alongside of . . . a parking meter, the owner . . . or driver of said vehicle shall . . . deposit a five-cent coin, or a one-cent coin, depending upon the length of time said owner . . . or driver shall require, in the parking meter alongside of . . . said parking space, and shall set said meter in accordance with the instructions contained thereon; and the said parking space may then be used by such vehicle during the parking limits provided in section 67 of this chapter. If said vehicle shall remain parked in such parking space beyond the period of one hour upon the deposit of (a) five-cent coin or the period of twelve minutes upon the deposit of a one-cent coin within a one-hour parking meter zone . . . the parking meter shall display a sign indicating illegal parking, and in that event such vehicle shall be considered parked overtime, and the parking of a vehicle overtime . . . where any such meter is located shall be a violation of article one of this chapter and punished as therein provided; provided, that any owner . . . or driver of any vehicle shall be allowed to deposit, at separate intervals, one-cent coins for a parking period of twelve minutes within a one-hour zone . . . the aggregate deposit not to exceed two one-cent coins for two such parking periods."

Section 69. "No person shall be allowed to deposit . . . more than two one-cent coins for the purpose of extending his parking period . . ."

Section 78 makes the violation of any of the provisions of Sections 66-78 subject to the penalties provided in Chapter 5 of the City Code.

There are attached to each meter "plainly visible" instructions as follows:

"ONE HOUR PARKING

12 minutes 1c
24 minutes 2c
36 minutes 3c
48 minutes 4c
60 minutes 5c

OR ONE NICKEL
8 A.M. to 6 P.M. Daily
Sundays Excepted"

The jury found all the facts pertaining to the parking ordinances and the installation of meters as here summarized and further found that "On February 25, 1952, not being a Sunday or other holiday as set out in said ordinances, and between the hours of 8 A.M. and 6 P.M., defendant willfully drove his Buick automobile into the parking meter space on the east side of Fayetteville Street, between Morgan Street and Cabarrus Street . . . and there parked said automobile for a period of 15 minutes . . . Defendant willfully failed and refused to deposit any coin of any sort in the said parking meter upon the curb alongside . . . said space, either at the time he entered said parking space with his automobile or at any time during the period that said automobile remained in said parking space, and said parking meter during said entire period displayed a sign plainly indicating illegal parking."

It returned its findings of fact as a special verdict. The presiding judge being of the opinion that, on the facts found, defendant is guilty as charged, so instructed the jury. The jury thereupon returned a verdict of guilty. The judge pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan and Robert B. Broughton, Member of Staff, for the State.

Joseph B. Cheshire, Jr., for defendant appellant.

BARNHILL, J. Following our decision in *Rhodes, Inc., v. Raleigh,* 217 N.C. 627, 9 S.E. 2d 389, the General Assembly adopted Ch. 153, Session Laws of 1941, now G.S. 160-200 (31), vesting in the municipalities of the State authority "to regulate and limit vehicular parking on streets and highways in congested areas." The Act further provides in part that "in the regulation and limitation of vehicular traffic and parking in cities and towns the governing bodies may, in their discretion, enact ordinances providing for a system of parking meters designed to promote traffic regulation and requiring a reasonable deposit (not in excess of five cents per hour) from those who park vehicles for stipulated periods of time in certain areas in which the congestion of vehicular traffic is such that public convenience and safety demand such regulation." See also G.S. 160-501 and sec. 22 (36), Ch. 1184, S.L. 1949 (Charter of City of Raleigh).

G.S. 160-200 (31) vests the City of Raleigh with authority to divide the areas of the city congested by vehicular traffic into zones or districts,

limit the parking of automobiles in such zones as public convenience and safety may demand, install meters in furtherance of the enforcement of such regulations, and require a motorist who leaves his automobile standing in a meter-controlled parking space to put the meter alongside said parking space in operation by depositing the designated coin in the meter at the time he enters the space for the purpose of parking to the end his parking may be timed or measured by the meter for the information of the law enforcement officers of the city.

Pursuant to this authority thus vested in it, the governing body of the City of Raleigh enacted the ordinance which is summarized in the statement of facts, zoning areas congested by automobile traffic and providing for the regulation of parking within said zones by the use of parking meters.

The ordinance adopted creates two criminal offenses material here: (1) parking in a meter-controlled parking space without first setting the meter in operation by depositing in it one of the designated coins; (2) leaving an automobile standing in said space for a period longer than that specified by the ordinance and signs erected for that particular zone.

The defendant is charged with the violation of each of these penal provisions of the ordinance. He was convicted on both counts. He rests his appeal to this Court primarily upon the contentions that (1) the ordinance is invalid as a police regulation, and (2) the City of Raleigh, in adopting the ordinance it now seeks to enforce, exceeded the authority delegated to it by the General Assembly. He states the question presented in this manner: "Does the requirement, on pain of criminal liability, for the deposit of money in a parking meter in order to park an automobile on the public streets for a period of time which varies in accordance with the amount of money deposited have a reasonable relation to the legitimate exercise of police power in the regulation and limitation of vehicular traffic and parking?"

It is suggested, however, that this raises a constitutional question, and courts do not let a case turn on a constitutional question when it may be decided on any other grounds. This is a sound rule when rightly applied. It is bottomed on the philosophy of equality between the legislative, executive, and judicial branches of our government and the system of checks and balances provided by our fundamental law. While we have cited the rule in cases involving municipal ordinances, strictly speaking, it applies only to Acts of the General Assembly—a co-ordinate branch of the government. *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22; *S. v. High,* 222 N.C. 434, 23 S.E. 2d 343.

The constitutionality of the enabling statute is not at issue, and there is no sound reason why we should hesitate to determine whether a municipal corporation, a subordinate branch of the government, a creature of

the Legislature which can exercise only those powers which have been expressly or by necessary implication delegated to it, has exceeded its authority. *Madry v. Scotland Neck,* 214 N.C. 461, 199 S.E. 618.

It would seem to be clear that this and the companion case against this same defendant, this day decided, are test cases to ascertain to what extent and in what manner the meter method of controlling parking of vehicles in congested areas of municipalities may be accomplished. It is apparent the defendant agreed to become the guinea pig in the test and is co-operating, for he has made material admissions of fact which the State, no doubt, would have found it most difficult to establish if it had been put to proof.

Moreover, the questions here presented are of vital public interest, affecting many of the municipalities of the State. It is a matter of common knowledge that the criminal dockets in the Superior Courts of those counties in which parking meters are used are becoming congested with appeals from city courts in overtime parking cases. Solicitors and judges alike doubt the constitutionality of some of the provisions of the ordinances and the sufficiency of available proof in many cases. At least one judge of the Superior Court has held a similar ordinance unconstitutional *in toto* and even members of this Court are not in complete accord.

None of the parties are entitled to an advisory opinion from this Court. They have adopted the only method available to them to ascertain the validity of the ordinance. In turn we, in the public interest, must do our part by overlooking nonfatal deficiencies in the record and deciding the essential questions presented to the end any necessary revisions of the ordinance may be made and the officers of the law and the trial courts may proceed to enforce parking regulations with assurance as to their duties and the rights of individual motorists.

While necessity does not create power, it sometimes demands the prompt and effective exercise of power. We must not assume authority we do not possess, but we must at times exercise existing jurisdiction at the first opportunity to the end the executive and legislative branches of the government may know what they may and should do to meet a grave problem of general public concern. This is one of those occasions.

As we said in *Insurance Asso. v. Parker,* 234 N.C. 20, "The complexity of today's commercial relations and the constantly increasing number of automobiles render the question of parking a matter of public concern which is taxing the ingenuity of our municipal officials." Unquestionably, the power to enact laws designed and intended to meet this problem comes within the general authority of the Legislature to enact laws to promote the peace, comfort, convenience, and prosperity of its people. *Escanaba, etc., Trans. v. Chicago,* 107 U.S. 678, 27 L. Ed. 442; *S. v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731. The evils to be remedied are

proper objectives of legislation enacted under the police power of the State.

A municipality is a governmental agency or arm of the State, and so the General Assembly may delegate to a city or town the authority to enact ordinances in the exercise of the police power for the government of those within its limits. *Bohn v. Salt Lake City,* 8 P. 2d 591, 81 A.L.R. 215. This includes the power to prescribe rules or standards of conduct the violation of which shall constitute a criminal offense. *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650.

But this power is subordinate to the constitutional guarantee of equality of privilege and of burden contained in the Fourteenth Amendment to the Federal Constitution. *Republic Iron & Steel Co. v. State,* 66 N.E. 1005, 62 L.R.A. 136; *Smith v. Cahoon,* 283 U.S. 553, 75 L. Ed. 1264. Any attempted exercise of the police power which results in the denial of equal protection of the law is invalid. *Smith v. Cahoon, supra.*

Therefore, an ordinance must be uniform and must have a reasonable relation to the evil sought to be remedied. Its objective must be the elimination of the known evil and must be so designed that it applies alike to all within a designated class. *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706; *S. v. Danenberg,* 151 N.C. 718, 66 S.E. 301; *Shelby v. Power Co.,* 155 N.C. 196, 71 S.E. 218; *Clinton v. Oil Co.,* 193 N.C. 432, 137 S.E. 183; *McRae v. Fayetteville,* 198 N.C. 51, 150 S.E. 810; *Shuford v. Waynesville,* 214 N.C. 135, 198 S.E. 585; *Rhodes, Inc., v. Raleigh, supra.*

Furthermore, a municipality is a mere creature of the Legislature. It has no inherent power and must exercise delegated power strictly within the limitations prescribed by the Legislature. *Kass v. Hedgpeth,* 226 N.C. 405.

So much for the principles of law which must control decision here. In considering the ordinance under which defendant stands indicted, it must be noted in the beginning that its validity depends, in the first instance, upon whether it meets the condition or limitation contained in the enabling statute, and its enforceability is restricted by the condition imposed by the ordinance itself.

The city may enact a meter control parking ordinance only for those "areas in which the congestion of vehicular traffic is such that public convenience and safety demand such regulation," G.S. 160-200 (31), and the ordinance is effective "when signs are erected in each block giving notice thereof." Section 19, Code of Raleigh.

On this record it is apparent that defendant is guilty on the first count and his conviction must be sustained if the provisions of the ordinance under which the charge is laid is valid and enforceable as a penal police regulation. We are of the opinion that it must be so considered.

A meter is a mechanical watchman set to time the period of parking in the parking space it is set to watch. It has come into widespread use and is accepted by public officials and motorists alike as a practical solution of the traffic problems involved in areas of cities which are congested by vehicular traffic, and it is now an established part of the traffic control system of many municipalities.

But it is a useless device constituting an unnecessary obstacle to free passage on the sidewalk unless it is set in operation at the time a motorist parks his vehicle. The requirement that the motorist set the meter in operation is a necessary part of the regulation intended and designed to control parking in congested areas and must be upheld as such. We do not deem it unreasonable to require a motorist to perform this service as a condition precedent to his right to park. That this is to be accomplished by the deposit of a coin is immaterial so long as it is a means to that end and not a disguised method of raising revenue.

It is quite true that in all probability some feasible method of setting the meter in operation without requiring the motorist to deposit a coin and thus, in a sense, "pay" for his right to park upon a public street may be devised. But the existence of some other method does not render the action of the board in selecting the coin method void. It had the right, in its discretion, to select the plan which it deemed best under the circumstances.

Of course, the difficulty has been and will continue to be the limitation of the requirement that the meter be set in operation by the deposit of a coin in such manner as to retain the regulation as one designed to promote the public convenience and safety and not to raise revenue. It is valid only so long as its prime purpose is to regulate parking in congested areas, and the maintenance fund derived from the deposit of coins is purely incidental. Here it is not found as a fact, and we find in the record no substantial indication, that the ordinance is a revenue-producing measure rather than a police regulation.

This brings us to the second count in the warrant in which it is charged that defendant parked overtime. He parked only fifteen minutes in a one-hour parking space on a street where the signs give notice that one-hour parking is permitted. Yet he stands convicted on this charge.

Section 19 of the ordinance declares that "when signs are erected . . . giving notice thereof . . . no person shall park any vehicle" on Fayetteville Street "longer than one hour at any one time . . ." Signs have been erected in the block where defendant's automobile was parked, giving notice that one-hour parking is permitted in that block. The city board has formally declared in the ordinance that public convenience and safety demand that parking on Fayetteville Street between Morgan and Cabarrus shall be limited to one hour. In view of these positive provisions of

the ordinance, is a motorist guilty of overtime parking when he leaves his vehicle standing in a parking space in that zone for only 15 minutes? The answer to this question necessitates a consideration of the provisions of Sections 68 and 69 of the ordinance which declare, in effect, that upon the deposit of only one penny in any meter at a one-hour parking space, lawful parking shall be limited to twelve minutes, and that upon the deposit of a second penny at a later interval the lawful parking time shall be extended to a total of twenty-four minutes. Are these provisions, creating limits within a limit, valid police regulations or do they offend the rule of uniformity as contended by defendant?

The ordinance contains no declaration that public convenience and safety demand that a motorist shall not park his vehicle in the area which includes the parking space in question for more than twelve minutes or twenty-four minutes. Instead, it declares in positive terms, that cannot be misunderstood, that parking for not more than one hour therein is lawful; that parking for more than that period at any one time is the act that is inconsistent with the demands of public convenience and safety. Likewise, the signs erected and the instructions attached to the meters in that block give notice to the public that one-hour parking in a space set apart therein for that purpose is lawful. We cannot say that the ordinance declares that public convenience and safety require that either twelve minutes or twenty-four minutes shall constitute the period of lawful parking in that block without holding that the provision is written into the ordinance by necessary implication in direct conflict with the positive terms of the law and the signs erected pursuant thereto. And it is axiomatic that penal statutes are construed strictly against the State and liberally in favor of the private citizen. All conflicts and inconsistencies are resolved in favor of the defendant.

Furthermore, to say that public convenience and safety demand that one motorist may not lawfully park his vehicle for more than twelve minutes or twenty-four minutes while another may park an hour in the same space would destroy uniformity, eliminate equality of privilege, and create a serious conflict in the terms of the ordinance itself. The conclusion that parking for one hour in a space set apart for one-hour parking is consistent with the demands of public convenience and yet public convenience requires a motorist to remove his vehicle from the identical space at the end of twelve minutes or twenty-four minutes is so conflicting in content as to be utterly irreconcilable. If public convenience and safety will permit one motorist to park in a given space for the period of one hour, then that privilege must be accorded to all, without additional limitation or restriction, in accord with the requirements of uniformity of right and equality of privilege guaranteed by the Fourteenth Amendment of the Federal Constitution.

In providing for the lesser parking limitations, the ordinance itself recognizes and classifies the space as a one-hour parking space and unequivocally bases the lesser periods upon the amount of money deposited in the meter. There is no attempt to evade or camouflage this fact. "Each parking meter shall be so set as to display a signal showing legal parking upon the deposit of a . . . one-cent coin therein for a period of twelve minutes, for that part of the street upon which the meter is placed, *for parking within a one-hour parking meter zone* . . ." Section 67. "If said vehicle shall remain parked in such parking space beyond the period of . . . twelve minutes upon the deposit of a one-cent coin *within a one-hour parking zone* . . . such vehicle shall be considered parked overtime . . ." Section 68. "Provided that any owner . . . or driver of any vehicle shall be allowed to deposit, at separate intervals, one-cent coin for a period of twelve minutes *within a one-hour zone* . . . the aggregate deposit not to exceed two one-cent coins for two such parking periods." Section 69. (Italics supplied.)

Other language used in the ordinance likewise refutes any suggestion that the two lesser parking periods provided for in a one-hour parking space are bottomed on the demands of public convenience and safety. A motorist, upon entering a one-hour parking space for the purpose of parking, "shall, upon entering said parking space immediately deposit a five-cent coin or a one-cent coin, depending upon the length of time said owner . . . driver shall require . . ." Thus the right to select the lesser period is made to rest in the individual motorist and not upon the demands created by congested traffic. While the individual motorist is entitled to every consideration conditions will permit, his requirements or desires cannot be made the basis of penal police regulations. Though he first selects a twelve-minute period when he enters the parking space, his right to remain for the full period of one hour in accord with the ordinance still exists.

Therefore, the conclusion is inescapable that the lawfulness of the parking for the lesser periods of twelve minutes or twenty-four minutes in a one-hour parking space prescribed by the ordinance rests not on the demands of public convenience and necessity required by the enabling statute and the fundamental law but upon the amount of money deposited in the meter. This will not suffice for the lawfulness of parking cannot be made to depend upon the amount of money deposited in the meter. The maximum length of time the motorist may leave his vehicle standing in a parking space on a public street must be fixed by law.

It follows that since the defendant parked for only fifteen minutes in a one-hour parking space he is not guilty of parking overtime as charged in the second count of the warrant.

The vice in the ordinance does not lie in the fact a motorist who intends to park only temporarily is permitted to select a period of parking less than one hour and thereby decrease the amount he is required to deposit in the meter to set it in operation. It lies in the fact that when he once selects a twelve or twenty-four minute period, he is thereafter prohibited, on pain of criminal prosecution, from extending that time by depositing additional pennies, not to exceed a total of five, so as to exercise the privilege granted by the ordinance, the signs erected thereunder, and the instructions attached to the meter. Therefore, it must not be understood that we mean to say that it is improper or unlawful for the city to establish shorter parking periods for one-hour and two-hour parking spaces by nonpenal provisions such as those now contained in its ordinance for the convenience of the motorist, to minimize his contribution to the maintenance fund, and to expedite traffic.

If the motorist permits the meter to register overtime parking, he is subject to citation to court to answer the charge of parking overtime. No doubt the coercive influence of this fact, with its attendant expense and loss of time, will induce most, if not all, motorists to comply strictly with such secondary or incidental provisions. In any event, it is for the city board to balance the advantages and disadvantages which may arise therefrom and decide which is the better course to pursue.

The jury returned a general verdict of guilty. There was no error in the trial with respect to the first count and only a minimum fine was imposed. Under these circumstances no cause for a new trial is made to appear. *S. v. Foy,* 233 N.C. 228, 63 S.E. 2d 170; *S. v. Cobb,* 233 N.C. 647, 65 S.E. 2d 131; *S. v. Best,* 232 N.C. 575, 61 S.E. 2d 612; *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804; *In re McKnight,* 229 N.C. 303, 49 S.E. 2d 753; *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363.

The court below will enter a verdict of not guilty on the second count in accord with this opinion. In the trial on the first count we find

No error.

ERVIN, J., concurring in the result reached by the majority, but dissenting from certain legal views expressed by them.

I accept without reservation the decision that no error was committed on the trial in the court below. But I find myself in disagreement with the majority in two respects.

The first point of disagreement concerns the interpretation of the record and is inconsequential in nature. As I see it, the accused has been adjudged guilty of this single offense: parking a motor vehicle in a parking space in the City of Raleigh without depositing a coin in the nearest parking meter as required by the city parking meter ordinance.

The second point of disagreement involves a question of constitutional law and is fundamental in character. For this reason, I deem it permissible for me to set forth in detail the reasons which leave me with the abiding conviction that there is no conflict between any of the provisions of the parking meter ordinance under review and the organic law.

It seems advisable to advert at the outset to the decision in *Rhodes v. Raleigh,* 217 N.C. 627, 9 S.E. 2d 389, 130 A.L.R. 311, which has been rather generally misinterpreted by legal text writers. This case turned on the fundamental proposition that a municipality is a creature of the State and has no powers save those conferred upon it by the laws of the State. *Green v. Kitchin,* 229 N.C. 450, 50 S.E. 2d 545; *S. v. Gulledge,* 208 N.C. 204, 179 S.E. 883; *S. v. Thomas,* 118 N.C. 1221, 24 S.E. 535. When it was argued and decided, the statute then codified as C.S. 2787 (31) gave municipalities power merely "to provide for the regulation . . . and limitation of . . . vehicular traffic" upon their public streets. The only question directly and properly before the court in the *Rhodes case* was whether or not C.S. 2787 (31) or any other then existing legislative enactment conferred upon the City of Raleigh power to enact an ordinance regulating parking on its streets by the use of coin-operated parking meters. The majority of the court answered that question in the negative. The various statements in the Court's opinion which were not necessary to the decision of that precise question constitute *obiter dicta,* and have no effect as declaring the law.

At its first session after the decision in the *Rhodes case,* the Legislature adopted Chapter 153 of the Public Laws of 1941 for the avowed purpose of amending C.S. 2787 (31). The amendatory act, which is now embodied in G.S. 160-200 (31), gives to municipalities in express terms the power "to regulate and limit vehicular parking on streets in congested areas." Moreover, it specifies that "in the regulation and limitation of vehicular traffic and parking in cities and towns the governing bodies may, in their discretion, enact ordinances providing for a system of parking meters designed to promote traffic regulation and requiring a reasonable deposit (not in excess of five cents per hour) from those who park vehicles for stipulated periods of time in certain areas in which the congestion of vehicular traffic is such that public convenience and safety demand such regulation." It further provides that "the proceeds derived from the use of such parking meters shall be used exclusively for the purpose of making such regulation effective and for the expenses incurred by the city or town in the regulation and limitation of vehicular parking, and traffic relating to such parking, on the streets and highways of said cities and towns."

It thus appears that the Legislature has explicitly delegated to municipalities the power to enact ordinances regulating vehicular parking on

public streets in congested areas by the use of parking meters, and providing for the collection of a meter fee sufficient to cover the expenses of maintaining the parking meters and enforcing parking regulations.

Subsequent to the adoption by the General Assembly of 1941 of the statute now codified as subsection 31 of G.S. 160-200, the City of Raleigh enacted a parking meter ordinance "to regulate and limit vehicular traffic and parking . . . during the hours of 8:00 o'clock A.M. to 6:00 o'clock P.M. each day, except Sundays, Independance Day, Labor Day, Thanksgiving Day, and Christmas Day . . . in certain areas of the city . . . in which the congestion of vehicular traffic is such that public convenience and safety demand such regulation."

The ordinance divides the specified areas of the city into three classes of districts designated as twelve minute parking meter zones, one hour parking meter zones, and two hour parking meter zones. Under its provisions, parking spaces are marked off on the streets of the various zones in which motor vehicles may be parked, and parking meters, which are clocks set on posts to measure the time of parking, are installed along the curbing, one to each parking space. The motorist who parks in one of these parking spaces is required to deposit in the nearest parking meter a specified coin for a designated period of parking. The deposit of the coin starts operation of the clock mechanism. Each parking meter bears an inscription showing the legal parking time for the zone in which it is situated, and when operated points out by its dial and hand the duration of the period of legal parking, and on the expiration of such period, indicates illegal or overparking.

Under the ordinance, the motorist is required to deposit in the nearest parking meter "a one-cent coin . . . for a period of twelve minutes" when he parks in a parking space in a twelve-minute parking meter zone; "a five-cent coin . . . for a period of one hour, or a one-cent coin . . . for a period of twelve minutes" when he parks in a parking space in a one-hour parking meter zone; and "a five-cent coin . . . for a period of two hours, or a one-cent coin for a period of twenty-four minutes" when he parks in a parking space in a two-hour parking meter zone. The ordinance expressly establishes the rule that the motorist cannot extend the legal parking time set forth above by depositing additional coins in the parking meter. It permits this solitary exception to this rule: The motorist may "deposit, at separate intervals, one-cent coins for a parking period of twelve minutes within a one-hour zone, or twenty-four minutes within a two-hour zone, the aggregate deposit not to exceed two one-cent coins for two such parking periods."

The ordinance specifies that "the proceeds derived from the use of . . . (the) . . . parking meters shall be used exclusively for the purpose of making . . . (the) . . . regulation effective and for the expenses in-

curred by the city . . . in the regulation and limitation of vehicular parking, and traffic relating to such parking, on the streets of . . . (the) . . . city." It provides criminal penalties for its violation.

The defendant was tried and convicted in the City Court of Raleigh upon a criminal complaint and warrant charging that he violated the parking meter ordinance of the City of Raleigh by willfully parking a motor vehicle in a parking space in a one-hour parking meter zone without depositing a coin in the nearest parking meter. He was ordered to pay a nominal fine, and appealed from the judgment imposing it to the Superior Court, where trial was had *de novo* on the original papers.

When the case was heard in the Superior Court, the jury returned a special verdict, which set out in approved form and specific detail facts showing that the defendant deliberately committed all the acts alleged in the criminal complaint and warrant. The trial judge concluded as a matter of law upon the special verdict that the defendant was guilty as charged, and rendered judgment that he pay a fine of $5.00 and the costs. The defendant excepted and appealed, asserting by appropriate assignments of error that the parking meter ordinance of the City of Raleigh and the underlying enabling act contravene the law of the land clause embodied in Article I, Section 17, of the North Carolina Constitution in so far as they undertake to authorize the exaction of a fee or charge for parking on a public street of the city, and that in consequence his conviction and the resultant judgment are void.

It is obvious that the City of Raleigh passed its parking meter ordinance in the exercise of the legislative authority granted to it by the statute now embodied in G.S. 160-200 (31). Manifestly this parking meter ordinance and the underlying enabling act have for their purpose the regulation of vehicular parking, and not the raising of revenue. This being true, they were enacted in the exercise of the police power of the State.

The police power of the State extends not only to regulations promoting public health, public morals, and public safety, but also to those designed to promote public convenience. *Wake Forest v. Medlin,* 199 N.C. 83, 154 S.E. 29. The only limit to its exercise is that regulations must not violate the law of the land clause embodied in Article I, Section 17, of the State Constitution, or any other constitutional provision. *Brewer v. Valk,* 204 N.C. 186, 167 S.E. 638, 87 A.L.R. 237.

To satisfy the law of the land clause, a regulation adopted in the attempted exercise of the State's police power must meet these requirements: (1) The regulation must be established for a purpose falling within the scope of the police power; and (2) the measures sanctioned by the regulation must be *actually* and *reasonably* adapted to accomplish such purpose. *S. v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731, 7 A.L.R. 2d 407.

It is too evident to admit of dispute that the parking meter ordinance and the underlying enabling act fulfill the first requisite of the law of the land clause. Their apparent and avowed purpose is to promote public convenience and public safety in the use of public streets in congested areas. *S. v. Carter,* 205 N.C. 761, 172 S.E. 415; 64 C.J.S., Municipal Corporations, section 1762.

This brings us to the crucial question whether the measures sanctioned by the parking meter ordinance and the enabling statute are *actually* and *reasonably* adapted to promote public convenience and public safety in the use of public streets in congested areas.

Judges are not required by law to be more ignorant than all other men. In consequence, they know judicially that the advent of the motor vehicle has made the regulation of parking in congested areas of our cities and towns a public necessity; that the only available and practical mode of regulation is the imposition of time limits on parking; that attempts to enforce such time limits by means of the "watch and chalk" method used by police officers in making rounds at appointed intervals proves both costly and unsatisfactory; and that coin-operated parking meters afford public authorities an accurate and inexpensive way to time motorists in their parking and thus to avoid overtime parking. *Cassidy v. City of Waterbury,* 130 Conn. 237, 33 A. 2d 142; *Foster's, Inc. v. Boise City,* 63 Idaho 201, 118 P. 2d 721; *People on Complaint of Bergen v. Littman,* 193 Misc. 40, 85 N.Y.S. 2d 48; *Owens v. Owens,* 193 S.C. 260, 8 S.E. 2d 339. The Supreme Court of Washington made these well chosen remarks in declaring parking meters admirably designed to facilitate the enforcement of time limits on parking: "We fail to see what difference it can make to either the traveler on the street or the occupant of abutting property whether the time limitations be enforced by a policeman marking cars with a piece of chalk or by a mechanical device that registers 'Time's up' in a way that all may see. The object of both is to prevent overtime parking, and, of the two, it seems to us that the latter is more effective. With the latter, there are no minutes of grace as there are with the policeman while he is making his rounds 'marking' and 'checking up,' for the time begins to run when the car is parked, and ends when the meter registers 'Time's up.'" *Kimmel v. City of Spokane,* 7 Wash. 2d 372, 109 P. 2d 1069.

The regulations promulgated by the ordinance under the authority of the enabling act classify the congested areas of the City of Raleigh as twelve-minute parking meter zones, one-hour parking meter zones, and two-hour parking meter zones conformable to their respective traffic conditions; impose time limits on the parking of motor vehicles on streets in the areas so classified to meet the respective regulatory requirements of the several zones; establish a coin-operated parking meter system to meas-

ure and mark the time limits so imposed; exact from motorists who park their vehicles on streets in the classified areas a nominal meter fee to cover the expense of maintaining the parking meter system and enforcing parking regulations; and provide criminal penalties for overtime parking and other violations of the regulations.

If a municipality is to regulate the parking of motor vehicles through the agency of parking meters, it must require motorists to deposit coins in them when they exercise the privilege of parking. This is necessarily so for the very simple reason that the parking meters available for use are coin-operated devices. *Gardner v. City of Brunswick,* 197 Ga. 167, 28 S.E. 2d 135; *City of Louisville v. Louisville Automobile Club,* 290 Ky. 241, 160 S.W. 2d 663; *City of Shreveport v. Brister,* 194 La. 615, 194 So. 566; *Wilhoit v. City of Springfield,* 237 Mo. App. 775, 171 S.E. 2d 95; *Owens v. Owens, supra.* The meter fees furnish funds to defray the expenses of maintaining the parking meter system and enforcing parking regulations. The meter fee imposed upon the exercise of the privilege of parking a motor vehicle in a parking meter zone, the necessity of moving a motor vehicle parked in a parking meter zone at the expiration of the time limit on parking, and the fear of suffering criminal penalties for overtime parking in a parking meter zone prompt many motorists to park their vehicles at convenient places outside parking meter zones, and thus reduce substantially the number of motor vehicles seeking parking accommodations on public streets in congested areas embraced in parking meter zones. *Bowers v. City of Muskegon,* 305 Mich. 676, 9 N.W. 2d 889; *Opinion of the Justices,* 94 N.H. 501, 51 A. 2d 836. The same factors hasten the departure of parked vehicles from parking meter zones. *In re Opinion of the Justices,* 297 Mass. 559, 8 N.E. 2d 179; *Gilsey Buildings v. Incorporated Village of Great Neck Plaza,* 170 Misc. 945, 11 N.Y.S. 2d 694, affirmed in 258 App. Div. 901, 16 N.Y.S. 2d 832; *Owens v. Owens, supra.*

These things being true, the exaction of the meter fee and the other measures sanctioned by the parking meter ordinance and the enabling act are *actually* adapted to promote public convenience and public safety in the use of public streets in congested areas. They not only provide the mechanical and financial means essential to the operation and maintenance of the parking meter system and the enforcement of parking regulations, but they also minimize the parking of motor vehicles in the congested areas classified as parking meter zones, prevent the abuse of the privilege of parking by the occupation of the same parking spaces by the same motor vehicles for unreasonable periods of time, distribute the privilege of parking more fairly among the members of the public using streets in such areas, and afford motorists in general better opportunities to transact business with the occupants of property abutting on streets in

such areas. *Andrews v. City of Marion,* 221 Ind. 422, 47 N.E. 2d 968; *Board of Coms'rs of City of Newark v. Local Government Board of N. J.,* 133 N.J.L. 513, 45 A. 2d 139; *Harper v. Wichita Falls* (Tex. Civ. App.), 105 S.W. 2d 743.

The measures are likewise reasonably adapted to accomplish the public good in view. The meter fees are modest in amount. Indeed, they are payable in the two coins of lowest value. Nothing indicates that receipts of meter fees are disproportionate to the expense of maintaining the parking meter system and enforcing parking regulations. *Cassidy v. City of Waterbury, supra; State ex rel. Harkow v. McCarthy,* 126 Fla. 433, 171 So. 314; *Gardner v. City of Brunswick, supra; City of Bloomington v. Wirrick,* 381 Ill. 347, 45 N.E. 2d 852; *Andrews v. City of Marion, supra; City of Louisville v. Louisville Automobile Club, supra; Bowers v. City of Muskegon, supra; Hendricks v. Minneapolis,* 207 Minn. 151, 290 N.W. 428; *Wilhoit v. City of Springfield, supra; City of Columbus v. Ward,* 65 Ohio App. 522, 31 N.E. 2d 142; *Ex Parte Duncan,* 179 Okl. 355, 65 P. 2d 1015; *William Laubach & Sons v. City of Easton,* 347 Pa. 542, 32 A. 2d 881; *Owens v. Owens, supra; Ex parte Harrison,* 135 Tex. Cr. 611, 122 S.W. 2d 314; *Webster County Court v. Roman,* 121 W. Va. 381, 3 S.E. 2d 631. The regulations operate alike on all motorists. They classify congested areas as twelve minute parking meter zones, one-hour parking meter zones, and two-hour parking meter zones conformable to their respective traffic conditions, and establish limits on parking in each zone to satisfy its peculiar regulatory requirements. They set up varying permissible parking periods and corresponding meter fees in one-hour and two-hour parking meter zones so that a motorist who has occasion to park in such zones may select a parking period reasonably suitable for his individual needs and pay no more than his just proportion of the cost of parking regulation.

In reaching the conclusion that the parking meter regulations and the underlying enabling act represent a valid exercise of the police power of the State, I do not overlook the fact that motorists may frequently avoid detection for overtime parking in parking meter zones by the simple expedient of depositing additional coins in parking meters. This fact does not invalidate the parking meter regulations. *Hickey v. Riley,* 177 Or. 321, 162 P. 2d 371. No police regulation could stand if the apprehension of all its violators were a *sine qua non* to its validity.

STATE v. WILLIAM G. SCOGGIN, JR.

(Filed 22 August, 1952.)

1. Municipal Corporations § 40—

The proof or admission that defendant owned an automobile registered in his name and that such automobile was parked on a city street in violation of its parking meter ordinance without evidence or admission tending to show who parked the automobile at the time and place in question, *is held* insufficient to sustain a conviction of defendant of parking or permitting his vehicle to be parked in violation of the ordinance.

2. Constitutional Law § 10a—

It is the duty of the courts to interpret and apply the law as it is written; it is the function and prerogative of the Legislature to make the law.

3. Constitutional Law § 8a—

The General Assembly has the power to declare that proof or admission of certain facts shall constitute a presumption of the main or ultimate fact in issue so as to make out a *prima facie* case, provided there is a rational connection between what is proved and what is to be inferred, but in the absence of legislative enactment the courts will not invoke such presumptions or rules of evidence to declare a defendant guilty of a criminal offense.

BARNHILL, J., concurring.

DEVIN, C. J., dissenting.

JOHNSON, J., dissenting.

APPEAL by defendant from *Carr, J.*, March Term, 1952, of WAKE.

The defendant was tried upon a warrant charging him with parking overtime in a parking meter zone on Fayetteville Street in the City of Raleigh, between Morgan Street and Cabarrus Street, in violation of the City's traffic ordinance limiting the time for parking motor vehicles.

The defendant was tried and found guilty in the Municipal Court of the City of Raleigh. He appealed to the Superior Court.

In the Superior Court, the jury returned a verdict of guilty as charged and from the judgment imposed, the defendant appeals to this Court assigning error.

Attorney-General McMullan and Robert B. Broughton, Member of Staff, for the State.

Joseph B. Cheshire, Jr., for defendant, appellant.

DENNY, J. The defendant does not challenge the validity of any provision contained in the traffic ordinance of the City of Raleigh, but appeals from the refusal of the court below to sustain his motion for nonsuit at the close of the State's evidence and renewed at the close of all the evidence.

It is provided in Section 19, Chapter 5, of the 1950 Code of the City of Raleigh, ". . . at any time between the hours of 8:00 A.M. and 6:00 P.M. of any day, except Sundays . . . No person shall park any vehicle for longer than ONE HOUR at any one time along the following streets within the areas and limits defined as follows: . . . (b) Along Fayetteville Street between Morgan Street and Cabarrus Street." Section 58 of this chapter provides, "No person shall allow, permit or suffer any vehicle registered in his name to stand or park in any street in this city in violation of any of the ordinances of the city regulating the standing or parking of vehicles." And section 68 of the same chapter reads as follows: "It shall be unlawful for any person to cause, allow, permit, or suffer any vehicle registered in his name, or under his control, to be parked overtime or beyond the lawful periods of time as above set forth."

It was admitted by the defendant and his counsel that on 11 September, 1951, that day not being a Sunday, and between the hours of 8:00 a.m. and 6:00 p.m., the defendant's motor vehicle was parked in a parking meter space in a one-hour parking zone on Fayetteville Street, in the City of Raleigh, between Morgan Street and Cabarrus Street, and that at such time the defendant was the owner of such motor vehicle and was duly registered as such owner with the Motor Vehicle Department of the State of North Carolina and the Licensing Department of the City of Raleigh, and at such time and place the parking meter displayed a sign plainly indicating illegal parking and that the lawful parking period had expired. However, no evidence was offered or admission made tending to show who parked the defendant's car at the time and place set out in the warrant.

It is apparent this is a test case and we are called upon to pass upon the sufficiency of the evidence to support the conclusion that the defendant parked, or allowed his automobile to be parked, in violation of the law as charged in the warrant. The decisive question, therefore, is whether in the absence of any authorized legislative rule of evidence, the mere proof or admission of ownership of the automobile, and that it was parked contrary to the provisions of the traffic ordinance of the City of Raleigh, is sufficient to support an inference that the defendant parked, or allowed the automobile to be so parked, and to sustain a conviction if such inference is not explained or refuted by other evidence. We are not dealing with an inference that may be drawn from circumstantial evidence, but whether an inference of guilt may be drawn from certain admitted or proven facts.

The traffic ordinance of the City of Raleigh contains no rule of evidence to the effect that proof or admission of ownership of a motor vehicle which has been parked in violation of the law, shall be *prima facie* evidence that the owner thereof committed or authorized such violation. In

fact, we know of no law in this State which has delegated to municipalities the right to legislate upon the question of evidence, and of its weight and effect upon the courts.

Some of the authorities in other jurisdictions hold that no *prima facie* rule of evidence, based on ownership, is necessary to support a conviction for the violation of a traffic ordinance. They follow what might be termed the rule of expediency; the inconvenience of keeping watch over parked vehicles to ascertain who in fact operates them, if not the impossibility of such task. *Commonwealth v. Ober,* 286 Mass. 25, 189 N.E. 601; *City of Chicago v. Crane,* 319 Ill. App. 623, 49 N.E. 2d 802. The following authorities also hold that where a parking ordinance has been violated, proof or admission of ownership of the vehicle involved is sufficient to carry the case to the jury and to sustain a conviction in the absence of an explanation or denial on the part of the defendant. *S. v. Morgan* (by an equally divided Court), 72 R.I. 101, 48 A. 2d 248; *People v. Marchetti,* 154 Misc. 147, 276 N.Y.S. 708; *People v. Rubin,* 284 N.Y. 392, 31 N.E. 2d 501. Other Courts have upheld such convictions under the *prima facie* rule of evidence with respect to ownership. *People v. Kayne,* 286 Mich. 571, 282 N.W. 248; *Commonwealth v. Kroger,* 276 Ky. 20, 122 S.W. 2d 1006; *City of St. Louis v. Cook,* 359 Mo. 270, 221 S.W. 2d 468.

The State cites the following decisions of this Court in support of its contention that the verdict below should be upheld. *S. v. Kittelle,* 110 N.C. 560, 15 S.E. 103; *S. v. Smith,* 117 N.C. 809, 23 S.E. 449; *S. v. Morrison,* 126 N.C. 1123, 36 S.E. 329; *S. v. Garner,* 158 N.C. 630, 74 S.E. 458; *S. v. Carter,* 205 N.C. 761, 172 S.E. 415; *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725; *S. v. Brannon,* 234 N.C. 474, 67 S.E. 2d 633.

In the case of *S. v. Kittelle, supra,* this Court upheld the conviction of the defendant, a licensed liquor dealer, where one of his employees sold beer to a minor in violation of the law. The conviction, however, was obtained under a statute which provided that such sale should be *prima facie* evidence of the violation thereof.

We do not consider the cases of *S. v. Smith, supra,* and *S. v. Morrison, supra,* to be in point on the question under consideration. Each of these cases involved an act which was illegal unless the defendant prior thereto had obtained a privilege license from the State authorizing the respective transactions complained of. In all such cases, when the State proves the commission of the act by the defendant, it makes out a *prima facie* case and the burden shifts to the defendant to show he was duly licensed to engage in the business or trade involved. In the instant case, the State seeks to prove by an inference or presumption that the defendant committed the offense complained of simply because he is the owner of the car and not by proof of any act committed by him, or by anyone under his control or by his permission.

In *S. v. Garner, supra,* the defendant was indicted under a statute which provided, "No cattle was to be moved or allowed to move from any quarantined area of this or any other State, . . ." The defendant lived in a quarantined area in Moore County near the Hoke County line. There was no fence between Hoke and Moore Counties. Hoke County was not in the quarantined area. The defendant owned a cow which was infected with cattle fever tick, and permitted her to run at large. As a result she strayed across the line into forbidden territory. The Court held that the act of turning the cow out, "whereby she was permitted to stray, was done purposely and therefore willfully." Likewise, we do not think this case in point. An automobile does not move upon our streets and highways except when operated by some individual. But the owner of the diseased cow knew when he turned her out and permitted her to run at large near the Hoke County line, that in all probability she would do exactly what he was forbidden by law to allow her to do.

In the case of *S. v. Carter, supra,* the defendant was convicted of violating an ordinance of the City of High Point which provided that, "it shall be unlawful for any person, firm or corporation to park any automobile, truck or any motor driven vehicle on the north side of English Street between College Street and Phillips Street . . ." The question presented on the appeal to this Court did not involve the question now before us. The defendant in that case challenged the authority of the City of High Point to adopt and pass such an ordinance. This Court, in upholding the ordinance, said: "All the evidence at the trial of this action shows that the defendant parked his automobile on English Street, between College Street and Phillips Street, in violation of a valid ordinance of the city of High Point."

The case of *S. v. Holbrook, supra,* in keeping with prior decisions of this Court, held that upon an indictment for larceny, possession of the fruits of crime recently after its commission justifies an inference of guilt, and, though only *prima facie* evidence of guilt, may be controlling unless explained or accounted for in some way consistent with innocence. Even so, in such case, the burden is on the State to prove that the goods have been stolen and that the defendant is in possession of them. *Wilson v. United States,* 162 U.S. 613, 40 L. Ed. 1090. However, the recent possession of stolen goods, without more, will not raise an inference or presumption that will support the charge (G.S. 14-71) of receiving stolen goods knowing them to have been feloniously stolen or taken. *S. v. Best,* 202 N.C. 9, 161 S.E. 535; *S. v. Lowe,* 204 N.C. 572, 169 S.E. 180; *S. v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814; *S. v. Larkin,* 229 N.C. 126, 47 S.E. 2d 697.

The State also, in citing *S. v. Brannon, supra,* points out that where, in a murder trial, it is proved or admitted that the defendant intentionally

killed the deceased with a deadly weapon, the law implies malice, and the defendant is presumed to be guilty of murder in the second degree unless he shows mitigating circumstances to reduce the homicide to manslaughter or excuse it altogether. It will be noted, however, in such a case, the presumption of malice does not arise until it is proved or admitted that the defendant intentionally killed the deceased with a deadly weapon.

Our Court, in the above cases, did not establish or recognize the *prima facie* rule of evidence in the absence of legislative authorization, in the sense or to the extent the State seeks to invoke such rule on the present record. No such rule of evidence or inference has been applied heretofore by this Court to a factual situation such as we have presented on this record. In fact, except in those cases where the *prima facie* rule of evidence has been established by legislative action, no such rule exists in this jurisdiction. Therefore, in order for us to sustain the verdict below, it would be necessary for us to establish a new rule of evidence and to give it retroactive effect.

In the very recent case of *S. v. Lloyd,* 233 N.C. 227, 63 S.E. 2d 150, in an opinion by *Devin, J.* (now *Chief Justice*), this Court held that where several automobiles were being driven upon a public highway at 75 to 90 miles an hour, and one of the automobiles was identified as a Mercury, which the highway patrolman testified belonged to the defendant Lloyd, such testimony was not sufficient to sustain a verdict. The opinion stated: ". . . we are inclined to the view that the defendant's motion for judgment as of nonsuit should have been allowed. Though we observe the rule that on this motion the evidence should be considered in the light most favorable for the State, nevertheless the identification of the defendant Lloyd as the operator of one of the recklessly driven automobiles seems lacking. Hence, we think the judgment should have been reversed, and it is so ordered."

We readily concede that a *prima facie* rule of evidence, as contended for by the State, is desirable for the proper and adequate enforcement of the traffic ordinances of the various municipalities of the State. We think, however, that such rule should be made applicable to parking violations by legislative enactment and not by judicial decree. It is our duty to interpret and apply the law as it is written, but it is the function and prerogative of the Legislature to make the law. *S. v. Welch,* 232 N.C. 77, 59 S.E. 2d 199; *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623; *Wilson v. Town of Mooresville,* 222 N.C. 283, 22 S.E. 2d 907; *Millwood v. Cotton Mills,* 215 N.C. 519, 2 S.E. 2d 560; *S. v. Revis,* 193 N.C. 192, 136 S.E. 346; *S. v. Means,* 175 N.C. 820, 95 S.E. 912. And where a Court has consistently declined through the years to permit an inference of guilt to be drawn from evidence such as that presented on this appeal, in order to make out a *prima facie* case, a radical departure from such

long established rule of evidence should be authorized by the lawmakers rather than by judicial fiat.

In civil actions in this State for the recovery of property damages or personal injuries sustained in motor vehicle accidents, this Court has never permitted a recovery against a defendant where the sole evidence against such defendant was no more than ownership of the motor vehicle plus the negligence of the driver. We have required, in such cases, that, "to charge the owner of a motor vehicle with the neglect or default of another there must be some evidence of the agency of the driver at the time and in respect to the transaction out of which the injury arose, and that proof of ownership alone is not sufficient to warrant or support an inference of such agency." *Carter v. Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586, and cited cases.

The above rule has now been changed by legislative enactment, Chapter 494, 1951 Session Laws of North Carolina, the pertinent parts of which read as follows: "(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 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 action, be *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment; . . ."

In the case of *Manley v. Georgia,* 279 U.S. 1, 73 L. Ed. 575, it is said: "State legislation declaring that proof of one fact or a group of facts shall constitute *prima facie* evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law." See also Wharton's Criminal Evidence, Volume 1, Sections 69 and 70.

Except for the rules of evidence which have been expressly sanctioned by the Constitution, such as the privilege against self-incrimination, the accused's right of confrontation, or cross-examination of opposing witnesses, etc., "the Legislature has the power to alter or create any rule of evidence. This is so for reasons inherent in the nature of legislative functions." Wigmore on Evidence, Volume 1, Section 7, page 208, *et seq.* The same authority, in Volume 4, Section 1356 (a), page 724, states:

"A rule of presumption is simply a rule changing one of the burdens of proof, *i.e.*, declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced . . . There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has (when not infringing the Judiciary's prerogative) over all other rules of procedure in general and evidence in particular . . . subject, only to the limitations of the rules of evidence expressly enshrined in the Constitution."

It has been a common practice of our Legislature to declare that proof of one or a group of facts shall constitute *prima facie* evidence of the main or ultimate fact in issue if there is a rational connection between what is proved and what is to be inferred. Among many of these instances are: (1) That the possession of more than one gallon of spirituous liquor at any one time shall constitute *prima facie* evidence that it is kept for the purpose of sale, G.S. 18-32; (2) that it is unlawful to have possession of any alcoholic beverages upon which the taxes imposed by law have not been paid, "and the possession of any alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the state of North Carolina shall constitute *prima facie* evidence of the violation of this section," G.S. 18-48; (3) that possession of lottery tickets shall be *prima facie* evidence of the violation of the provisions of G.S. 14-291.1; (4) that any one (not an officer or soldier on duty), not being on his own land, shall have about his person a deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof, G.S. 14-269; (5) that an administrator or executor's account, when filed and approved, shall constitute *prima facie* evidence of its correctness, G.S. 28-117; (6) that a recital in a deed, shall be presumed to be *prima facie* correct, G.S. 28-103; (7) that when land is sold to create assets to pay a decedent's debts and the record does not show what disposition was made of the funds, "then it is presumed, *prima facie,* that the proceeds of the sale" have been properly applied, G.S. 28-101; (8) that "vouchers are presumptive evidence of disbursement, without other proof, unless impeached," G.S. 28-119; (9) that the transfer of property under certain circumstances, shall be deemed to have been made in contemplation of death, G.S. 105-2; (10) that killing of livestock by an engine or cars running upon any railroad, "shall be *prima facie* evidence of negligence on the part of the railroad company in any action for damages against such company," G.S. 60-81.

If no inference or presumption is permitted to be drawn from the ownership of a motor vehicle and its negligent operation by another, in the absence of a legislative rule of evidence, in a civil action, where the plaintiff is only required to carry the burden of proof, by the greater

weight of the evidence, or by the preponderance thereof; we should not, in the absence of a legislative rule of evidence to the contrary, consider mere ownership of a motor vehicle, parked in violation of a city ordinance, and no more, sufficient to sustain a criminal conviction which must be proved beyond a reasonable doubt.

The judgment of the court below is

Reversed.

BARNHILL, J., concurring: In my opinion this is not a case of circumstantial evidence in which the only question is whether the circumstances proven will support the inference that defendant is the person who parked his automobile in the parking space here involved and left it standing there for more than one hour in violation of the ordinance. The evidence is direct and positive. An automobile was parked in a one-hour parking space on Fayetteville Street. The vehicle belonged to defendant, was registered in his name, and bore his license plates. The meter registered overtime parking. This testimony presents the simple question: Is proof that defendant is the owner of an automobile which was parked overtime, and nothing more, sufficient to overcome the presumption of innocence and support his conviction on a charge of overtime parking? If so, it was sufficient to be submitted to the jury. If not, the demurrer to the evidence should have been sustained.

The majority opinion fully supports the conclusion that the evidence does not have sufficient probative force to require its submission to a jury and cites analogous cases in which we have come to the same conclusion. I merely wish to discuss briefly the question of expediency and necessity raised by the dissent.

It is suggested in the first place that the facts here offered in evidence created in the mind of the police officer who tagged defendant's automobile the conviction that defendant was the person who parked the vehicle; that it "carried the case to the jury" in his mind. As a matter of fact, the officer did not know or care whose automobile it was. It was parked overtime and he tagged it and so reported to the city traffic department. That department ascertained the name of the owner and issued the citation.

Let us concede, however, that the facts discovered by the officer "carried the case to the jury" in his mind. Even so, we cannot afford to set our judicial sights by the sidewalk opinion of a policeman. Such officers generally are good citizens and faithful public servants. But their casual opinions, formed as they go about their business of enforcing the law, are no proper guide for us.

The minority opinion makes out a good case for those who conceive that it is the province of the courts, by judicial construction, to engraft

on inadequate legislation provisions necessary to make it effective; to point the way to social reform; and to provide the rules for the elimination of the evils created by our complex civilization. For us to hold that the mere proof that defendant owned the automobile that was parked overtime is insufficient will, in effect, strike down the ordinance, or at least render it unenforceable and "leave unregulated motor traffic not only in Raleigh but in practically every city and town in North Carolina." So it is argued. The long and short of it is that it is expedient for us to act now and save the impending situation.

Emergency and necessity are the magic words that lure courts into the legislative field. But neither emergency nor necessity creates power or confers jurisdiction.

When the fiction of a presumption in the form of a rule of evidence is, as here, required to relate the facts proven to, and make them *prima facie* evidence of, the ultimate facts sought to be established, the rule of evidence must be created by legislative Act and not by judicial decree. So far as I have been able to ascertain, this Court has always recognized this to be the law and has never in the past undertaken to create such a rule.

Furthermore, there is nothing in the record to indicate that any defendant at any time in any court of this State has been convicted on a charge of parking overtime in a trial in which the presumption or *prima facie* rule here involved was applied against him. Certainly it is not a matter of common knowledge that the rule is generally applied in trial courts to such an extent that we may take judicial notice thereof.

The prerogative of this Court is to interpret and apply the law—never to make it. This we should ever keep in mind, for our sense of self-restraint is the only check upon our exercise of power. We may rejoice in the accomplishments of our Court only so long as we maintain, in letter and spirit, the division of the great functions of government written into our Constitution which is the best security for a government of laws and the only safeguard against a return to a government of men.

It is true courts of other states have, at times, yielded to the temptation to usurp the functions of the legislative branch of government by engrafting on the law rules of evidence and other provisions deemed necessary to meet the problems of the day. Unfortunately, that is the trend of modern decision in a number of our courts. One, at least, in recent years, has played ducks and drakes with precedents of long standing and has virtually rewritten several sections of our Federal Constitution so as to accord with its concept of the need for social reform created by the complexity of modern civilization. It has sought, assiduously and with some success, to engraft its own philosophy of government upon the body of the law. As a result, the divergent views of its members as expressed in the numerous concurring and dissenting opinions filed, have created con-

fusion and uncertainty in the law to such an extent as to cause the court to lose much of the respect and confidence the people had, and should always have, for that high tribunal. We must not be led astray by the examples set by these courts whose anxiety to meet the problems of the day have led them across the bounds which delimit judicial action.

Surely we could now prescribe the rule of evidence which would create the required presumption, give it retroactive effect, and affirm the conviction of defendant. No doubt such action would command the approval, perhaps the applause, of many citizens who are not close students of the division of powers incorporated in our system of government. But for us to do so would create a precedent which would rise up to plague us in the future. One departure from the realm of the judicial would lead to another. Therefore, neither the emergent situation nor the example set by some other courts should tempt us to undertake to discharge the duties assigned to the lawmaking branch of our government.

We need fear no calamitous results from this decision. Parking regulations were enforced long before the advent of meters. They are now enforced in acceptable manner in areas where no meters are used. Meters are mere silent watchmen. Police officers are still required to check them and tag the cars. The "mark and watch method" which has been effective in the past is still available.

In this connection I call attention to the fact a bill to create the exact presumption or rule of evidence here proposed was submitted to and rejected by the last General Assembly. Senate Bill 257. See House Journal, Session 1951, p. 553. The municipalities of the State appealed first to the proper forum for legislation establishing a rule of evidence which would materially facilitate the enforcement of parking ordinances. Having failed there, they now appeal to the courts. If confusion does follow our disposition of the appeal, responsibility will not lie at our door.

However urgent the situation may be, it must await action by the only agency of government authorized to make the law. In the meantime, it is our duty to reverse the verdict and judgment entered in the court below.

DEVIN, C. J., dissenting: It was admitted that the ordinance of the City of Raleigh regulating the parking of automobiles in congested areas of the city, enacted pursuant to power conferred by the General Assembly, was in full force and effect at the time the defendant was charged with overtime parking in violation of this ordinance. Neither the constitutionality nor the propriety of the one hour parking limit was brought in question.

The ordinance contains this provision: "It shall be unlawful for any person to cause, allow, permit, or suffer any vehicle registered in his name,

or under his control, to be parked overtime or beyond the lawful period of time."

The defendant admits that at the time and place alleged in the warrant, in a space duly designated and marked in accordance with the ordinance, the automobile belonging to him and duly registered in his name and bearing his identifying license plates issued by the State and city, was parked for an overtime period in violation of the ordinance. Upon evidence offered to this effect, and with no evidence *contra,* the defendant was found guilty of violating the ordinance.

The only question raised is whether these facts afford any evidence of sufficient probative value to be submitted to the jury on the question of violation of the ordinance by the defendant. According to the majority opinion these facts are insufficient to raise an inference—a permissible deduction from the facts shown—that the admittedly unlawful parking of an automobile admittedly belonging to the defendant, was caused or permitted by him, or by his authority, or by someone for whom he was legally responsible.

The principal ground upon which the majority opinion rests is that there is no legislative enactment specifically declaring that these facts constitute *prima facie* evidence of guilt.

Numerous decisions have been written by this Court defining the meaning and extent of the phrase *prima facie* evidence. The epitome of these decisions is aptly stated by *Chief Justice Stacy* in *Vance v. Guy,* 224 N.C. 607: "A *'prima facie* case' means and means no more than evidence sufficient to justify, but not to compel an inference of liability, if the jury so find." Is there such a relation between the facts admitted and the ultimate fact to be established as to authorize but not require the jury to find that fact? Or, as stated by Mr. Wigmore, are the facts in evidence such as would justify men of ordinary reason and fairness in affirming the question at issue? But I think we have here not so much a question of statutory presumption or inference as a matter of circumstantial evidence. A shoe track identified as having been made by the defendant's shoe at the time and place of the crime is competent against him without having to negative the possibility that someone else may have borrowed and worn his shoe. Likewise, possession of stolen goods shortly after the larceny raises an inference deducible from those facts that the possessor is the thief. *S. v. Weinstein,* 224 N.C. 645. The salutary rule that in criminal actions the evidence must satisfy the jury beyond a reasonable doubt is one for the guidance of the jury and not the court. The court's province is to decide whether there be any evidence, more than a scintilla, of the defendant's guilt. If there is, it becomes a case for the jury.

When the policeman tagged the defendant's automobile for overtime parking and notified him to appear in court to answer the charge that he had caused or permitted his automobile to be parked overtime, he acted on the same facts as we now have before us. The inference properly deducible from these facts, nothing else appearing, created in his mind the conviction that the defendant's automobile, identified by his individual license plates, was parked overtime in the limited area by the defendant's act or with his knowledge and consent. It "carried the case to the jury" in his mind, and so would it in the mind of the average man on the street. The facts here shown, unexplained and unrebutted, should not be dismissed as having no probative force.

The purpose of evidence is the ascertainment of truth as the basis for the administration of justice. It is a step in the process of persuasion. The rules of evidence as we have them today do not depend upon legislative authority. From the beginning, certainly since the advent of trial by jury upon the testimony of witnesses, the rules as to the competency, *quantum* and legal effect of evidence have been in large measure crystallized from the decisions of the courts, based on reason and human experience. In more recent times these rules have been sanctioned, altered, amended or abrogated by statute. But specific legislative authority is not essential to determine the competency or legal effect of evidence. Many rules of evidence applicable to particular circumstances have been established in the absence of statute.

The only reference to be found in our statute on the question of inferences or permissible deductions from the ownership of an automobile is contained in Chap. 494, Laws 1951, which makes ownership of an automobile *prima facie* evidence that it was being operated at the time of an accident by or for the owner, and that the person operating it was acting for the owner and in the scope of his employment. True, this only applies to civil actions, but it is expressive of the legislative will that the owner of an automobile should be held to answer for infractions of the rules of civil conduct caused by the agency he has set in motion, without being permitted to escape by reason of the absence of more specific evidence impracticable to obtain. If ownership be evidence to hold him for a civil injury, why not also for an injury to the State and the city?

Here we must consider, in addition to admitted ownership of the illegally parked automobile, the language of the ordinance which makes it unlawful to "permit" a vehicle "registered in his name" to stand—to remain—in a prohibited area, for an unlawful period of time.

Many of the rigid rules of the common law and those prescribed by statute have given way to a more liberal interpretation, as conditions and circumstances change, in obedience to reason and the common experience of men. Indeed, some of the rules now in force in North Carolina might

well be re-examined. A million and a quarter motor vehicles traverse the streets and highways of the State, and doubtless in time all of them seek a place to park somewhere on a public street. Raleigh has probably 20,000 vehicles belonging to its citizens, plus a substantial increment from daily visitors. Considering the limited areas for business and shopping, interminable confusion, discrimination, and injustice would result but for a definite and well understood means of regulating traffic and parking. To strike these provisions down by invoking a rule of evidence of doubtful application would have the effect of nullifying the ordinance and would practically destroy the power to enforce it, and would leave unregulated motor traffic not only in Raleigh but in practically every city and town in North Carolina. That the Legislature did not append a rule of evidence to the power conferred on the city ought not be held to destroy its effectiveness. The General Assembly doubtless acted on the assumption that the courts could handle traffic law violations without the necessity of legislative enactment prescribing additional rules of evidence. The absence of such a rule should not render the ordinance futile.

To hold this evidence sufficient under the circumstances here shown to go to the jury would offend no constitutional provision. It would serve to conform to the consensus of judicial authority and to the practical interpretation of an act almost universally observed. For ten years and more, and until shortly before the appeal in this case was undertaken, the enforcement of the ordinance was unquestioned, and evidence such as here shown was deemed sufficient to make a *prima facie* case. This has been the practically universal rule so far as I know of municipal authorities and municipal courts in this State and throughout the country.

This is the first case to come to this Court, but the question has been considered by courts of last resort in other states, and these with singular unanimity have sustained conviction for parking violation on similar evidence. The diligence of counsel for the defendant has resulted in finding only eight reported cases on this question from seven different states, *viz.:* Massachusetts, New York, Rhode Island, Illinois, Kentucky, Michigan, and Missouri, all of which have reached practically the same conclusion. Not a single one of these cases supports the defendant's view. The decisions referred to are from courts of recognized authority, and while not compelling here are persuasive, and suggest to my mind that the reason underlying those decisions ought to prevail here.

Let us briefly examine those cases and the reasons for the conclusions reached.

In *Commonwealth v. Ober,* 286 Mass. 25, the conviction of the defendant for violation of a traffic regulation almost identical with ours, and upon evidence that an automobile registered in the name of defendant was parked overtime in a limited area, was upheld. The Court said:

"The reported evidence established a *prima facie* case which was not met by evidence offered by the defendant."

In *People v. Rubin,* 284 N.Y. 392, for violation of a similar ordinance and on substantially the same evidence conviction of the defendant was sustained. In answer to the defendant's contention that there was no direct proof that the unlawful parking was done by the defendant, the Court said: "To rule that this inference may not be drawn from the established facts would be to deny to the trier of the facts the right to use a common process of reasoning." Proof of ownership and unlawful parking was thought to afford a sufficient basis for the inference of personal conduct.

In *City of Chicago v. Crane,* 319 Ill. App. (1943), 623, conviction of the defendant for parking near a fire hydrant was upheld upon showing that the automobile so parked in violation of the ordinance belonged to the defendant and bore his license plate. The Court said: "When it appeared from the stipulation of facts that defendant owns the car that was parked near the fire hydrant, the City made out a *prima facie* case against him," citing the Massachusetts, Kentucky, Michigan, and New York cases.

In *People v. Marchetti,* 276 N.Y.S. 708, it was held that upon evidence of ownership of the automobile and its legal parking the prosecution could rest the case upon a presumption that the operation was by the owner. The Court said: "Presumption need not always be provided for by statute."

In *Commonwealth v. Kroger,* 276 Ky. 20, 122 S.E. 2d 1006, where conviction was upheld, there was a proviso in the ordinance that overtime parking of an automobile should be *prima facie* evidence that the violation of the ordinance was committed by the owner, but it was held that without that proviso in the ordinance the conviction would have been upheld. The Court said: "Independently of the enacted presumption, the circumstances (similar to those here) stipulated and agreed to are amply sufficient under the general law of evidence—of ancient and uninterrupted declaration—to support a conviction or the establishment of the principal fact by circumstantial evidence."

In *People v. Kayne,* 286 Mich. 571, it is interesting to note that the evidence showed that of the automobiles found parked overtime in Detroit 95.6% had been parked by the owner or by an immediate member of his family. In that case conviction for overtime parking was sustained, but there the state had the benefit of a statute that registration plates displayed on the automobile constituted a *prima facie* presumption that the owner parked the automobile.

In *City of St. Louis v. Cook,* 359 Mo. 270, conviction for parking in violation of the ordinance was upheld, but there the ordinance provided

that the presence of a vehicle in violation of the ordinance was *prima facie* evidence that the person in whose name registered had committed the act. The Court, however, called attention to the cases in which it was held that independent of such a rule of evidence the inference that the owner was responsible for unlawful parking was reasonable and sufficient.

In *State v. Morgan,* 72 R.I. 101, the conviction of the defendant for violation of a traffic regulation on proof only that his automobile was parked illegally was upheld, the Court being evenly divided in opinion on the question of the sufficiency of the proof that the automobile was parked by or for the defendant.

The case of *S. v. Lloyd,* 233 N.C. 227, is cited in the majority opinion in support of the position taken. In that case involving the question of the identity of the driver of a speeding automobile nonsuit was sustained. But it will be noted that evidence of the defendant's ownership of the automobile in that case was coupled with evidence, offered by the State, that the defendant denied he was present at the time of the offense charged but was in the city of Durham.

This precise question has never been heretofore considered by this Court, but it seems that in other jurisdictions upon the same facts as here admitted, the courts of last resort there have found no difficulty in sustaining convictions for violation of traffic regulations. I had hoped this Court might be influenced by the same reasoning to reach the same conclusion. There is ground for apprehension that the result of the decision in this case on efforts to enforce traffic regulations will be unfortunate, not only in Raleigh but in every city and town in the State in which ordinances have been adopted and enforced to cope with the problem in the public interest. The city has no means of avoiding this situation, for it is not endowed with power by ordinance to prescribe a rule of evidence for the courts. It is suggested that the remedy lies with the General Assembly, but nearly a year must elapse before a new rule of evidence in such cases can be promulgated. In my opinion it is within the power of this Court to declare the legal inferences deducible from the facts proven as applicable to cases of this kind, in view of the nature of the offense, the public purpose sought, and the impracticability of obtaining better evidence. There is a rational connection between the ownership of an automobile for which individual license to operate upon the public streets has been granted, and the actual use of it by the owner in the operation and parking of that automobile which should justify the inference deducible from that ownership, when the automobile is shown unlawfully parked, that this was caused or permitted by or for the owner.

It has been said that parking meters are silent policemen, but unfortunately they cannot testify in court, and we must depend upon circumstantial evidence for the enforcement of these regulations.

The courts do not make the laws nor do they declare public policy. Their decisions are based on principles of law regardless of the outcome, but while conforming to these principles consideration should be given any sound reason which would authorize the exercise of police power in the interest of good order and public safety. Laws are the tools the community uses to effectuate its ideals, and these tools should not be rendered ineffectual save for reasons which are sound and incontrovertible.

In view of the importance of the enforcement of the traffic regulations adopted by the City of Raleigh to prevent public mischief, whether the facts admitted be regarded as making out a *prima facie* case, or permitting a reasonable inference of guilt, or as affording circumstantial evidence which should carry the case to the jury, in my opinion the Court should hold that they were sufficient to warrant consideration by the jury, and, in the absence of evidence *contra*, to support the verdict and judgment. My vote is that the judgment below should be affirmed.

JOHNSON, J., dissenting: The *prima facie* rule with which we are dealing is not a creature of the Legislature. It is of judicial origin under application of the scintilla doctrine, as a limitation on jury trial. In basic theory, it is for the Court to determine, rather than for the Legislature to prescribe, what does or does not constitute a *prima facie* case.

The books are full of decisions of all sorts in nonsuit cases, civil and criminal, applying the scintilla rule as part and parcel of the doctrine of *prima facie* case as designed wholly and solely by judicial handiwork, with no semblance of any statutory rule of evidence or fixed legislative presumption coming into play.

Therefore, assuming, as seems to be conceded in the majority opinion, that the formula needs change to fit the situation here presented, it seems to me that the Court should do the job.

My vote is to affirm in accordance with the views expressed in the dissent of *Chief Justice Devin*.

NATIONAL SURETY CORPORATION; YORK MILLS, INC., AND ALL OTHER CREDITORS WHO DESIRE TO MAKE THEMSELVES PARTIES TO THIS ACTION, v. VAN B. SHARPE AND LOUISE R. SHARPE, CO-PARTNERS, TRADING AND DOING BUSINESS AS CARTHAGE WEAVING COMPANY.

(Filed 22 August, 1952.)

1. Appeal and Error § 1—

As a general rule, an appellate court will not grant relief to a party who has not appealed or complained of the judgment.

2. Courts § 12—

Constitutionally enacted Federal statutes take precedence over State laws. U. S. Constitution, Art. VI, sec. 2.

3. Receivers § 12c—

Receivership of an insolvent is an act of bankruptcy which puts into operation 31 U.S.C.A. 191, which stipulates that debts due the United States shall have priority, but does not create a lien upon the debtor's property in favor of the United States, and therefore does not give the United States priority over a *bona fide* conveyance made by the debtor before receivership or over a prior specific lien embracing specific property of the debtor as contradistinguished from a general lien covering all his property.

4. Same—

26 U.S.C.A. 3670 and 3671 give the United States a lien for taxes as of the date notice of lien is filed in the office of the register of deeds of the county in which the property is situate, but such lien is subordinate to the lien of a duly registered chattel mortgage, G.S. 47-20, or real estate mortgage, or judgment lien, G.S. 1-234, including the special lien of a contractor perfected by judgment, G.S. 44-1, when such liens are duly acquired before the filing of the notice of the Federal tax lien, though superior to such liens acquired after the filing of the notice.

5. Receivers § 7—

G.S. 55-147 to G.S. 55-160, inclusive, are applicable as near as may be to a receivership under G.S. 1-502.

6. Receivers § 9—

A receiver takes the property of the insolvent debtor subject to the mortgages, judgments and other liens existing at the time of his appointment, and upon the sale of encumbered property by the receiver free of such liens, the liens are transferred to the proceeds of sale. G.S. 55-149, G.S. 55-154.

7. Receivers § 12c—

Indebtedness incurred by a receiver in operating the business of a private concern owing no duty to the public cannot be given priority over the claims of non-consenting lienholders. The distinction between such operating expenses and costs of administration is pointed out.

8. Same—

Costs of administration may be charged against the interests of prior lienholders, since such expenses are incurred in the preservation and liquidation of the assets of the insolvent for their benefit, and such costs of administration include court costs in proceedings relating to the receivership, compensation to the receiver and to the receiver's attorney, G.S. 55-155, bookkeeping and clerical expense, auditing expense, premiums on fire insurance on property in receivership, compensation for watchman, and costs of sale of property in receivership.

9. Same—

Indebtedness incurred by a receiver in operating the business of a private concern owing no duty to the public is entitled to preference over the claims of general creditors arising before the receivership, and constitute a charge first upon income, and when that is insufficient, against the property of the insolvent.

10. Same—

When the receiver has funds remaining after satisfying liens antedating the receivership he should apply such funds upon claims in the following order of preference: (1) costs of administration; (2) claims of the U. S. for Federal employment and social security taxes accruing during the operation of the business by the receiver; (3) claims of the city and county for property taxes assessed during the receivership, G.S. 55-160; 105-340; 105-376; 105-412; (4) claim of the State for contributions under the State Employment Law, G.S. 96-10 (c), arising during receivership; (5) claims for labor, materials and services incurred in the operation of the business by the receiver; (6) general unsecured claims.

11. Receivers § 12d—

The United States filed claim against the receiver for damages for breach of contract by receiver in failing to deliver goods in accordance with contract executed with the receiver in the operation of the business. The claim was challenged, but the other claimants failed to demand jury trial on their exceptions. G.S. 55-153. *Held:* It was incumbent on the United States to establish its claim before the judge in conformity with the practice where jury trial is waived, and when it presents no evidence thereon it fails to establish the claim in fact, and the order of the judge allowing same without evidence and finding by the court thereon is ineffective.

12. Receivers § 12c—

Preferences are not favored and can only arise by reason of some definite statutory provision or some fixed principle of common law.

13. Same—

An item of operating expense, even though it is incurred by the receiver in conformity with an order of the court for the operation of the business by the receiver, is not entitled to priority over non-consenting lienholders who were given no notice.

14. Same—

G.S. 55-136 gives priority to laborers for wages due for work performed during the period of the two months prior to the date proceedings in in-

solvency were instituted, and does not apply to wages during the period the business is operated by the receiver.

15. Same—

The contract price for repairing machinery of the concern on a single occasion is not a claim for "wages" within the purview of G.S. 55-136, and cannot be entitled to preference under that statute regardless of whether the contract was executed prior to, or subsequent to the operation of the business by the receiver.

16. Same—

A judgment rendered in favor of a claimant after the appointment of a receiver for the debtor cannot create a lien against the debtor's property because such property is vested in the receiver at the time of the rendition of the judgment.

17. Same—

Indebtedness incurred by a receiver in operating the business of a private concern owing no duty to the public has priority over the claim of a lienholder when such lienholder expressly or impliedly consents to such operations by the receiver.

18. Same—

The courts will not direct a receiver as to the distribution of a fund before the receiver has such fund in hand.

APPEALS by the plaintiff, York Mills, Inc., and eleven intervening judgment creditors, namely, American Woolen Company, Artistic Weaving Company, Cutter's Exchange, House-Hasson Hardware Company, Master Manufacturing Company, Patent Button Company, Smith-Courtney Company, D. W. Vaughn, W. Ames & Company, John Wood, and F. F. Weishaar, from *Moore, J.*, at November Term, 1951, of MOORE.

Receivership proceeding heard by the presiding judge on exceptions to the report of the receiver passing upon the validity and priority of claims against an insolvent private manufacturing concern, and recommending the order of distribution of the available assets among the creditors of the concern.

This cause has been before us on four other occasions. *Surety Corp. v. Sharpe*, 233 N.C. 644, 65 S.E. 2d 137; 233 N.C. 642, 65 S.E. 2d 138; 233 N.C. 83, 62 S.E. 2d 501; 232 N.C. 98, 59 S.E. 2d 593.

The controlling facts appear in the numbered paragraphs set forth below. The monetary items mentioned in these paragraphs and the ensuing opinion are approximate.

1. Before the day named in the next paragraph, the defendants Van B. Sharpe and Louise R. Sharpe, as partners, conducted a private manufacturing business at Carthage in Moore County, North Carolina, under the firm name of Carthage Weaving Company. Such firm name is hereafter used to signify the partnership.

2. On 20 July, 1949, an order was entered in this cause appointing a receiver to take charge of the affairs and property of the Carthage Weaving Company. The order was made with the consent of the defendants upon the verified application of the original plaintiff, National Surety Corporation, alleging the insolvency of the partnership and "all the members composing the same."

3. At all the times herein mentioned, the defendants, either as partners or as individuals, owned the property enumerated in this paragraph. The Carthage Weaving Company had two pieces of realty lying in Moore County. One was a factory in Carthage, and the other was a farm at Pinebluff. The partnership also held personal property situated in Moore County. The defendants, as individuals, possessed an apartment house and a dwelling, both of which were situated in Moore County. The apartment house was in Carthage, and the dwelling was in Pinehurst. The dwelling was covered by a deed of trust, which was made and registered on 27 April, 1946, and which vested a paramount title to the dwelling in W. A. Leland McKeithen, as substitute trustee, to secure the payment of a debt owed by the defendants as individuals to the Pilot Life Insurance Company.

4. At the time of the appointment of the receiver, the Carthage Weaving Company was indebted to numerous creditors in various sums on sundry obligations, which arose before the receivership and were as follows: (a) $2,000.00 due W. R. Makepeace; (b) $2,350.00 due O. B. Taylor; (c) $30,148.00 due the United States for income taxes; (d) $30,132.20 due thirty-one judgment creditors on thirty-one judgments; and (e) $87,646.54 due forty-eight general creditors on forty-eight unsecured accounts. All of these debts were still unpaid when this cause was heard by Judge Moore at the November Term, 1951, of the Superior Court of Moore County. None of them represented salaries or wages due employees for work done for the Carthage Weaving Company.

5. The debts of the Carthage Weaving Company to W. R. Makepeace and O. B. Taylor were for the purchase prices of specific pieces of machinery, and were secured by duly registered purchase money chattel mortgages covering such machinery.

6. The thirty-one judgments mentioned in paragraph 4 were rendered and docketed at various times between 24 January, 1947, and 8 October, 1948, and each of them constituted a lien as of the day of its docketing on all the real property owned by the defendants, either as partners or as individuals, in Moore County. The judgment creditors referred to in paragraph 4 included the appellants American Woolen Company, Artistic Weaving Company, Cutter's Exchange, House-Hasson Hardware Company, Master Manufacturing Company, Patent Button Company, Smith-Courtney Company, D. W. Vaughn, W. Ames & Company, John Wood,

and F. F. Weishaar, whose judgments accounted for $16,020.84 of all the judgment debts of the Carthage Weaving Company. For convenience of expression, these eleven appellants are hereafter called the appealing judgment creditors.

7. The general creditors mentioned in paragraph 4 embraced the plaintiff York Mills, Inc., which held an unsecured account totaling $8,166.56 against the Carthage Weaving Company for materials delivered by it to the partnership just before the appointment of the receiver. During the receivership, to wit, on 18 May, 1950, York Mills, Inc., obtained judgment on this account against Van B. Sharpe and Louise R. Sharpe in an independent action. This judgment was forthwith docketed in the office of the clerk of the Superior Court of Moore County. The record does not indicate that York Mills, Inc., was authorized by any order of court to prosecute the independent action, or that the receiver had any knowledge of its pendency.

8. At the time of the appointment of the receiver, the defendants, as individuals, were indebted to six judgment creditors, to wit, Bonitz Insulating Company, Carthage Hardware Company, J. L. Currie Company, J. W. McLeod, Pinehurst Warehouse, Inc., and Sanford Sash & Blind Company, in sums aggregating $2,588.49 upon six separate judgments, which were rendered and docketed on various dates between 6 March, 1946, and 6 November, 1947, and constituted contractors' liens upon the apartment house at Carthage. For convenience of narration, these six judgment creditors are hereafter designated as the six contractors.

9. The receiver continued and carried on the business of the Carthage Weaving Company as a private manufacturing concern from 20 July, 1949, until 30 September, 1950. This continued operation of the business was sanctioned by the original order of 20 July, 1949, and subsequent orders entered in this cause on 14 January, 1950, and 29 July, 1950. The last of these three orders was made "upon motion of York Mills, Inc.," which had theretofore intervened in the cause as a plaintiff and acquiesced in the continued operation of the business by the receiver. It appears by implication that a substantial part of the unpaid operating expenses hereinafter referred to were incurred by the receiver after the entry of the order of 29 July, 1950. It expressly appears, however, that "the judgment creditors existing prior to receivership . . . had no notice of the receivership proceedings" until the September Term, 1950, of the Superior Court of Moore County, when the "American Woolen Company, J. L. Currie Company, and numerous other creditors . . ., both secured and unsecured," appeared before the presiding judge and moved for an order in the cause "directing the receiver to cease all further operations of the business" and to distribute all available assets among the creditors according to their respective rights.

10. Certain expenses incurred by the receiver between 20 July, 1949, and 30 September, 1950, for the operation of the business of the Carthage Weaving Company remained unpaid when this cause was heard before Judge Moore at the November Term, 1951, of the Superior Court of Moore County. These unpaid operating expenses were as follows: (a) $6,855.22 due various regular employees for salaries and wages for work done for the receiver; and (b) $15,759.50 due twenty-four independent business concerns for materials or services furnished the receiver. These independent business concerns included the claimant, Gouger Electric Company, which rendered services worth $782.94 to the receiver in repairing undesignated machinery in the factory at Carthage, and the claimant, Esso Standard Oil Company, which delivered materials worth $1,173.46 to the receiver. The transaction between the Esso Standard Oil Company and the receiver was expressly authorized in advance by an order in this cause.

11. Certain taxes accrued against the Carthage Weaving Company during the receivership and were unpaid when this cause was heard by Judge Moore at the November Term, 1951, of the Superior Court of Moore County. These taxes were as follows: (a) $3,089.46 due Moore County for county taxes on the real and personal property of the partnership; (b) $4,309.11 due the Town of Carthage for municipal taxes on the factory and personal property of the partnership; (c) $5.86 due the Town of Pinebluff on the farm of the partnership; (d) $4,633.31 due the United States for Federal employment and social security taxes; and (e) $1,509.89 due North Carolina for contributions under the State Employment Security Law.

12. When the motion of the American Woolen Company and other creditors was heard at the September Term, 1950, of the Superior Court of Moore County, the court found that the operation of the business of the Carthage Weaving Company by the receiver was resulting in a continuing loss. For this reason, the court directed the receiver to cease operating the business at midnight on 30 September, 1950; to give notice to the creditors of the Carthage Weaving Company to present their claims to him by 23 October, 1950, on pain of being barred from participation in the distribution of the assets available for application to the debts of the insolvent partnership; to cause the homestead and personal property exemptions allowed the defendants by law to be allotted to them out of their property; to sell free from all liens all the remaining real and personal property owned by the defendants, either as partners or as individuals, except the equity of redemption in the dwelling at Pinehurst; and to report to the court his decision as to how the proceeds of the sale should be distributed among the creditors. The equity of redemption in the dwelling at Pinehurst was exempted from sale by the receiver because

the paramount deed of trust embracing the dwelling was in process of being foreclosed by W. A. Leland McKeithen, the substitute trustee, who was directed by an order in this cause to pay over to the receiver on the completion of foreclosure any surplus left in his hands after payment of the debt due the Pilot Life Insurance Company and the costs and fees incident to foreclosure. The foreclosure of the deed of trust on the dwelling at Pinehurst had not been consummated when this cause was heard by Judge Moore at the November Term, 1951, of the Superior Court of Moore County.

13. The receiver obeyed all the directions given him by the court as set forth in the preceding paragraph. In so doing, he employed a watchman at wages totaling $1,404.26 to guard the property in his charge until he could effect its satisfactory sale, and the obligation thus incurred remained unpaid when this cause was heard by Judge Moore at the November Term, 1951, of the Superior Court of Moore County.

14. Claims were filed with the receiver for all the debts and taxes referred to in paragraphs 4, 8, 10, and 11. The claimants disagreed respecting the relative priorities of some of these claims, but they did not dispute the validity of any of them. In fact, the only claim presented to the receiver whose validity was challenged was a claim not hitherto mentioned filed by the United States for damages for supposed breaches of contracts allegedly made by the receiver with governmental agencies. The record indicates that this controverted claim was based on the following theory: That the receiver made several binding contracts to manufacture goods for governmental agencies; that the receiver closed the factory in obedience to the order of court before all the goods were delivered; that the act of the receiver in closing the factory under these circumstances breached the contracts with the governmental agencies, and caused the United States to suffer damages; and that such damages constituted a valid claim of high priority against the assets available for the payment of the obligations of the Carthage Weaving Company.

15. After causing homestead and personal property exemptions to be assigned to the defendants out of their property and selling the remaining property owned by them, either as partners or as individuals, other than the equity of redemption in the dwelling at Pinehurst, the receiver had $85,155.68 in his hands for application to the costs and expenses of the receivership and for distribution among the claimants. This sum was the total of these items: (a) $17,355.68, the unexpended portion of the sale price of the personal property of the partnership; (b) $55,000.00, the sale price of the factory at Carthage; (c) $5,300.00, the sale price of the farm at Pinebluff; and (d) $7,500.00, the sale price of the apartment house at Carthage. The unexpended portion of the sale price of the personal property included $12,000.00 derived from the sale of the machinery

mortgaged to W. R. Makepeace, and $795.00 derived from the sale of the machinery mortgaged to O. B. Taylor. Under the orders of the court, all property was sold free of liens, and liens were transferred from the property to the proceeds of its sale.

16. The receiver passed on the validity and priority of all claims, and made report thereon to the court. The United States and certain other claimants noted various exceptions to the report of the receiver. The portions of the report necessary to an understanding of the questions arising on the appeal are hereinafter referred to in paragraph 19 of this statement of facts.

17. This cause was heard on the report of the receiver and the exceptions to it at the November Term, 1951, of the Superior Court of Moore County. At that time, Judge Moore, who presided, made allowances for the costs of administration of the receivership. These allowances totaled $8,784.78, and covered auditor's fees, clerical hire, compensation for the receiver, counsel fees, court costs, and insurance protecting the property during the receivership.

18. Judge Moore then ruled on the exceptions to the report of the receiver, and embodied his rulings in an order of distribution directing the receiver to apply the money in his hands to the costs, debts, and taxes under consideration in the following order:

First class. The operating expenses set forth in paragraph 10; the Federal employment and social security taxes set out in paragraph 11; the contributions under the State Employment Security Law mentioned in paragraph 11; the wages of the watchman referred to in paragraph 13; and the costs of administration set forth in paragraph 17.

Second class. The Federal income taxes set out in paragraph 4.

Third class. The debt of W. R. Makepeace mentioned in paragraph 4; the sum of $795.00 representing a part of the debt of O. B. Taylor referred to in paragraph 4; the six contractors' liens set forth in paragraph 8; and the property taxes of Moore County, the Town of Carthage, and the Town of Pinebluff set out in paragraph 11.

Fourth class. The claim of the United States for damages totaling $176,790.55 for supposed breaches of contracts allegedly made by the receiver with governmental agencies as stated in paragraph 14.

Fifth class. The sum of $1,555.00 representing a part of the debt of O. B. Taylor, the thirty-one judgments, and the forty-eight unsecured accounts referred to in paragraph 4.

The order of distribution provided for preferences within the third class by directing that the claims of Makepeace and Taylor "be paid from the amounts derived from the sale of the personal property on which the mortgages were given" and that the six contractors' liens "against the apartment house . . . be paid out of the proceeds of the sale of such

apartment house." It refrained from passing on the relative priorities as among themselves of the claims in the fifth class on the ground that the claims of the other classes would "more than exhaust the amount in the hands of the receiver."

19. The order of distribution rejected several rulings of the receiver, including a ruling that the thirty-one judgment creditors mentioned in paragraph 4 had liens on the proceeds of the sales of the realty and by reason thereof occupied a preferred status, which entitled them to have their judgments paid ahead of a substantial portion of all the other claims. In addition, the order of distribution drastically changed the ruling of the receiver relating to the claim of the United States for damages for supposed breaches of contracts allegedly made by the receiver with governmental agencies. When this claim was originally filed with the receiver, it totaled $88,550.72. The receiver approved the claim for that amount, but adjudged it to be unpreferred in nature. The United States and certain other claimants excepted to this ruling of the receiver on divergent grounds. The United States asserted that the receiver erred in refusing to accord its claim high priority while the other claimants challenged the validity of the claim in its entirety. The other claimants did not demand a jury trial on their exceptions. When the report of the receiver was heard in the Superior Court, the presiding judge permitted the United States to amend its claim for damages by increasing its amount to $176,790.55, and thereupon adjudged in his order of distribution that the United States had a valid preferred claim on this score for that sum. The judge made this adjudication without hearing any evidence relating to the claim and without making any findings of fact to support this conclusion.

20. The York Mills and the eleven appealing judgment creditors excepted to the order of distribution and appealed, assigning errors.

John M. Spratt and G. S. Steele for the plaintiff, York Mills, Inc., appellant.

W. D. Sabiston, Jr., for the claimant, American Woolen Company, appellant.

Johnson & Johnson and W. D. Sabiston, Jr., for the claimants, Artistic Weaving Company, Cutter's Exchange, House-Hasson Hardware Company, Master Manufacturing Company, Patent Button Company, Smith-Courtney Company, D. W. Vaughn, W. Ames & Company, John Wood, and F. F. Weishaar, appellants.

McKeithen & McConnell for the claimant, Esso Standard Oil Company, appellee.

W. Clement Barrett for the claimants, Gouger Electric Company and the employees of the receiver, appellees.

ERVIN, J. The order of distribution consigns the claims of the York Mills and the eleven appealing judgment creditors to the lowest category. The assignments of error assert that the claims of these parties are of high dignity; that as such they are entitled to preference in the distribution of the assets in the hands of the receiver over nearly all the claims assigned to the preceding classes of priority; and that in consequence the court erred to the prejudice of the appellants in relegating their claims to positions inferior to such other claims. In addition, the assignments of error declare that there is neither a factual nor a legal basis for the claim of the United States for damages for the supposed breaches of contracts allegedly made by the receiver with governmental agencies.

It is plain, therefore, that this appeal necessitates a review of virtually all of the provisions of the order of distribution. In performing this judicial task, however, we will not give the twenty non-appealing judgment creditors mentioned in paragraph 4 of the statement of facts any greater relief than that afforded them in the court below even if we conclude that the presiding judge committed error in putting them in the lowest category of creditors. The non-appealing judgment creditors have acquiesced in the order of distribution. As a general rule, an appellate court will not grant relief to a party who has not appealed or complained of the judgment. *Van Dyke v. Insurance Co.*, 173 N.C. 700, 91 S.E. 600; 5 C.J.S., Appeal and Error, section 1835.

The first question presented by the assignments of error involves these subsidiary inquiries:

1. What were the relative rights of the creditors whose claims antedate the receivership at the time of the appointment of the receiver?

2. To what extent, if any, have those rights been changed or impaired by events occurring during the receivership?

In determining the relative rights of the pre-existing creditors against the defendants and their property at the time of the appointment of the receiver, recourse must be had to relevant Federal statutes and State laws. Since constitutionally enacted Federal statutes take precedence over State laws under the supremacy clause of the Constitution of the United States, we will first refer to the pertinent Federal statutes. Art. VI, Sec. 2, U. S. Const.

These statutes and the decisions interpreting them are set forth in the numbered paragraphs which follow.

1. The statute codified as 31 U.S.C.A. section 191, which had its genesis in the Act of Congress of 3 March, 1797, stipulates that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority established shall

extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

2. Whenever an insolvent is indebted to the United States and a receiver is put in charge of his property, 31 U.S.C.A. section 191 comes into play, and the debts due to the United States must be first satisfied. *Illinois ex rel. Gordon v. Campbell,* 329 U.S. 362, 67 S. Ct. 340, 91 L. Ed. 348; *Bramwell v. United States Fidelity & G. Co.,* 269 U.S. 483, 46 S. Ct. 176, 70 L. Ed. 368; *United States v. Oklahoma,* 261 U.S. 253, 43 S. Ct. 295, 67 L. Ed. 638; *Leggett v. College,* 234 N.C. 595, 68 S.E. 2d 263; *Bishop v. Black,* 233 N.C. 333, 64 S.E. 2d 167. This is true because putting a receiver in charge of an insolvent debtor's property constitutes an act of bankruptcy. 11 U.S.C.A. section 21 (a) (5); *Illinois ex rel. Gordon v. Campbell, supra; Manufacturers' Finance Co. v. McKey,* 294 U.S. 442, 55 S. Ct. 444, 79 L. Ed. 982.

3. Section 191 of Title 31 of the United States Code Annotated does not create a lien upon the insolvent debtor's property in favor of the United States, but merely confers upon the United States a right of priority in payment out of the property in the hands of the receiver. *Bramwell v. United States Fidelity & G. Co., supra; United States v. Oklahoma, supra; Beaston v. Farmers' Bank of Delaware,* 12 Pet. 102, 9 L. Ed. 1017; *United States v. Fisher,* 2 Cranch 358, 2 L. Ed. 304. The priority of the United States arises upon the appointment of the receiver. *Illinois ex rel. Gordon v. Campbell, supra; Leggett v. College, supra; Bishop v. Black, supra.* As a consequence, 31 U.S.C.A. section 191 does not give the United States priority over a *bona fide* conveyance made by the debtor before the receivership, or over a prior specific lien embracing specific property of the debtor as contradistinguished from a general lien covering all his property. *Illinois ex rel. Gordon v. Campbell, supra; Beaston v. Farmers' Bank of Delaware, supra; Brent v. Bank of Washington,* 10 Pet. 596, 9 L. Ed. 547; *Field v. United States,* 9 Pet. 182, 9 L. Ed. 94; *Conard v. Atlantic Ins. Co. of New York,* 1 Pet. 386, 7 L. Ed. 189; *Thelusson v. Smith,* 2 Wheat. 396, 4 L. Ed. 271; 75 C.J.S., Receivers, section 284.

4. Taxes due the United States constitute debts within the provision of 31 U.S.C.A. section 191 that debts due the United States shall be first satisfied in case of a debtor's insolvency. *Massachusetts v. United States,* 333 U.S. 611, 68 S. Ct. 747, 92 L. Ed. 968; *Illinois ex rel. Gordon v. United States,* 328 U.S. 8, 66 S. Ct. 841, 90 L. Ed. 1049; *United States v. Texas,* 314 U.S. 480, 62 S. Ct. 350, 86 L. Ed. 356; *Stripe v. United*

States, 269 U.S. 503, 46 S. Ct. 182, 70 L. Ed. 379; *Price v. United States,* 269 U.S. 492, 46 S. Ct. 180, 70 L. Ed. 373.

5. The statutes now embodied in Sections 3670 and 3671 of Title 26 of the United States Code Annotated, which constitute a revision of the Act of Congress of 13 July, 1866, give the United States a lien for taxes due it. Section 3670 provides that if any person liable to pay a tax to the United States neglects or refuses to pay such tax after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights of property, whether real or personal, belonging to such person. Under Section 3671, the lien for Federal taxes arises at the time the assessment list is received by the collector of internal revenue unless another date is specifically fixed by law, and continues until liability for the tax is satisfied or becomes unenforceable by reason of lapse of time.

6. Under these statutes, unrecorded Federal tax liens are accorded priority over all persons except those given protection by the subsequently enacted statute mentioned in the next paragraph. *United States v. Security Trust & Sav. Bank,* 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53; *United States v. Snyder,* 149 U.S. 210, 13 S. Ct. 846, 37 L. Ed. 705; *United States v. Barndollar & Crosbie,* 166 F. 2d 793; *United States v. Sampsell,* 153 F. 2d 731; *MacKenzie v. United States,* 109 F. 2d 540; *United States v. Fisher,* 93 F. Supp. 73; *United States v. Caldwell,* 74 F. Supp. 114; *United States v. Record Pub. Co.,* 60 F. Supp. 194; *Filipowicz v. Rothensies,* 43 F. Supp. 619.

7. Section 3672 of Title 26 of the United States Code Annotated, which is a re-enactment and extension of an Act of Congress of 4 March, 1913, specifies that the Federal tax lien created by Sections 3670 and 3671 "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector (1) in the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or (2) in the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory." North Carolina has provided by statute that "notices of liens for internal revenue taxes payable to the United States . . . may be filed in the office of the register of deeds of the county . . . within which the property subject to such lien is situated." G.S. 44-65.

8. Under Section 3672 of Title 26 of the United States Code Annotated, the date of the filing of the notice of a Federal tax lien controls in a

controversy respecting priority as between the United States and a judgment lien creditor, a mortgagee, a pledgee, or a purchaser. *Board of Sup'rs of La. State University v. Hart,* 210 La. 78, 26 So. 2d 361, 174 A.L.R. 1366; *Tildesley Coal Co. v. American Fuel Corporation,* 130 W. Va. 720, 45 S.E. 2d 750. As a consequence, a Federal tax lien is inferior to either a chattel mortgage or a real estate mortgage recorded prior to the filing of the notice of the tax lien. *United States v. Sampsell, supra; United States v. Beaver Run Coal Co.,* 99 F. 2d 610; *Miners' Sav. Bank of Pittston, Pa., v. Joyce,* 97 F. 2d 973; *Ormsbee v. United States,* 23 F. 2d 926; *In re Fahnestock Mfg. Co.,* 7 F. 2d 777; *Sherwood v. United States,* 5 F. 2d 991; *Bank of America Nat. Trust & Sav. Asso. v. United States,* 84 F. Supp. 387; *In re F. MacKinnon Mfg. Co.,* 24 F. 2d 156. A Federal tax lien is likewise subordinate to the lien of a judgment docketed before the filing of the notice of the tax lien. *In re Northwest Wood Products Co.,* 168 F. 2d 639; *United States v. Sampsell, supra; Claude D. Reese, Inc., v. United States,* 75 F. 2d 9; *United States v. Record Pub. Co., supra; United States v. Spreckels,* 50 F. Supp. 789; *Dannenberg v. L. Leopold & Co.,* 188 Misc. 250, 65 N.Y.S. 2d 549; *Manufacturers' Trust Co. v. Sobel,* 175 Misc. 1067, 26 N.Y.S. 2d 145; *In re Astoria Boulevard,* 171 Misc. 1018, 13 N.Y.S. 2d 433. The converse of these propositions is true. Federal tax liens take precedence over all mortgages and judgment liens acquired after the filing of the notice of the tax liens. *United States v. Security Trust & Sav. Bank, supra; MacKenzie v. United States, supra; Miller v. Bank of America, N. T. & S. A.,* 166 F. 2d 415; *Bank of America Nat. Trust & Sav. Ass'n v. United States,* 73 F. Supp. 303; *United States v. Record Pub. Co., supra; United States v. Spreckels, supra; In re Bowen,* 48 F. Supp. 67; *Industrial Com'r of N. Y. v. Stambler,* 196 Misc. 1022, 95 N.Y.S. 2d 70. Under Section 3672 of Title 26 of the United States Code Annotated, Federal taxes assessed after the docketing of a judgment lien or the recording of a mortgage are junior to the claim of the judgment creditor or the mortgagee. *Ferris v. Chic-Mint Gum Co.,* 14 Del. Ch. 232, 124 A. 577.

9. In enacting the provision of 26 U.S.C.A. section 3672 that a lien for unpaid United States taxes is not valid against a mortgagee, pledgee, purchaser, or judgment creditor until notice of the lien is filed by the collector of internal revenue, Congress impliedly amended *pro tanto* the provision of 31 U.S.C.A. section 191 giving debts due the United States priority over other debts in the distribution of the assets of an insolvent debtor among his creditors. 59 C.J., Statutes, section 434. In consequence, the United States does not have priority in the distribution of the assets of an insolvent debtor for unpaid Federal taxes over docketed judgment liens or recorded mortgages antedating the filing of notice of the lien of such taxes. *Ferris v. Chic-Mint Gum Co., supra; In re Deck-*

er's Estate, 355 Pa. 331, 49 A. 2d 714; *In re Meyer's Estate,* 159 Pa. Super. 296, 48 A. 2d 210.

The State laws germane to this aspect of the litigation are summarized in the numbered paragraphs set forth below.

1. When a creditor takes a chattel mortgage from his debtor as security for the payment of his debt and causes the mortgage to be registered in the county where the debtor resides or in the county where the personal property is situated in case the debtor resides out of the State, he acquires property rights in the personal property covered by his mortgage. G.S. 47-20; *Odom v. Clark,* 146 N.C. 544, 60 S.E. 513. These rights entitle the creditor to sell the mortgaged property for the satisfaction of his debt, and are tantamount to a specific lien on specific property within the purview of the decisions interpreting 31 U.S.C.A. section 191. *North River Coal & Wharf Co. v. McWilliams Bros., Inc.,* 32 F. 2d 355; *Bank of Wrangell v. Alaska Asiatic Lumber Mills,* 84 F. Supp. 1.

2. When a creditor obtains a judgment and causes it to be docketed on the judgment docket of the Superior Court in any county, the judgment becomes a general lien "on the real property in the county where the same is docketed of every person against whom . . . such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment." G.S. 1-234; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 666.

3. G.S. 44-1 gives a contractor an inchoate lien upon a building and the lot on which it is situated for work done and materials furnished by him in constructing, improving, or repairing such building pursuant to a contract with the owner. *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390. When the contractor perfects such inchoate lien in compliance with the requirements of Article 8 of Chapter 44 of the General Statutes, the resulting judgment creates this twofold lien: (1) A special lien on the building and the lot upon which it is situated; and (2) a general lien on the other real property of the owner in the county where the judgment is docketed. Under the controlling statute, the property subject to the special lien, *i.e.,* the building and the lot on which it is situated, must be sold for the satisfaction of the judgment before resort can be had to the other property of the owner. G.S. 44-46; *Pipe & Foundry Co. v. Howland,* 111 N.C. 615, 16 S.E. 859; *McMillan v. Williams,* 109 N.C. 252, 13 S.E. 764.

4. Where several judgments have been docketed against the same debtor subsequent to his acquisition of real property, the liens of such judgments take rank or priority with reference to such property according to the dates when such judgments were respectively docketed. *Hardware Co.*

v. Jones, 222 N.C. 530, 23 S.E. 2d 883; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 667.

The record is somewhat lacking in clarity on the present phase of the controversy. Nevertheless, it does justify the inference that the Collector of Internal Revenue for the District of North Carolina received an assessment list covering the income taxes due the United States prior to the appointment of the receiver, and that in consequence the United States acquired a lien for such taxes under the provisions of Sections 3670 and 3671 of Title 26 of the United States Code Annotated before that event occurred. There is nothing in the record, however, indicating that notice of the lien for Federal income taxes was filed in the office of the Register of Deeds of Moore County at any time before the recording of the chattel mortgages and the docketing of the judgments mentioned in paragraphs 4, 5, 6 and 8 of the statement of facts.

These things being true, we conclude that the pre-existing creditors had the following rights against the defendants and their property at the time of the appointment of the receiver:

1. W. R. Makepeace and O. B. Taylor had property rights tantamount to specific liens on the personal property covered by their respective chattel mortgages.

2. The six contractors named in paragraph 8 of the statement of facts had special liens on the apartment house at Carthage and general liens on the factory in Carthage and the farm at Pinebluff; and the judgment creditors mentioned in paragraphs 4 and 5 of the statement of facts held general liens on the apartment house, factory, and farm. The judgment liens, whether general or special, had priority as among themselves according to the order of the docketing of their underlying judgments.

3. The United States held a Federal tax lien for the unpaid income taxes on all the real and personal property of the defendants, but such tax lien was subordinate to the two chattel mortgages and the special and general liens of all the judgment creditors.

4. The general creditors mentioned in paragraphs 4 and 7 of the statement of facts had no liens of any character. They merely held unsecured claims against the defendants.

This brings us to the subsidiary inquiry whether the rights of the pre-existing creditors have been changed or impaired by the events occurring during the receivership.

It seems advisable to emphasize at this juncture that the Carthage Weaving Company is a private industrial concern having no duty to perform a service of a public nature, and that the money available for distribution represents the *corpus* of property, which was owned by the defendants, either as partners or as individuals, when the various claims

antedating the receivership accrued, and which has been sold by the receiver by permission of court free from liens.

The receiver was appointed under the provisions of the Code of Civil Procedure. Under G.S. 1-502, the statutes embodied in G.S. 55-147 to G.S. 55-160, both inclusive, are "applicable, as near as may be," to a receiver so appointed.

G.S. 55-149 provides in express terms that upon the appointment of a receiver for an insolvent debtor, all of the real and personal property of the insolvent debtor forthwith vests in the receiver. In the very nature of things, the receiver takes the property of the insolvent debtor subject to the mortgages, judgments, and other liens existing at the time of his appointment. *Vanderwal v. Dairy Co.,* 200 N.C. 314, 156 S.E. 512; *Acceptance Corporation v. Mayberry,* 195 N.C. 508, 142 S.E. 767; *Martin v. Vanlaningham,* 189 N.C. 656, 127 S.E. 695; *Thompson v. Dillingham,* 183 N.C. 566, 112 S.E. 321; *Lasley v. Scales,* 179 N.C. 578, 103 S.E. 214; *Roberts v. Manufacturing Co.,* 169 N.C. 27, 85 S.E. 45; *Withrell v. Murphy,* 154 N.C. 82, 69 S.E. 748; *Garrison v. Vermont Mills,* 154 N.C. 1, 69 S.E. 743; *Fisher v. Bank,* 132 N.C. 769, 44 S.E. 601; *Bank v. Bank,* 127 N.C. 432, 37 S.E. 461; *Pelletier v. Lumber Co.,* 123 N.C. 596, 31 S.E. 855, 68 Am. S. R. 837; *Worth v. Bank,* 122 N.C. 397, 29 S.E. 775; *Cotton Mills v. Cotton Mills,* 116 N.C. 647, 21 S.E. 431. This rule is recognized and enforced when the court permits a receiver to sell encumbered property free from liens, and transfers the liens to the proceeds of sale. G.S. 55-154; 75 C.J.S., Receivers, section 290.

Liens constitute valuable property rights. This observation is trebly true if the debtor is insolvent. A primary purpose for the receivership of an insolvent private concern owing no duty to the public is the preservation of the rights of lien creditors as they exist at the time of the appointment of the receiver. *Mlodzik v. Ackerman Oil Co.,* 191 Wis. 233, 212 N.W. 790, 54 A.L.A. 266. It would thwart this purpose and offend the first principle of economic righteousness to permit an operating receiver to hazard the property rights of lienholders without their consent in a perilous private enterprise merely because the court may entertain the uncertain hope that some pecuniary advantage might thereby be obtained for the general creditors or some other third persons. Besides, such course would transgress the basic concept enshrined in Article I, Section 17, of the State Constitution that no person can be deprived of his property except by his own consent or the law of the land. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717.

For these reasons, we hold that indebtedness incurred by a receiver for the expenses of carrying on and operating the business of an insolvent private concern owing no duty to the public cannot be given priority over the claims of non-consenting lienholders to the *corpus* of the property.

This holding is sanctioned by *Roberts v. Manufacturing Co., supra,* where this Court stamped with its approval this declaration from *International Trust Co. v. United Coal Co.,* 27 Colo. 246, 60 P. 621, 83 Am. S. R. 59: "In administering the affairs of an ordinary insolvent private business corporation, for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business and to make the same a first and paramount lien upon the *corpus* of the property superior to that of prior lienholders without their consent." Moreover, our conclusion on this point is in accord with the overwhelming weight of authority in other jurisdictions. *Nicholson v. Western Loan & Building Co.,* 60 F. 2d 516; *American Engineering Co. v. Metropolitan By-Products Co.,* 280 F. 677; *The Wabash,* 279 F. 921; *In re J. B. & J. M. Cornell Co.,* 201 F. 381; *Union Trust Co. v. Southern Sawmills & Lumber Co.,* 166 F. 193, 92 C.C.A. 101; *International Trust Co. v. Decker Bros.,* 152 F. 78, 81 C.C.A. 302, 11 L.R.A. (N.S.) 152; *Hanna v. State Trust Co.,* 70 F. 2, 16 C.C.A. 586, 30 L.R.A. 201; *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.,* 50 F. 481, 16 L.R.A. 603; *Belknap Sav. Bank v. Lamar Land & Canal Co.,* 28 Colo. 326, 64 P. 212; *International Trust Co. v. United Coal Co., supra; Orr v. Dade Developers,* 138 Fla. 122, 190 So. 20; *Knickerbocker Trust Co. v. Green Bay Phosphate Co.,* 62 Fla. 519, 56 So. 699; *Stevens v. Evening Courier,* 31 Idaho 710, 175 P. 964; *Cronan v. Kootenai County First Judicial Dist. Ct.,* 15 Idaho 184, 96 P. 768; *Dalliba v. Winschell,* 11 Idaho 364, 82 P. 107, 114 Am. S. R. 267; *Mountain City Motor Co. v. Mountain City Motor Co.,* 221 Ky. 579, 299 S.W. 189; *Freeman v. Craft,* 220 Ky. 15, 294 S.W. 822; *Hooper v. Central Trust Co.,* 81 Md. 559, 32 A. 505, 29 L.R.A. 262; *Supreme Fuel Sales Co. v. Peerless Plush Mfg. Co.,* 117 N. J. Eq. 259, 175 A. 358; *Lockport Felt Co. v. United Box Board & Paper Co.,* 74 N. J. Eq. 686, 70 A. 980; *Terry v. Martin,* 7 N.M. 54, 32 P. 157; *Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co.,* 148 N.Y. 315, 42 N.E. 707, 31 L.R.A. 403, 51 Am. S. R. 690; *Raht v. Attrill,* 106 N.Y. 423, 13 N.E. 282, 60 Am. R. 456, 20 Abb. N. C. 26; *Sinopoulo v. Portman,* 192 Okl. 558, 137 P. 2d 943; *James v. Lemlex,* 139 Okl. 199, 281 P. 7098; *Stacy v. McNicholas,* 76 Or. 167, 144 P. 96, 148 P. 67; *United States Investment Co. v. Portland,* 40 Or. 523, 64 P. 644, 67 P. 194, 56 L.R.A. 627; *Moore v. Lincoln Park & Steamboat Co.,* 196 Pa. 519, 46 A. 857; *Lane v. Washington Hotel Co.,* 190 Pa. 230, 42 A. 697; *Gillespie v. Blair Glass Co.,* 189 Pa. 50, 41 A. 1112; *Rhode Island Hospital Trust Co. v. S. H. Greene & Sons Corporation,* 50 R.I. 305, 146 A. 765; *Tennant v. Dunn,* 130 Tex. 285, 110 S.W. 2d 53; *Craver v. Greer,* 107 Tex. 356, 179 S.W. 862; *Moran v. Leccony Smokeless Coal Co.,* 124 W. Va. 54, 18 S.E. 2d 808; *Thomsen*

v. Cullen, 196 Wis. 581, 219 N.W. 439; *First Nat. Bank v. Cook,* 12 Wyo. 492, 76 P. 674, 78 P. 1083, 2 L.R.A. (N.S.) 1012.

Notwithstanding the rule that pre-existing liens on the property of an insolvent private concern owing no duty to the public cannot be displaced in favor of debts contracted by the receiver in carrying on and operating the business of the concern without the consent of the lienholders, the court may charge against the interests of lienholders expenses incurred by the receiver in preserving and selling the property subject to the liens and in applying the cash realized by its sale upon the claims of the lienholders. *Wood v. Woodbury & Pace,* 217 N.C. 356, 8 S.E. 2d 240; *Bank v. Country Club,* 208 N.C. 239, 179 S.E. 882; *Kelly v. McLamb,* 182 N.C. 158, 108 S.E. 435; *Colorado Wool Marketing Ass'n v. Monaghan,* 66 F. 2d 313; *Turner v. State Wharf & Storage Co.,* 263 Mass. 92, 160 N.E. 542; *Sinopoulo v. Portman, supra.* This practice is justified because these expenses are such as would necessarily be incurred by the lienholders themselves in enforcing their claims in the absence of the receivership. As a general rule, however, expenses of this character will not be charged against the interests of lienholders where unencumbered assets are available for their payment. *Lumber Co. v. Lumber Co.,* 150 N.C. 281, 63 S.E. 1048, and 152 N.C. 270, 67 S.E. 579.

Confusion arises in some cases on account of a failure to note the essential difference between costs of administration and expenses of operation in operating receiverships. The necessity for observing this difference is reflected in these observations of the Supreme Court of Appeals of West Virginia: "Costs and expenses of receivership are generally limited to taxes and those costs and expenses necessary to preserve the estate for the benefit of all persons interested, and are payable, primarily, out of the fund in the hands of the receiver, but if necessary, out of the *corpus* of the estate in the custody of the court. The prestige and dignity of the court is involved in seeing that expenses incurred under its direction are paid; otherwise it would be loathe to take charge of property under a receivership in any case. But this does not mean that the court can operate the property through a receiver, and through such operations encroach upon the rights of creditors, especially lienholders, by charging the expenses of such operations to the *corpus* of the estate by which such liens are secured." *Moran v. Leccony Smokeless Coal Co., supra.*

Costs of administration are preferred in payment to expenses of operation. This is so for the very simple reason that the cost of administering property in receivership and the expense of preserving and selling such property and distributing its proceeds among creditors are virtually identical. Costs of administration include such items as the following: (1) Court costs in proceedings relating to the receivership, G.S. 55-155, *Goldberg v. Minerva Sales Co.,* 286 Ill. App. 210, 3 N.E. 2d 301; *Aetna*

Trust & Savings Co. v. Nackenhorst, 188 Ind. 621, 122 N.E. 421; (2) compensation for the receiver, G.S. 55-155, *Cotton Mills v. Cotton Mills,* 115 N.C. 475, 20 S.E. 770; (3) compensation for the receiver's attorney, *Graham v. Carr,* 133 N.C. 449, 45 S.E. 847; (4) bookkeeping and clerical expense, *Nettles Grocery Co. v. Frederick Bros.,* 167 La. 359, 119 So. 256; (5) auditing expense, *Pennsylvania Engineering Works v. New Castle Stamping Co.,* 259 Pa. 378, 103 A. 215; (6) premiums for fire insurance on property in receivership, *Nettles Grocery Co. v. Frederick Bros., supra; Bailey v. Bailey,* 262 Mich. 215, 247 N.W. 160; (7) compensation for watchmen for services in guarding property in receivership, *Nettles Grocery Co. v. Frederick Bros., supra;* and (8) costs of sale of property in receivership, *City Item Co-op. Printing Co. v. Phoenix Furniture Concern,* 108 La. 258, 32 So. 469.

But obligations incurred by a receiver for labor, materials or services in carrying on and operating the business of an insolvent private concern owing no duty to the public are entitled to preference over the claims of general creditors arising before the receivership. *Nettles Grocery Co. v. Frederick Bros., supra; Renberg v. Thede,* 132 Okl. 247, 270 P. 62; *Prenatt v. Messenger Printing Co.,* 250 Pa. 406, 95 A. 564; *Friedheim v. Crescent Cotton Mill,* 64 S.C. 277, 42 S.E. 119; *Hornby v. Hornby,* 71 S.D. 418, 25 N.W. 2d 237; 75 C.J.S., Receivers, section 292. Such obligations are charged first upon income, and when that is insufficient, against the property of the insolvent concern or the proceeds of sale of such property. *Hornby v. Hornby, supra.*

The task of applying these rules to the case at bar must now be performed. W. R. Makepeace is entitled to priority of payment of his claim in full with accrued interest from the $12,000.00 derived from the sale of the personal property mortgaged to him, and O. B. Taylor is entitled to priority of payment of his claim to the extent of $795.00 without interest from the $795.00 obtained by the sale of the personal property covered by his mortgage. The eleven appealing judgment creditors and the six contractors are entitled to priority of payment of their several judgments with accrued interest and costs in the order of their docketing from the cash realized from the sale of the apartment house, the factory and the farm. The claims of the six contractors are payable, however, out of the proceeds of the apartment house alone until the exhaustion of such proceeds compels resort to the sale prices of the factory and farm. After the allocation of the amounts herein mentioned to the two mortgagees, the six contractors, and the eleven appealing judgment creditors, the claim of the United States for income taxes is entitled to priority of payment out of the remainder of the proceeds realized from the sale of both the real and the personal property.

When the liens antedating the receivership have been satisfied in the manner stated in the preceding paragraph, the receiver will have approximately $33,603.15 left in his hands. He should then apply this sum upon these claims and costs in this order of preference:

1. The costs of administration, which consist of the allowances specified in paragraph 17 of the statement of facts and the wages due the watchman for his services in guarding the property pending its sale. G.S. 55-155; *Humphrey v. Lumber Co.,* 174 N.C. 514, 93 S.E. 971.

2. The claims of the United States for Federal employment and social security taxes, which accrued during the receivership. *Spokane County v. United States,* 279 U.S. 80, 49 S. Ct. 321, 73 L. Ed. 621.

3. The claims of Moore County, the Town of Carthage, and the Town of Pinebluff for county and municipal property taxes which were assessed during the receivership. G.S. 55-160, 105-340, 105-376, and 105-412.

4. The claim of North Carolina for contributions under the State Employment Law, which arose during the receivership. G.S. 96-10 (c); *Tildesley Coal Co. v. American Fuel Corporation, supra.*

5. The claims for labor, materials, and services, which accrued during the receivership and are mentioned in paragraph 10 of the statement of facts. These claims embrace those of the Esso Standard Oil Company, the Gouger Electric Company, and all the laborers hired by the receiver other than the watchman.

The receiver will necessarily be compelled to pay the claims for labor, materials and services accruing during the receivership *pro rata* because the money in hand will not suffice to discharge them in full. 75 C.J.S., Receivers, section 283.

Inasmuch as the outlays just enumerated will exhaust the fund, nothing will be available for application to the remaining portion of the debt due O. B. Taylor, the claims of the twenty non-appealing judgment creditors, and the claims of the forty-eight general creditors antedating the appointment of the receiver. The claim of York Mills is included in the claims which do not share in the fund.

In reaching our decision, we have not ignored the claim of the United States for damages for supposed breaches of contract, or the contentions pressed upon us by counsel for the Esso Standard Oil Company, the Gouger Electric Company, the laborers employed by the receiver, and the York Mills.

We will note our conclusions on these matters seriately.

When the United States comes into court to enforce its rights, it comes as any other suitor, and is subject to the rules governing like litigation between private parties. *Curtner v. United States,* 149 U.S. 662, 13 S. Ct. 985, 37 L. Ed. 890; *United States v. O'Grady,* 22 Wall. 641, 22

L. Ed. 772; *Brent v. Bank of Washington, supra; Mitchel v. United States,* 9 Pet. 711, 9 L. Ed. 283.

The United States filed a claim with the receiver for damages totaling $88,550.72 for supposed breaches of contracts allegedly made by the receiver with governmental agencies. The receiver allowed the claim as an unpreferred one, and the United States and certain other claimants excepted to this ruling. The United States asserted that the receiver erred in refusing to accord its claim high priority while the other claimants challenged the validity of the claim in its entirety.

Although the other claimants waived jury trial on their exceptions by failing to demand such trial in the mode prescribed by G.S. 55-153, it was incumbent on the United States to establish its claim by proper evidence before the presiding judge in conformity with the practice which prevails in civil cases where trial by jury is waived. *Surety Corp. v. Sharpe,* 232 N.C. 98, 59 S.E. 2d 593. Moreover, it was the duty of the presiding judge to demand the production of such evidence, and to make appropriate findings of fact from it before rendering judgment in favor of the United States on the claim. G.S. 1-185; *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639.

Despite these considerations and the additional circumstance that the claim was increased in amount from $88,550.72 to $176,790.55 by amendment in the Superior Court, the United States offered no evidence before the presiding judge to prove its claim, and the presiding judge made no findings of fact warranting a decision for the United States on the claim. Since these defects appear on its face, the record discloses the lack of a factual foundation for the claim, and in consequence does not support the adjudication that the United States has a valid claim against the receiver for damages totaling $176,790.55 for breaches of contracts made by the receiver with governmental agencies. For this reason, the exceptions to the adjudication are sustained, the claim is disallowed, and we forego consideration of the question whether the claim would have been valid in law had it been established in fact.

The law declares that "preferences are not favored . . . and can only arise by reason of some definite statutory provision or some fixed principle of common law which creates special and superior rights in certain creditors over others." *Power Co. v. Yount,* 208 N.C. 182, 179 S.E. 804.

The Esso Standard Oil Company asserts that its claim is entitled to priority over the pre-existing liens and the impliedly authorized obligations contracted by the receiver in operating the business of the Carthage Weaving Company merely because the court entered a prior order without notice to other creditors expressly authorizing the receiver to buy its product as a material "needed in the carrying out of a contract" made during the receivership. The Esso Standard Oil Company bases this

contention on the proposition that a fixed principle of law gives operating expenses incurred by a receiver "pursuant to express order of the court" preference over pre-existing liens and impliedly authorized operating expenses, and cites *Armour v. Laundry Company,* 171 N.C. 681, 89 S.E. 19, as authority for that proposition.

Candor compels the confession that the *Armour case* is somewhat lacking in the clarity desirable in judicial opinions. In our judgment, however, the *Armour case* does not sanction the proposition that when it permits a receiver to carry on the business of an ordinary insolvent private concern, the court either can or does give a particular operating expense preference over pre-existing liens and impliedly authorized operating expenses in the distribution of the *corpus* of the property of the concern by conferring its express authorization on the contracting of the particular operating expense. We are unwilling to concede that the law is so disloyal to reason as to found such a substantial distinction on such an insubstantial difference.

As we interpret it, the *Armour case* merely recognizes and applies these orthodox rules relating to receiverships: (1) That expenses incurred by a receiver in the preservation of the property in receivership are chargeable against the interests of pre-existing lienholders where unencumbered assets are not available for the payment of such expenses; and (2) that expenses contracted by a receiver in carrying on and operating the business of an ordinary insolvent private concern are subordinate to the rights of non-consenting lienholders. The indebtedness represented by the receiver's certificates was entitled to priority over the liens and operating expenses because "it was necessary for the protection (*i.e.,* the preservation) of the fund."

The Gouger Electric Company and the laborers employed by the receiver other than the watchman contend that the statutory provision now codified as G.S. 55-136 gives their claims priority over those of the other claimants. This statute is as follows:

"In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets: Provided, that the lien created by this section shall not apply to multiple unit dwellings, apartment houses, or other buildings for family occupancy except as to labor performed on the premises upon which the lien is claimed. This section shall not apply to any single unit family dwelling."

The claims of the laborers are for wages due them for work done for the receiver during the receivership, and in consequence can not qualify for a preferred status under G.S. 55-136. The statute does not apply to any wages except those due persons in the regular employment of an insolvent corporation, partnership or individual "for labor, work, and services rendered within," *i.e., inside the limits of,* "two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual." We cannot accept as valid the suggestion contained in *Walker v. Lumber Co.,* 170 N.C. 460, 87 S.E. 331, that the word "within" means "subsequent," and that the statute, therefore, gives laborers "a first lien" for all their wages accruing "after 60 days prior to the insolvency," notwithstanding the supervening receivership. This suggestion cannot be reconciled with the meaning attributed to the word "within" by judicial decisions and lexicographers. 69 C.J. 1314. Moreover, it ignores the plain legislative purpose not to extend the protection of the statute to persons in the employment of the receiver as contradistinguished from persons in the employment of the insolvent corporation, partnership or individual. Furthermore, it conflicts with the construction either expressly or impliedly put on the statute by all other relevant decisions. *Leggett v. College, supra; In re Port Publishing Co.,* 231 N.C. 395, 57 S.E. 366, 14 A.L.R. 2d 842; *Lumber Co. v. Phosphate Co.,* 189 N.C. 206, 126 S.E. 511; *Humphrey v. Lumber Co., supra; Roberts v. Manufacturing Co., supra; Riley v. Sears,* 156 N.C. 267, 72 S.E. 367, and 151 N.C. 187, 65 S.E. 912.

The Gouger Electric Company is an independent concern which repaired machinery belonging to the Carthage Weaving Company on a single occasion during the receivership at a contract price fixed by mutual agreement between it and the receiver. The claim based on such service could not constitute a preferred one under G.S. 55-136 even if the service had been rendered to the insolvent concern itself within two months next preceding 9 July, 1949, the date of the commencement of this action. The statute applies only to "wages due . . . persons doing labor or service . . . in (the) . . . regular employment" of another. The Gouger Electric Company is due the unpaid contract price—not wages. *Iron Co. v. Bridge Co.,* 169 N.C. 512, 86 S.E. 184. Moreover, its claim is based on a single piece of work. It was not hired to do permanent or steady work in the usual course of the occupation of another. This being true, it did not render the service in the regular employment of another. *Perroni v. Farley,* 14 N. J. Misc. 86, 182 A. 353; *State ex rel. Bettman v. Christen,* 128 Ohio St. 56, 190 N.E. 233; *Reese v. Industrial Commission of Ohio,* 55 Ohio App. 76, 8 N.E. 2d 567.

The York Mills held an unsecured claim against the Carthage Weaving Company at the time of the appointment of the receiver. Subsequent to that event, to wit, on 18 May, 1950, the York Mills reduced such claim to judgment in an independent action against the defendants Van B. Sharpe and Louise R. Sharpe, and caused such judgment to be forthwith docketed on the judgment docket of the Superior Court of Moore County. The record does not indicate that the prosecution of the independent action was authorized by an order in this cause, or that the receiver had any notice of its pendency.

Counsel for the York Mills insist with much earnestness that this judgment entitles their client to a preferred status in the distribution of the money now in the hands of the receiver. It might be argued with much force that this contention is untenable under the doctrine that the right of a pre-existing creditor to a preference in receivership proceedings is fixed as of the date of the appointment of a receiver, and that if a pre-existing claimant is not preferred at such time he may not secure a preference by anything done thereafter. 75 C.J.S., Receivers, section 283.

Be this as it may, it is obvious that the contention of the York Mills is not maintainable for other reasons. The York Mills did not acquire any lien under the judgment on any of the property owned by the defendants as partners because such property vested in the receiver prior to the rendition of the judgment. G.S. 55-149; *Hardware Co. v. Holt,* 173 N.C. 308, 92 S.E. 8. The present record spares us the task of determining whether or not the judgment gave the York Mills a lien on the apartment house or any other real property owned by the defendants as individuals. This is true for the very simple reason that the liens antedating the receivership and the costs and expenses incurred by the receiver in carrying on and operating the business will exhaust all the money in the hands of the receiver, including the proceeds of the apartment house. The claim of the York Mills is subordinate in any event to these liens, costs, and expenses because the liens are senior to such claim, and the costs and expenses were incurred with the acquiescence of the York Mills. It is well settled that costs and expenses incurred by a receiver with the express or implied consent of a lienholder are preferred to the claim of such lienholder. 75 C.J.S., Receivers, section 292.

The presiding judge rightly refrained from giving the receiver any directions concerning the disbursement of any surplus which might arise on the foreclosure of the deed of trust covering the dwelling in Pinehurst. It is a well settled rule in equity that a court will not instruct a receiver as to the distribution of funds until he has them in hand. *Strauss v. Building & Loan Association,* 117 N.C. 308, 23 S.E. 450, 52 Am. S. R. 585, 30 L.R.A. 693.

The order of distribution is modified to conform to this opinion. As thus modified, it is affirmed.

Modified and affirmed.

M. P. McLEAN, JR., AND McLEAN TRUCKING COMPANY v. N. V. KEITH AND CAROLINA SOUTHERN MOTOR EXPRESS, INC.

(Filed 22 August, 1952.)

1. Carriers § 5—

The approval of the Interstate Commerce Commission is prerequisite to the transfer by a common carrier of a certificate of convenience and necessity or the operating rights evidenced thereby, 49 USCA 312 (b) and 5 (2), and where a carrier has executed a contract to convey or a bill of sale, the purchaser's contention that he acquired thereby a vested property interest in the operating rights evidenced by the certificate separate and apart from operating authority thereunder, notwithstanding the want of approval of the transfer by the Interstate Commerce Commission, *is held* untenable.

2. Same—

Where a common carrier in Interstate Commerce executes a contract to convey or bill of sale of its rights under its certificate of convenience and necessity, the proposed purchaser has the right to apply to the Interstate Commerce Commission for approval and to have the seller join in such application, and a court of equity will decree specific performance to the extent of compelling the parties to take steps necessary to effectuate the transfer in accordance with the manner and form agreed upon by them.

3. Same—

Where a franchise carrier in interstate commerce executes a contract to convey or bill of sale of his rights under his certificate, but the contract expressly stipulates that the transfer should be under the short form procedure set up under section 212 (b) of 49 USCA 312 (b), time being of the essence, *held:* upon compliance by the seller in duly joining in application for approval under the short form, the purchaser, upon the ultimate disapproval of the transfer by the Interstate Commerce Commission upon this application, is not entitled to specific performance to compel the seller to join in application for approval of the transfer under the long form prescribed by 49 USCA 5 (2) (a).

4. Specific Performance § 1b—

The remedy of specific performance is available only to compel a party to do precisely what he is obligated to do under the terms of the contract, and it cannot be used to make a new or different contract for the parties simply because the one made by them proves ineffectual.

5. Same: Contracts § 8—

Where the parties expressly agreed as to the procedure to be followed to effectuate a contract, it cannot be held, upon such procedure proving in-

effectual, that the parties are under obligation to follow another procedure under the implication that they should do all things necessary to effectuate their agreement, since it is only when the parties do not expressly agree that the law may raise an implied promise.

APPEAL by plaintiffs from *Rousseau, J.*, February Term, 1952, of FORSYTH.

Civil action instituted by the plaintiffs to establish alleged title to common carrier truck-route operating rights evidenced by certificate of convenience and necessity issued by the Interstate Commerce Commission, and to compel the defendant N. V. Keith by specific performance to comply with the alleged terms of a contract of sale of the operating rights.

The background facts may be summarized as follows: The plaintiff McLean Trucking Company, a corporation, is a common carrier of freight by motor truck for hire, with office and place of business in the City of Winston-Salem, North Carolina. The defendant N. V. Keith, prior to 13 October, 1947, was engaged in a like business under the name of Keith Motor Lines, with office and place of business in the City of Sanford, North Carolina.

The defendant Keith held a consolidated certificate of convenience and necessity issued by the Interstate Commerce Commission covering interstate truck routes through various states on the east coast extending from New England to Florida. For some time prior to 13 October, 1947, McLean Trucking Company, through its president, M. P. McLean, Jr., had been negotiating with the defendant Keith "for the purchase of these truck routes."

As a result of the negotiations, the defendant Keith appeared at the office of McLean Trucking Company on 13 October, 1947, and advised M. P. McLean, Jr., that he would sell his operating rights for the sum of $30,000—$10,000 down and $5,000 a month—but stated that "if he made the deal, he would have to sell that day." He said he "wanted to sell that day so he could buy some other rights." McLean wanted the Keith rights and testified: "I agreed to buy them, if we could . . ."

In this situation the parties were confronted with the problem of complying with the Federal statutes and the rules and regulations of the Interstate Commerce Commission which require the approval of the Commission of a transfer of operating rights from one owner to another before the purchaser may operate under the rights.

Transfers are authorized only under the procedure provided by Section 212 (b) of the Federal Motor Carrier Act of 1935 as amended (49 USCA Sections 312 (b) and 5 (2)). The Act contemplates two types of transfers, and makes provision for procedure to be followed in effectuating a proposed transfer of either type:

(1) Where less than 20 vehicles are involved or the proposed transfer is to a non-carrier, the procedure is by application under rules of the Commission promulgated pursuant to Section 212 (b) of the Federal Motor Carrier Act of 1935 (49 USCA Sec. 312 (b)). A transfer under this section is controlled by Rule 1 (d) promulgated by the Interstate Commerce Commission 1 December, 1943 (8 Fed. Reg. 12448), which provides: "No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided . . ." Applications under this section are referred to in the motor-carrier trade as "short forms." They are relatively simple, requiring a minimum of detailed information, and are usually processed in a relatively short time—"anywhere from a few days up to 30 days."

(2) When more than 20 vehicles are involved and the transfer is to an existing carrier, or to a person affiliated with such a carrier within the meaning of 49 USCA Sections 1 (3) (b), 5 (4) and (5), the procedure is by application under Section 5 of the Interstate Commerce Act as amended (49 USCA Sec. 5 (2) (a)), which provides: "It shall be lawful, with the approval and authorization of the Commission as provided in subdivision (b) . . . for any carrier . . . to purchase . . . the properties, or any part thereof, of another; . . ." Subdivision (b) provides: "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission. . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: . . ." The obvious purpose of this section is to provide procedure whereby the Commission may investigate carefully proposed purchases, mergers, and operating control among and between carriers for the protection of the shipping public. When this section applies, the parties to the transaction are required to file detailed information with the Commission, and usually a lengthy investigation is required, involving findings and conclusions as to how the public interest and advantage will be affected by the transaction. The result is that it usually requires considerable time for an application under this section (49 USCA Sec. 5 (2) (a)), usually referred to in the motor-carrier trade as a "long form" application, to be disposed of by the Commission. The applicant also is required to submit proof of consistency with the public interest and other matters which are not required in the case of transactions governed by

section 212 (b) of the Motor Carrier Act (49 USCA Sec. 312 (b)), and the regulations prescribed thereunder.

The evidence discloses that both McLean and Keith were familiar in a general way with these requirements respecting the transfer of operating rights. Both parties were motor carriers and also more than 20 vehicles were involved; McLean Trucking Company was operating several hundred, and Keith "approximately nine tractors and twenty-one semi-trailers."

Thus, in neither aspect of Section 212 (b) of the Federal Motor Carrier Act (49 USCA Sec. 312 (b)) was it possible for McLean Trucking Company to purchase the Keith rights under the "short-form" procedure. Therefore, if McLean Trucking Company was to purchase the rights, it was necessary, under pain of violating the penal provisions of the Interstate Commerce Act (49 USCA Sec. 5 (4)), that application for approval be made by long-form application under Section 5 (2) (b) of the Interstate Commerce Act (49 USCA Sec. 5 (2) (b)); and the parties knew that the transfer of the Keith rights could not be made to McLean Trucking Company "on the basis of the short form."

In this situation the evidence discloses that McLean "was in no hurry to get the application through," the inference being that he was willing to follow the appropriate long-form procedure prescribed by Section 5 (2) (b) of the Act. However, Keith "was in a hurry—said . . . if he made the deal he would have to sell it that day," and that it would have to be on the short form. "Mr. Keith said he was going to buy another set of rights and as long as he owned his present Keith rights, . . . he couldn't buy them and get them registered under Interstate Commerce regulations . . ." This was so because if he bought the other rights while still owning his original rights, he then would be a motor carrier in the process of acquiring other rights, and thus under the controlling statute it would be necessary for Keith to use the long-form application in seeking approval of the Interstate Commerce Commission for the purchase of the other rights. Whereas, in order for Keith to be able, within the law, to acquire the other rights under the short-form procedure, it was necessary for him to dispose of his existing rights to a non-carrier, so he himself would then be a non-carrier and as such eligible to purchase other rights under the short-form procedure allowed by the rules of the Commission (49 USCA Sec. 312 (b)).

Clearly this could not be done if McLean Trucking Company was to be the purchaser, because the sale would be governed by Section 5 (2) (b) of the Interstate Commerce Act (49 USCA Sec. 5 (2) (b)). And when that section of the Act applies, a failure to observe its requirements brings into operation the penal provisions of Section 5 (4) of the Act, which provides that: "It shall be unlawful for any person . . . to enter

into any transaction (within the scope of Section 5 (2)) or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by the use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever." (49 USCA Sec. 5 (4)).

An awkward situation was thus presented. Keith wished to sell and McLean to buy, but Keith insisted on selling under the short-form procedure, which appeared to be inappropriate.

In this situation, with Keith insisting on selling that day—"because he wanted part of his money . . . so he could buy these other rights," McLean called into the conference . . . "an Interstate Commerce Attorney from Washington," who, as McLean put it, "said if we got a third party to buy, that he thought it would be all right." The Washington attorney cited as authority for this suggestion the decision of the Interstate Commerce Commission in Roadway Express, Inc.—Merger—Walser Transportation, Inc. (1940), 35 M.C.C. p. 463, in which Roadway acquired the Walser rights through a third-party non-carrier intermediary. In that case the hearing-examiner found "that control and management in a common interest of Roadway and Walser had already been effectuated" in violation of the provisions of Section 5 (4) of the Interstate Commerce Act. However, the Commission overruled the examiner and approved the merger.

Acting upon the advice of the Washington attorney that a third party be procured to make the initial purchase, McLean contacted for that purpose Thomas P. Ravenel, regularly retained attorney of McLean Trucking Company. McLean testified: "It was then that I sent for Mr. Ravenel and called him in. I didn't have to go far to find a purchaser for the rights. He was in the office . . . I had to have . . . somebody else as a purchaser, and I got Mr. Ravenel, one of my employees. . . ." Ravenel made the initial purchase with the understanding that McLean Trucking Company would file a proper application to facilitate the ultimate transfer of the operating authority to the Trucking Company. The arrangement for the sale of the rights was then concluded in the following manner:

(1) Keith and Ravenel executed a written memorandum of contract that day (13 October, 1947), stipulating in substance that Keith contracted to sell and Ravenel to purchase the interstate motor-carrier rights of Keith for $30,000—$10,000 cash and balance of $20,000 in four monthly payments—with the parties agreeing "to submit an application to the Interstate Commerce Commission to consummate the agreement."

(2) Upon execution of the contract, Ravenel that day gave Keith his check for $10,000 as part payment of the purchase price of the rights, and thereafter the additional sum of $20,000 was paid, completing the purchase price according to the terms of the contract.

(3) McLean testified in part: "When the contract between Mr. Ravenel and Mr. Keith was entered into and signed by them . . ., I executed a check for $10,000 and helped Mr. Ravenel raise the $10,000 payment . . . I gave Mr. Ravenel a certified check . . . I know Mr. Ravenel used the check as collateral, and that he borrowed the money to make "his check to Keith good. I was wanting to give it the appearance that Mr. Ravenel was the true and genuine purchaser of these rights; I was not actually the purchaser. I don't think the company was. I furnished the remainder of the money, the other $20,000." (Next day—14 October, 1947—Keith contracted to purchase from the Colonial Motor Freight Lines, Inc., certain motor carrier operating rights evidenced by "N. C. Certificate No. 463-A for the sum of $7,000.00 in cash or certified check upon approval of the Commission.")

(4) On 17 October, 1947, Keith and Ravenel submitted a short-form application to the Interstate Commerce Commission for approval of the sale, and it was approved by the Commission on 13 November, 1947.

(5) After the Commission approved the sale of the rights, Ravenel and Keith, under date of 2 December, 1947, entered into a contract by the terms of which it was agreed that the lines should be operated in the name of Ravenel but with Keith acting as agent and general manager of operations. Operations were begun on this basis, with Keith being paid a fixed salary for his services, and with neither McLean nor McLean Trucking Company having "any control over (operations) whatsoever."

(6) Meanwhile, on 30 January, 1948, in furtherance of the agreement of the parties, McLean Trucking Company and Ravenel executed and filed with the Interstate Commerce Commission a long-form application asking approval for transfer of the operating authority and rights from Ravenel to the McLean Trucking Company.

Thereafter the Interstate Commerce Commission of its own motion instituted a special investigation of the facts surrounding the original purchase and sale of the Keith rights. The purpose of the investigation was to determine whether the original transfer, which had been processed under short-form application and the provisions of Section 212 (b) of the Federal Motor Carrier Act (49 USCA Sec. 312 (b)), was properly the subject of such application and mode of handling. M. P. McLean, Jr., was interviewed by the special investigator of the Commission and made a full disclosure of all the facts respecting the transaction.

While the investigation was in progress the long-form application for approval of the transfer from Ravenel to McLean Trucking Company

was withdrawn by the parties before the Commission took action thereon. It has never been renewed. Operation of the lines by Ravenel was terminated after a period of about six months, and the employment arrangement between Keith and Ravenel was discontinued by mutual consent. There was an operating loss of about $7,000 which was paid and absorbed by McLean Trucking Company. Also, while there was testimony tending to show that Ravenel resigned as attorney for McLean Trucking Company the day the contract was made with Keith, "and had no connection with the Trucking Company during the time he was operating these rights . . .," nevertheless the undisputed evidence shows that Ravenel's retainer continued to be paid by the Trucking Company "until January or February, 1951." After operations were terminated during or about June, 1948, the lines were never operated any more by Ravenel, and the operating authority lay dormant until revived some 18 months later in 1950 by Keith, as hereinafter explained.

On 4 April, 1949, the Interstate Commerce Commission of its own motion formally reopened the original application filed by Ravenel and Keith, which had been approved after informal proceedings under the short-form application, and proceeded to rehear the matters appertaining to that application.

Both McLean Trucking Company and Ravenel participated in the rehearing proceedings. As to this, the record indicates that through counsel both the Trucking Company and Ravenel executed and filed a joint stipulation of facts. This stipulation, with exhibits, covers about nine pages of the record, and concedes and admits the facts surrounding the proposed purchase of the Keith rights to be substantially as herein stated.

Thereafter, and during or about the month of January, 1950, the hearing examiner of the Interstate Commerce Commission filed with the Commission his report containing findings of fact and conclusions thereon, together with draft of an order which he recommended for entry by the Commission. The effect of this recommended order would be to vacate and set aside the previous order of the Commission by which the transfer from Keith to Ravenel was approved, and to dismiss the application.

All interested parties were served with copies of the examiner's report and recommended order, and notice was also given them that unless exceptions should be filed within a stipulated time the recommended order would become the order of the Commission. No exceptions were filed and the order became effective as of 6 March, 1950, and there was no appeal therefrom by either McLean Trucking Company or Ravenel.

After this order of the Commission became final on 6 March, 1950, M. P. McLean, Jr., requested Keith to execute new forms under Section 5

of the Interstate Commerce Act (49 USCA Sec. 5 (2) (a)), in an effort to try to effectuate an approval of a transfer of the rights to McLean Trucking Company, or, as an alternative, to join in a proper petition to sell the rights to some other purchaser. Keith refused to comply with these demands, stating he would join in no other petition to transfer the rights to anyone, and further expressing the intention to keep the rights as his own. McLean further testified that at one time he offered to resell the rights to Keith for $25,000, but this offer Keith also refused.

Later, and on or about 13 March, 1950, the defendant Keith with two members of his family organized the defendant Carolina Southern Motor Express, Inc., and petitioned the Interstate Commerce Commission to transfer the operating rights to this corporation. The transfer was approved by the Commission on 28 April, 1950, and a certificate for the rights was issued by the Commission to the defendant corporation on 29 May, 1950, and it is now operating thereunder.

Subsequently, by bill of sale dated 14 June, 1951, Ravenel transferred and assigned all his "right, title and interest in and to" the truck rights and certificate of convenience and necessity and all of his rights in and under the Keith-Ravenel contract to M. P. McLean, Jr., and McLean Trucking Company.

The gravamen of the complaint and relief sought by the plaintiffs is: that the defendant Keith, as holder of the certificate of convenience and necessity issued by the Interstate Commerce Commission, owned the operating rights when the contract of sale was made between Keith and Ravenel on 13 October, 1947; that title to the rights passed at that time from Keith to Ravenel; that authority to operate under the rights was conferred on Ravenel by order entered by the Commission 13 November, 1947, approving the transfer; that while this order was vacated later by the Commission's order of 6 March, 1950, even so, the effect of the latter order was only to withdraw from Ravenel his operating authority, without affecting his title to or ownership of the operating rights, thus leaving title thereto vested in Ravenel; that, therefore, Keith did not own the operating rights when he attempted later to transfer the rights to his co-defendant, Carolina Southern Motor Express, Inc.; and that the later sale for a valuable consideration of these rights by Ravenel to the plaintiff under date of 14 June, 1951, vested in the plaintiffs the title to the rights, and that therefore they own title to the operating rights, notwithstanding operating authority has not been granted to them, but has been granted to the corporate defendant, by the Interstate Commerce Commission.

Upon these grounds the plaintiffs demand relief on these alternate theories: First, they assert that Keith's attempt to transfer the operating rights to the corporate defendant was a nullity and constitutes a cloud

on their title, and they pray judgment that this alleged cloud be removed and that they be declared the "owners in fee" of the "rights . . .," and that "the court enjoin the Carolina Southern Motor Express, Inc., from further exercising or using the rights represented" by the Keith certificate.

Secondly, the plaintiffs urge that, even though they should be denied the other relief demanded, in any event they are entitled, by reason of the contractual relations between the parties, to a decree of specific performance, compelling Keith to join with them in executing such forms and application as shall be required by the Interstate Commerce Commission in order to obtain the Commission's approval of the sale and transfer of the rights to the plaintiffs, to the end that they may obtain from the Commission authority to operate under the rights.

The defendants, answering the complaint by general denials and averments of further defense, insist that the plaintiffs are not entitled to relief of any kind in this action. They also plead laches and illegality of the contract declared upon by the plaintiffs, and set up the further defense that the plaintiffs are not entitled to recover under application of the rule of equity expressed in the maxim that "he who comes into equity must come with clean hands."

At the close of the trial below, after all the evidence was in, the defendant Keith, notwithstanding the plaintiffs did not sue for return of the purchase price of the operating rights, tendered judgment against himself in favor of the plaintiffs in the amount of $30,000, with interest thereon at 6% per annum from 6 March, 1950, until the date of tender, 27 February, 1952, upon the condition that specific performance be not decreed and that all interest in the carrier rights remain in the defendant Carolina Southern Motor Express, Inc.

Also, after each side had rested its case and at the conclusion of all the evidence, the parties, by oral consent as provided by G.S. 1-184, waived a jury trial and agreed that the court might consider the evidence, find the facts, and render judgment without the intervention of a jury. And thereupon the jury was dismissed.

The court, however, upon consideration of the evidence and the argument of counsel, concluded, and so ruled, that the defendants' motion for judgment as of nonsuit, renewed at the conclusion of all the evidence, should be allowed, and judgment was entered accordingly.

At the time of the signing of the judgment of nonsuit, the court permitted the defendant Keith to withdraw the previous tender of judgment against himself and allowed the defendants to substitute in lieu thereof their written tender of payment with the Clerk, under which the defendants paid into the office of the Clerk the sum of $33,600, subject to the terms set out in the tender, which provide in part that the plaintiffs may,

within 30 days after the filing of the opinion of the Supreme Court deciding this appeal, apply for and obtain from the Clerk the moneys so deposited by the defendants, upon condition that the acceptance and receipt thereof by the plaintiffs shall constitute a full and final settlement of all matters in controversy between the plaintiffs and the defendants.

From the judgment of nonsuit entered at the conclusion of the evidence, the plaintiffs appealed, assigning errors.

W. Dennie Spry, Ratcliff, Vaughn, Hudson, Ferrell & Carter, and Ingle, Rucker & Ingle for plaintiffs, appellants.

James E. Wilson, James J. Doherty, York & Boyd, and Womble, Carlyle, Martin & Sandridge for defendants, appellees.

JOHNSON, J. Decision here turns on the answers to these questions: (1) In the absence of approval by the Interstate Commerce Commission of the purchase by the plaintiffs of Keith's operating rights, did the plaintiffs acquire a vested property interest in the rights, separate and apart from the operating authority? (2) Was the evidence sufficient to support a decree of specific performance against Keith, requiring him to join with the plaintiffs in a long-form application to the Interstate Commerce Commission asking its approval of the transfer of the operating rights to the plaintiffs?

A study of the record and the controlling authorities impels the conclusion that both questions should be answered in the negative. This being so, it follows that the judgment of nonsuit was properly entered by the trial court. We treat the questions in the order stated:

1. *The Question of Separate Transfer of Operating Rights.*—Here the plaintiffs urge that the operating rights evidenced by an interstate motor-carrier certificate of convenience and necessity may be transferred, separate and apart from operating authority, without the approval of the Interstate Commerce Commission.

However, transfers are authorized only under the procedure provided by Section 212 (b) of the Federal Motor Carrier Act of 1935 as amended (49 USCA Sections 312 (b) and 5 (2)). The Act contemplates two types of transfers—one under short-form procedure pursuant to regulations made by the Interstate Commerce Commission, the other under long-form procedure prescribed by Section 5 of the Interstate Commerce Act as amended (now treated as a part of the Federal Motor Carrier Act by virtue of amendment which repealed Section 213 of the original Motor Carrier Act and substituted therefor the amended Section 5 of the Interstate Commerce Act. See 49 USCA Sections 5 and 312 (b)). And unless and until approval is obtained as prescribed by one or the other of these two modes of procedure, there can be no valid or effective transfer

by sale of either a certificate of convenience and necessity or the operating rights evidenced thereby. The clear meaning of the controlling statutory provisions seems to be that prior approvel by the Commission is a condition precedent to any such transfer, and until approval is obtained neither the transfer of operating rights nor any other part of the proposed sale may be lawfully consummated. This interpretation is supported by what is said in these decisions: *U. S. v. Resler,* 313 U.S. 57, 85 L. Ed. 1185; *Zabarsky v. Flemings,* 113 Vt. 200, 32 A. 2d 663; *Gregory v. Lewis,* 205 Ark. 68, 167 S.W. 2d 499. See also *Royal Blue Coaches v. Delaware River Coach Lines, Inc.,* 140 N. J. Eq. 19, 52 A. 2d 763,—final appeal 2 N.J. 73, 65 A. 2d 264; *Raymond Bros. Motor Transp., Inc.—Purchase—North American,* 37 M.C.C. 431; *Hoover Truck Co.—Purchase—Frank Johnson,* 37 M.C.C. 507; *Porashnick Local Truck System, Inc.—Purchase—George E. Smith and J. V. Griffin,* 37 M.C.C. 565.

Under the interpretation urged by the plaintiffs, the mere execution of a contract or bill of sale by the holder of a certificate, without sanction or approval of the Interstate Commerce Commission, would permit the creation of a vested property interest in operating rights, separate and apart from operating authority. This would give rise to an awkward situation, wherein one might purchase operating rights and, without prior approval of the Commission, apply to the court for relief on the theory of protecting vested property rights, and thereby indirectly challenge the jurisdiction of the Interstate Commerce Commission and its statutory powers of regulation and control over interstate motor carriers.

The interpretation urged by the plaintiffs not only runs counter to the express provisions of the Federal Motor Carrier Act, but is contrary to the declared purpose of Congress in thereby delegating to the Interstate Commerce Commission the exclusive power to grant operating rights to motor carriers engaged in interstate commerce and in conferring on the Commission broad powers of regulation and control over this branch of interstate commerce (49 USCA Sections 304, 305 and 312); 37 Am. Jur., Sections 115-128 *et seq.* See also *McLean Trucking Co. v. U. S.,* 321 U.S. 67, 88 L. Ed. 544.

Factually distinguishable are the cases cited and relied on by the plaintiffs. The cases on which the plaintiffs chiefly rely as supporting the proposition here urged are: *Re Rainbo Express, Inc., etc.,* 179 Fed. 2d 1, 15 A.L.R. 2d p. 876; *Brown v. Smith et al.,* 32 Tenn. App. 622, 225 S.W. 2d 91; *Costello v. Acco. Transport Co.,* 33 Tenn. App. 411, 232 S.W. 2d 297.

Each of these cases involves, in a bankruptcy or insolvency proceeding, the validity of a chattel mortgage on a motor carrier certificate of convenience and necessity. In substance, the decisions hold that prior approval of the Interstate Commerce Commission is not necessary to the

validity of a chattel mortgage on a certificate as between the mortgagor and his privies and the mortgagee.

The other cases cited on the proposition here urged—principally decisions of the Interstate Commerce Commission—deal with the rights of purchasers at mortgage sales. The gist of these decisions is that on foreclosure the purchaser acquires the right to apply to the Commission for operating approval.

It is true that in basic theory the execution of a chattel mortgage passes legal title to the *res* to the mortgagee. And the plaintiffs, relying upon this theory, call to their aid these decisions in chattel mortgage cases and urge that by analogy it follows that a separate property right is created *ipso facto* by the execution of a contract for the sale of a certificate or the operating rights evidenced thereby. However, this so-called passing of legal title in mortgage transactions is fictional only, as furnishing in legal contemplation a repository and notional vehicle for the later transfer of title, if need be, in case of foreclosure, so as to effectuate the underlying security purposes of the chattel mortgage. Even under this theory, the equitable or beneficial title remains in the mortgagor. In the cited cases, the recognition of this fictional theory of the passing of legal title to the mortgagee means nothing more than that this fictional vehicle carries to the purchaser on foreclosure the right to apply to the Commission for approval of transfer of the operating rights. Such seems to be the rationale of the decisions reached in the cited cases. At any rate, we are not inclined to treat these decisions in cases involving chattel mortgages as authoritative or controlling in support of the proposition that, notwithstanding want of approval by the Commission, as required by statute, operating rights become clothed with the attributes of property in a constitutional sense upon the mere execution of a contract of sale of a certificate of convenience and necessity.

Therefore, if it be conceded *arguendo* that the holder of an interstate certificate of convenience and necessity has a vested property right therein, even so, with the transfer in the present case standing unapproved by the Interstate Commerce Commission, it follows from what we have said that the alleged or proposed transfer of rights to the plaintiffs entitles them in no aspect of the case either to an adjudication of title or to injunctive relief against the defendants as prayed. Accordingly, we do not reach for decision, and it is not necessary for us to discuss, the refinements arising out of the arguments in the briefs respecting whether a certificate of convenience and necessity to operate as an interstate motor common carrier is regarded as a franchise—limited or special—possessing the attributes of property and entitling the holder to the usual constitutional protective safeguards. See, however: 60 C.J.S., Motor Vehicles, Sections 84 (a) and (c); Annotations: 15 A.L.R. 2d 883; 73 C.J.S.,

Property, Sections 1, 2, 13 and 15; *Elizabeth City v. Banks,* 150 N.C. 407, bot. p. 415, 64 S.E. 189; *Coach Co. v. Transit Co.,* 227 N.C. 391, 42 S.E. 2d 398; *Utilities Commission v. McLean,* 227 N.C. 679, 44 S.E. 2d 210; *Atlantic Greyhound Corporation v. North Carolina Utilities Commission,* 229 N.C. 31, 47 S.E. 2d 473.

2. *The Question of Specific Performance.*—While approval by the Commission is a condition precedent to a valid and effective transfer of a certificate of convenience and necessity or operating rights evidenced thereby, nevertheless a failure to secure such prior approval does not leave the proposed purchaser remediless. A contract to convey or a bill of sale, unapproved by the Commission, but otherwise valid, confers upon the proposed purchaser the right to apply to the Commission for approval. *Royal Blue Coaches v. Delaware River Coach Lines, Inc., supra.* Ordinarily, a court of equity will decree specific performance of a valid contract to transfer operating rights evidenced by a certificate of convenience and necessity, to the extent of compelling the parties to take steps necessary to effectuate the transfer, such as making application to the Commission in manner and form as agreed by the parties in making the contract. *Lennon v. Habit,* 216 N.C. 141, 4 S.E. 2d 339; *Watson Bros. Transp. Co. v. Jaffa,* 143 F. 2d 340.

Here, the plaintiffs contend they are entitled to a decree compelling the defendants to join in another application to the Commission— the long-form type of application designated as Form BMC 44 under Section 5 of the Interstate Commerce Act (49 USCA Sec. 5).

However, all the evidence discloses that Keith expressly contracted to sell only under the short-form procedure set up under Section 212 (b) of the Federal Motor Carrier Act (49 USCA Sec. 312 (b)), and all the evidence tends to show he has complied with the contract in this respect. He joined with Ravenel in the short-form application, as agreed and the transfer was approved. This being so, the plaintiffs are not entitled to specific performance. The remedy of specific performance is an equitable remedy of ancient origin. Its sole function is to compel a party to do precisely what he ought to have done without being coerced by the court. 49 Am. Jur., Specific Performance, Sec. 2, p. 6.

Equity can only compel the performance of a contract in the precise terms agreed on. It cannot make a new or different contract for the parties simply because the one made by the parties proves ineffectual. 49 Am. Jur., Specific Performance, Sec. 22, pp. 35 and 36. "The remedy of specific performance is never applicable where there is no obligation to perform," 58 C.J., p. 847, and specific performance does not lie until there has been a breach of contract. 58 C.J., p. 851.

The plaintiffs contend that under all the circumstances it was implied in the terms of the contract that Keith should do all things necessary to

effectuate a transfer to the plaintiffs. The answer to this is that the parties did not leave to implication the matter of procedure to be followed in effectuating the proposed transfer. As to this, they contracted in express terms, and the rule is that there can be no implied agreement where an express one exists. It is only when the parties do not expressly agree that the law may raise an implied promise. *Winstead v. Reid,* 44 N.C. 76; *Lawrence v. Hester,* 93 N.C. 79; 12 Am. Jur., Contracts, Sec. 7.

Accordingly, with no breach of contract being made to appear, the action of the court below in declining to decree specific performance will be upheld. With decision being rested on this ground, it is not necessary for us to discuss the contentions *pro* and *con* treated at length in the briefs respecting whether or not the plaintiffs are barred relief under application of the rule of equity expressed in the maxim that "he who comes into equity must come with clean hands," and these related maxims: *Ex turpi causa non oritur actio,* and *In pari delicto portior est conditio defendentis.*

A study of the record impels the conclusion that the court below followed and applied the pertinent, controlling principles of law and equity and reached the right decision. Therefore the judgment below is

Affirmed.

ELMER COX, ADMINISTRATOR OF PATTY MATTHEWS COX, v. HENNIS FREIGHT LINES, INC.,

and

LETHIE MATTHEWS v. HENNIS FREIGHT LINES, INC.

(Filed 22 August, 1952.)

1. Trial § 23a—

Nonsuit may not be entered upon a particular theory of liability unless such theory is not supported by the pleadings, liberally construed in favor of the plaintiff, or by the evidence, considered in the light most favorable to plaintiff.

2. Trial § 22c—

Upon motion to nonsuit, the credibility of witnesses and the weight to be given their testimony are matters within the province of the jury, and it may accept as true a part of the testimony offered by a party and reject as false the remainder of such testimony.

3. Automobiles § 18h (2)—Evidence held for jury in this action involving collision at intersection controlled by automatic signals.

Plaintiffs' evidence tended to show that the green signal light was with the driver of the car in which one plaintiff and the intestate of the other plaintiff were riding as guests, and that their driver proceeded first into the intersection and that the car was struck by defendant's tractor-trailer,

which entered the intersection from the right without giving the car time to clear the intersection, although its driver could have observed the prior entry of the car into the intersection, *held:* Defendant's motions to nonsuit were properly denied, since plaintiffs' evidence tends to show that the collision occurred as a proximate result of the negligence of defendant's driver in crashing the stop light, or in his failure to maintain a proper lookout, to keep his vehicle under reasonable control, or in driving at a speed greater than was reasonable and prudent under the existing conditions.

4. Automobiles § 8i: Municipal Corporations § 39—

A municipal corporation is given authority by statute to install automatic traffic control signals and to compel their observance by ordinance. G.S. 20-169.

5. Automobiles § 8i—

A motorist is guilty of negligence as a matter of law if he fails to stop in obedience to a red traffic light as required by municipal ordinance, and such negligence is actionable if it proximately causes the death or injury of another.

6. Same—

The fact that a motorist has a green traffic light facing him as he approaches and enters an intersection does not relieve him of the duty to maintain a proper lookout, to keep his vehicle under reasonable control, and to drive his vehicle at a speed which is reasonable and prudent under the existing conditions, or exonerate him from legal liability for the death or injury of another proximately resulting from his failing to perform his legal duty in one or more of these respects.

7. Automobiles § 18a—

In an action based upon defendant's failure to observe and obey an automatic traffic control signal, the failure of the complaint to allege that such signal was maintained and operated under an ordinance of the municipality is a defect, but such defect is cured by the answer when it alleges this material fact.

8. Pleadings § 19—

A fatal omission in the complaint is cured if such omission is supplied by an affirmative allegation of the answer.

9. Automobiles §§ 8i, 18i—Right of motorist to rely on traffic control light is not subject to limitation that he be free of negligence.

When supported by the evidence, the court should give in substance at least a requested instruction to the effect that if the automatic signal light was green facing the driver of defendant's truck, such driver, in the absence of anything which should have given him notice to the contrary, had the right to assume and act upon the assumption that the driver of a vehicle entering the intersection along an intersecting street would not only exercise ordinary care for his own safety as well as the safety of his passengers, but would bring his car to a stop before entering the intersection in obedience to the traffic signal, and an instruction to the effect that the right of defendant's driver to rely upon the signal device obtained only

if defendant's driver was exercising due care and was free from negligence, is error.

10. Negligence § 9—

The rule that a party is not under duty to anticipate disobedience of law or negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, is entitled to assume and act on the assumption that others will obey the law and exercise ordinary care, *held* not subject to the limitation that such party be absolutely free of negligence on his own part, although such rule would not absolve him from liability if his own negligence constitutes the proximate cause, or one of the proximate causes, of the injury.

APPEAL by defendant from *Gwyn, J.*, and a jury, at November Term, 1951, of YADKIN.

Two consolidated civil actions arising out of a collision between two motor vehicles at a street intersection, where traffic was regulated by automatic traffic control signals.

These are the facts:

1. Rockford Street, which runs northeast and southwest, and Worth Street, which runs northwest and southeast, intersect and cross each other in a somewhat congested area in the Town of Mount Airy, North Carolina. Each street is paved, and has a width of 30 feet.

2. Traffic at the intersection is regulated by automatic traffic control signals erected under an ordinance of the Town of Mount Airy. These signals are suspended over the center of the intersection, and display successively green, yellow, and red lights in four directions, namely, both ways on Rockford Street and both ways on Worth Street. The lights are synchronized so that green lights are exhibited to motorists on Rockford Street when red lights are shown to motorists on Worth Street, and *vice versa*. The ordinance provides, in substance, that a motorist facing a green light may proceed straight through the intersection or turn right or left on it, and that a motorist facing a red light must stop before entering the intersection and remain standing until the light confronting him changes to green. A violation of the ordinance is a misdemeanor.

3. At eleven o'clock in the forenoon on 21 November, 1950, a northeast-bound Chevrolet automobile driven by Marvin Matthews, which approached and entered the intersection on Rockford Street, and a northwest-bound tractor-trailer combination owned by the defendant Hennis Freight Lines, Inc., which approached and entered the intersection on Worth Street, collided on the intersection, killing Patty Matthews Cox and injuring Lethie Matthews, who were guests in the Chevrolet car. The automatic traffic control signals were working at the time of this event, and the tractor-trailer combination was then being operated by its

regular driver, Gerald Fisher Hamer, on a business mission for the defendant.

4. These two actions grow out of the collision between the Chevrolet automobile and the tractor-trailer combination. The plaintiff Elmer Cox, as administrator, sues the defendant for damages for the death of his intestate, Patty Matthews Cox, and the plaintiff Lethie Matthews sues the defendant for damages for her personal injuries. The cases were consolidated for trial by consent of the parties, each of whom introduced evidence.

5. According to the testimony presented by the plaintiffs, the tragedy happened in this way:

Patty Matthews Cox and Lethie Matthews traveled northeastward along Rockford Street as guests in the Chevrolet automobile driven by Marvin Matthews. As the Chevrolet car neared the intersection of Rockford and Worth Streets, Marvin Matthews was confronted by a red light. He brought the Chevrolet to a complete stop just outside the intersection, and waited for the light to change. When the light facing him became green, Marvin Matthews put the Chevrolet into motion, entered the intersection substantially in advance of the tractor-trailer combination which was then moving northwesterly along Worth Street, and undertook to proceed straight through the intersection at a speed not exceeding ten miles an hour. Although the prior entry and occupation of the intersection by the Chevrolet automobile was clearly visible to him for an appreciable time as he approached the intersection, the driver of the tractor-trailer combination drove northwestwardly on Worth Street at a speed approximating 40 miles an hour, proceeded onto the intersection without changing the course of his vehicle or making any attempt to slacken its speed until a mere instant before the impending collision, and struck the Chevrolet car, killing Patty Matthews Cox and inflicting upon Lethie Matthews bodily injuries which necessitated the amputation of her right leg and made her a virtual cripple.

6. The evidence adduced by the defendant gives this version of the unfortunate occurrence:

The tractor-trailer combination moved northwestward on Worth Street toward the intersection at a speed of "somewhere between 20 and 25 miles an hour." At the same time, Marvin Matthews, who "could see southwardly and to his right on Worth Street approximately 150 feet," drove his Chevrolet automobile, which was substantially more distant from the intersection than the tractor-trailer, in a northeastern direction on Rockford Street. When the tractor-trailer combination reached a point 75 feet from the intersection, the traffic lights changed so that the light confronting the driver of the tractor-trailer was green, and the light facing Marvin Matthews was red. The traffic lights continued in this state

until the collision occurred. Inasmuch as he had the green light in his favor and believed that Marvin Matthews would stop before entering the intersection in obedience to the red light facing Rockford Street, the driver of the tractor-trailer combination entered the intersection when the Chevrolet "car was around 10 to 15 feet from the intersection," and undertook to proceed straight through the intersection. Instead of stopping before entering the intersection, Marvin Matthews drove his Chevrolet through the red light confronting him, proceeded onto the intersection at unabated speed, and crashed against the side of the tractor-trailer combination, causing the collision and its tragic consequences. Just as soon as he realized that Marvin Matthews would continue on his way without stopping or even slowing down in utter disregard of the red light facing Rockford Street, the driver of the tractor-trailer combination tried in vain to avert the impending collision by applying his power brakes.

7. These issues were submitted to the jury in the death action:

(1) Was the death of Patty Matthews Cox, deceased, caused by the negligence of the defendant, as alleged? (2) What amount, if any, is the plaintiff entitled to recover of the defendant? The jury answered the first issue "Yes," and the second issue "$10,000.00." The court entered judgment for the plaintiff Elmer Cox, Administrator of Patty Matthews Cox, on this verdict, and the defendant appealed, assigning errors.

8. These issues were submitted to the jury in the personal injury action: (1) Was the plaintiff Lethie Matthews injured by the negligence of the defendant, as alleged? (2) What amount, if any, is the plaintiff entitled to recover of the defendant? The jury answered the first issue "Yes," and the second issue "$45,000.00." The court entered judgment for the plaintiff Lethie Matthews on the verdict, and the defendant appealed, assigning errors.

9. The defendant asserts by its assignments of error that the trial judge erred in refusing to dismiss the actions upon compulsory nonsuits after all the evidence was in; that the trial judge erred in failing to charge the jury as requested in special prayers for instructions tendered by the defendant; and that the trial judge erred in the instructions actually given by him to the jury.

J. T. Reece, Wm. M. Allen, and Hoke F. Henderson for plaintiffs, appellees.

Folger & Folger for defendant, appellant.

ERVIN, J. The court cannot submit a case to the jury on a particular theory unless such theory is supported by both the pleadings and the

evidence. *Hooper v. Glenn,* 230 N.C. 571, 53 S.E. 2d 843; *Ewing v. Kates,* 196 N.C. 354, 145 S.E. 673; *Pittman v. Tobacco Growers Association,* 187 N.C. 340, 121 S.E. 634; *Frick Co. v. Boles,* 168 N.C. 654, 84 S.E. 1017; *Wilson v. Railroad,* 142 N.C. 333, 55 S.E. 257. In ascertaining whether a pleading upholds a theory, the court construes the allegations of the pleading with liberality in favor of the pleader with a view to presenting the case on its real merits. G.S. 1-151; *Lyon v. R. R.,* 165 N.C. 143, 81 S.E. 1. In determining the sufficiency of evidence to sustain the theory of the complaint and to withstand the motion of the defendant for a compulsory nonsuit, the court interprets the evidence in the light most favorable to the plaintiff. *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757, 17 A.L.R. 2d 881; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Potter v. Supply Co.,* 230 N.C. 1, 51 S.E. 2d 908; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488. In performing this task, the court bears in mind that the credibility of witnesses and the weight to be given to their testimony are matters within the province of the jury, and that the jury may accept as true a part of the testimony offered by a party and reject as false the remainder of such testimony. *Graham v. Gas Co., supra; Casada v. Ford,* 189 N.C. 744, 128 S.E. 344; *Hadley v. Tinnin,* 170 N.C. 84, 86 S.E. 1017; *Maynard v. Sears,* 157 N.C. 1, 72 S.E. 609; *Newby v. Edwards,* 153 N.C. 110, 68 S.E. 1062; *S. v. Smallwood,* 75 N.C. 104.

When the pleadings and the evidence in the cases now before us are tested by these rules, it is manifest that they support two theories of recovery. These theories are somewhat alternative in character, and are summarized in the numbered paragraphs set forth below:

1. The driver of the defendant's tractor-trailer combination was guilty of negligence in that he failed to stop in obedience to a red traffic light as commanded by the ordinance, and his negligence in this respect proximately caused the death of Patty Matthews Cox and the personal injury of Lethie Matthews.

2. Marvin Matthews drove the Chevrolet automobile into the intersection first and undertook to proceed straight through it ahead of the tractor-trailer combination, whose driver could observe the prior entry and occupancy of the intersection by the Chevrolet car. Notwithstanding this, the driver of the tractor-trailer combination immediately proceeded onto the intersection without permitting the Chevrolet automobile to clear the intersection or its pathway thereon. In so doing, the driver of the tractor-trailer combination was negligent in that he failed to maintain a proper lookout, or in that he failed to keep his vehicle under reasonable control, or in that he drove his vehicle at a speed greater than was reasonable and prudent under the conditions then existing. The negligence of the driver of the tractor-trailer combination in one or more of

these respects, either of itself or in conjunction with concurrent negligence on the part of Marvin Matthews, proximately caused the death of Patty Matthews Cox and the personal injury of Lethie Matthews, irrespective of the color of the traffic light confronting the driver of the tractor-trailer combination at the time of his entry into the intersection.

These theories rest upon substantial legal foundations. The Legislature has decreed in express terms that "local authorities shall have power to provide by ordinances for the regulation of traffic by means of . . . signaling devices on any portion of the highway where traffic is heavy or continuous." G.S. 20-169. In consequence, the Town of Mount Airy acted within the limits of its authority as a municipal corporation in enacting its ordinance and in installing its automatic traffic control signals. Since the ordinance is designed to guard the safety of persons using the public streets of the municipality, a motorist is negligent as a matter of law if he fails to stop in obedience to a red traffic light as required by the ordinance, and his negligence in that particular is actionable if it proximately causes the death or injury of another. *Boles v. Hegler,* 232 N.C. 327, 59 S.E. 2d 796; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Dillon v. Winston-Salem,* 221 N.C. 512, 20 S.E. 2d 845; *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 211; *King v. Pope,* 202 N.C. 554, 163 S.E. 447; *Wolfe v. Coach Line,* 198 N.C. 140, 150 S.E. 876; *Wolfe v. Baskin,* 137 Ohio St. 284, 28 N.E. 2d 629. The mere fact that the operator of a motor vehicle may have a green light facing him as he approaches and enters an intersection where traffic is regulated by automatic traffic control signals does not relieve him of his legal duty to maintain a proper lookout, to keep his vehicle under reasonable control, and to drive his vehicle at a speed which is reasonable and prudent under existing conditions, or exonerate him from legal liability for the death or injury of another proximately resulting from his failure to perform his legal duty in one or more of these respects. *Bobbitt v. Haynes,* 231 N.C. 373, 57 S.E. 2d 361; *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539; *Rose v. Campitello,* 114 Conn. 637, 159 A. 887; *Davis v. Dondanville,* 107 Ind. App. 665, 26 N.E. 2d 568; *Landers v. Mahler,* 295 Ill. 498, 15 N.E. 2d 13; *Capillon v. Langsfeld* (La. App.), 171 So. 194; *McCormick & Co. v. Cauley* (La. App.), 168 So. 783; *U. S. Fidelity & Guaranty Co. v. Continental Baking Co.,* 172 Md. 24, 190 A. 768; *Shea v. Judson,* 283 N.Y. 393, 28 N.E. 2d 885; *Schmidt v. City Ice & Fuel Co.,* 60 Ohio App. 29, 19 N.E. 2d 514; *Radobersky v. Imperial Volunteer Fire Dept.,* 368 Pa. 235, 81 A. 2d 865; *Wilson v. Koch,* 241 Wis. 594, 6 N.W. 2d 659.

These things being true, the court rightly refused to nonsuit the actions. In reaching this conclusion, we do not overlook the circumstance that the first theory of recovery presented by plaintiffs is defectively stated in

their pleadings. The complaints do not allege, as they ought, that the automatic traffic control signals at the intersection involved in the tragedy were maintained and operated under an ordinance of the Town of Mount Airy. *Stewart v. Cab Co.*, 225 N.C. 654, 36 S.E. 2d 256. It appears, however, that the defendant sets forth this material fact in its answers in complete detail. As a consequence, the rule that a defective pleading may be aided by the allegations of the adverse party applies. Under this rule, the answer of a defendant aids the complaint, and cures an omission if it affirmatively alleges a material fact not alleged by the plaintiff. *Ricks v. Brooks,* 179 N.C. 204, 102 S.E. 207; *Harvell v. Lumber Co.,* 154 N.C. 254, 70 S.E. 389; *Bank v. Fidelity Co.,* 126 N.C. 320, 35 S.E. 588, 83 Am. S. R. 682; *Whitley v. Railroad Company,* 119 N.C. 724, 25 S.E. 1018; *Lockhart v. Bear,* 117 N.C. 298, 23 S.E. 484; *Willis v. Branch,* 94 N.C. 142; *Johnson v. Finch,* 93 N.C. 205; *Pearce v. Mason,* 78 N.C. 37; *Garrett v. Trotter,* 65 N.C. 430.

Counsel for the defendant aptly tendered to the court written requests for these special instructions:

"1. The operator of defendant's truck was not under the duty of anticipating negligence on the part of the operator of the Matthews car and in the absence of anything which should have given him notice that the operator (of the Matthews car) was not going to stop at the intersection . . ., the operator of defendant's truck was entitled to assume and to act on the assumption that the operator of the Matthews car would exercise ordinary care for his own safety and the safety of the occupants of his car and bring his car to a stop before entering the intersection, if the signaling device had a red or stop signal at the intersection at the time the Matthews car approached and entered the intersection."

"2. The court charges you that if the signal light was green facing the driver of defendant's truck . . . at the time defendant's driver approached the intersection, and there was nothing to . . . prevent the driver of the Matthews car from seeing the truck as it approached the intersection, there would be no duty on defendant's driver to anticipate that Matthews would fail to stop as required by the . . . ordinance, and . . . the signal light, and in the absence of anything which gave or should have given notice to the contrary, defendant's driver was entitled to assume and to act on the assumption . . . that Matthews would not only exercise ordinary care for his own safety as well as (that of) those riding in his car, but would act in obedience to the ordinance . . . and the signaling device . . . before entering the intersection."

Instead of giving such instructions, the court charged the jury on this aspect of the controversy in this language: "As long as the operator of a motor vehicle upon a public street or highway is exercising due care, he has the right to rely upon signal devices erected and maintained by a

municipal corporation. As long as the operator of a motor vehicle upon a public street is in the exercise of due care, he has the right to assume that others who are operating along the highway will obey the laws and ordinances regulating the operation of motor vehicles, unless there are circumstances to put him on notice to the contrary. If Gerald Fisher Hamer, the defendant's driver, was in the exercise of due care and if there were no circumstances to put him on notice that Marvin Matthews was failing to observe and obey the law, if Marvin Matthews did fail to observe and obey the law, then if Gerald Fisher Hamer, the defendant's driver, under those circumstances, drove into the intersection while the light facing him was green, it would not be negligence on his part to assume that Marvin Matthews would obey the law and stop if the red light was facing him."

The defendant asserts in its assignments of error that the court erred in refusing the requests for special instructions, and in charging the jury as set out above.

The requests of the defendant for special instructions are sanctioned by this well settled doctrine: One is not under the duty of anticipating disobedience of law or negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary a person is entitled to assume, and to act on the assumption, that others will obey the law and exercise ordinary care. *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532; *Bobbitt v. Haynes, supra; Wilson v. Motor Lines,* 230 N.C. 551, 54 S.E. 2d 53; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Dawson v. Transportation Co.,* 230 N.C. 36, 51 S.E. 2d 921; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Gaskins v. Kelly,* 228 N.C. 697, 47 S.E. 2d 34; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Tysinger v. Dairy Products, supra; Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Montgomery v. Blades,* 222 N.C. 463, 23 S.E. 2d 844; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707; *Sebastian v. Motor Lines, supra; Quinn v. R. R.,* 213 N.C. 48, 195 S.E. 85; *Hancock v. Wilson,* 211 N.C. 129, 189 S.E. 631; *James v. Coach Co.,* 207 N.C. 742, 178 S.E. 607; *Jones v. Bagwell,* 207 N.C. 378, 177 S.E. 170; *Cory v. Cory,* 205 N.C. 205, 170 S.E. 629; *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840; *Wilkinson v. R. R.,* 174 N.C. 761, 94 S.E. 521; *Wyatt v. R. R.,* 156 N.C. 307, 72 S.E. 383; 38 Am. Jur., Negligence, section 192; 65 C.J.S., Negligence, section 15.

The able and conscientious trial judge was undoubtedly constrained to refuse the requests for special instructions and to charge the jury as

he did by statements in the opinions in *Groome v. Davis,* 215 N.C. 510, 2 S.E. 2d 771, and *Swinson v. Nance,* 219 N.C. 772, 15 S.E. 2d 284, to the effect that a motorist forfeits a right of way conferred upon him by positive legislative enactment and disables himself to claim the benefit of the doctrine invoked by the defendant in the instant cases if he is not altogether free from negligence.

Although these statements constituted mere *obiter dicta* in the *Groome case,* they were recognized and applied as established law by a divided court in the *Swinson case.* Inasmuch as the majority opinion in the last named decision stated that "ordinarily it is said that a defense of this kind is available only to one who is himself free from negligence, or, to put it more accurately, of negligence such as might stand in proximate relation to the injury," it may be argued that the majority of the Court in the *Swinson case* simply intended to uphold the sound proposition that a motorist whose negligence has proximately caused injury to another cannot absolve himself from liability by claiming that he assumed that the injured party or some third person would act lawfully and prudently. Be this as it may, it cannot be gainsaid that the statements in the opinions in the *Groome* and *Swinson cases* fully support the action of the trial judge in refusing the requests for special instructions and in charging the jury as he did.

It thus appears that we cannot pass on the assignments of error under consideration without either approving or disapproving the statements of the *Groome* and *Swinson cases.*

It may seem at first blush that the nebulous cause of legal righteousness will be served by classifying as legal pariahs all those who are guilty of negligence of any character, regardless of whether or not there is any probability, or even possibility, that their negligence will result in injury to themselves or others.

Second thought compels the conclusion, however, that the law of negligence as it has been established and enforced in this jurisdiction time out of mind cannot be reconciled with the unqualified assertions of the *Groome* and *Swinson cases* that the right to rely on a right of way created by positive legislation and to assume that other users of the highway will obey the law and exercise ordinary care is restricted to those motorists who are themselves absolutely free from negligence.

The validity of this view is obvious, we think, when the part of the charge under scrutiny and its inherent implications are stated. When this is done, the charge comes to this: If the two motor vehicles involved in these cases approached and reached the intersection when the traffic light facing the defendant's driver was green and the traffic light confronting the operator of the Chevrolet car was red, the defendant's driver had no right to rely on the automatic traffic control signals or to act on

the assumption that the operator of the Chevrolet car would observe the ordinance and stop in obedience to the red light if he, *i.e.*, the defendant's driver, was negligent in any respect, even though the attending circumstances reasonably indicated that the operator of the Chevrolet car intended to observe the ordinance and stop in obedience to the red light, and even though the attending circumstances also reasonably indicated that there was no likelihood whatever that the negligence of the defendant's driver would cause any injury to an occupant of the Chevrolet car or any other person.

The statements of the *Groome* and *Swinson cases* are not sound law. Their acceptance as such would produce virtual chaos in the administration of the law of negligence. They constitute a negation of the basic concept that since every person necessarily acts on appearances, his conduct in a given situation must be judged in the light of *all* the circumstances surrounding him at the time. *Malcolm v. Cotton Mills,* 191 N.C. 727, 133 S.E. 7; *Perkins v. Wood & Coal Co.,* 189 N.C. 602, 127 S.E. 677; *Forsyth v. Oil Mill,* 167 N.C. 179, 83 S.E. 320. They ignore the fundamental principle that the only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation. *Smith v. Whitley,* 223 N.C. 534, 27 S.E. 2d 442; *Wall v. Asheville,* 219 N.C. 163, 13 S.E. 2d 260; *Byrd v. Express Co.,* 139 N.C. 273, 51 S.E. 851. When they are incorporated in a charge, they obscure the essential rule that "foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 809. Indeed, an instruction embodying these statements has an exceedingly strong tendency to implant in the minds of jurors the fallacious notion that when a motorist, who undertakes to exercise a right of way conferred on him by positive legislation, is negligent in any degree, he makes himself legally accountable "for whatsoever shall come to pass," no matter how unforeseeable it may be. When all is said, the statements under scrutiny necessarily rest on a commixture of these somewhat perplexing theories: (1) That the nebulous cause of legal righteousness requires that a motorist be penalized for his negligence, even though it bears no causal relation whatever to the occurrence under judicial investigation; and (2) that the negligence of a motorist, however inconsequential it may be, can nullify positive legislation aptly designed to protect human life and limb at highway intersections.

For the reasons given, we are compelled to disapprove the statements of the *Groome* and *Swinson cases,* and to hold that the trial judge erred in carrying those statements into effect by refusing the requests for special instructions and by charging the jury as he did. The error of the judge

in so doing prejudiced the rights of the defendant, and necessitates a new trial of these cases. It is so ordered.

New trial.

MRS. ANNIE ESTHER LEE v. H. L. GREEN & COMPANY, INCORPORATED, TRADING AND DOING BUSINESS UNDER THE NAME AND STYLE OF SILVER'S FIVE AND TEN CENT STORE.

(Filed 22 August, 1952.)

1. Negligence § 4f—

While a proprietor of a store is not an insurer of the safety of its customers, he is under duty to exercise ordinary care to keep the aisles and passageways where customers are expected to go in a reasonably safe condition and to give warning of hidden dangers or unsafe conditions of which he knows or in the exercise of reasonable supervision and inspection should know.

2. Same—

The doctrine of *res ipsa loquitur* does not apply to injuries resulting from slipping or falling on the oiled floor of a store.

3. Same—

In order for a customer to recover for injuries sustained in falling upon an oiled floor of a store, the customer must introduce evidence tending to show that the proprietor had the floor oiled or permitted it to be oiled in an improper manner so as to leave it in an unsafe condition.

4. Same—

Plaintiff's evidence was to the effect that she slipped and fell on an aisle in defendant's store at a place that was slick with excessive oil or grease, that all of the floor in this portion of the store appeared to have been oiled or greased, and that the application was fresh at some spots and dry at others, with greater accumulations of oil or grease at some places than at others. *Held:* The evidence was sufficient to make out a *prima facie* case and take the issue of negligence to the jury.

5. Same—

Where the evidence tends to show that the floor of an entire portion of a store had been given some general type of oil treatment, improperly applied so that more oil was allowed to accumulate at some places than at others, *held:* It is not incumbent upon plaintiff to show when or by whom the treatment was applied or the mode of procedure followed in applying it, since the fact of its general application supports the inference that it was oiled by or under the direction or supervision of the proprietor, and therefore knowledge of the proprietor of the hazardous condition may be inferred, since no one needs notice of that which he knows.

BARNHILL, J., dissenting.

WINBORNE and DENNY, JJ., concur in dissent.

LEE *v.* GREEN & CO.

APPEAL by plaintiff from *Pless, J.*, 7 January Term, 1952, of GUILFORD (Greensboro Division). Reversed.

Civil action to recover damages for personal injuries sustained by plaintiff as a result of slipping and falling on the floor of defendant's store.

The plaintiff, a housewife about 53 years of age, after purchasing some articles on the first floor of the defendant's store in Greensboro, went down the stairway to the basement to make other purchases. At the bottom of the stairway she turned to the right and after going 12 or 15 feet from the bottom step her right foot slipped out from under her at a slick place on the floor and she fell, fracturing her hip and sustaining other personal injuries. The floor was made of tongue and grooved wood material.

The plaintiff's narrative of the occurrence is in substance as follows: "At the moment my foot slipped, I was looking at the things offered on the counter by my right side. When I fell, the merchandise I had bought flew across the floor. . . . I had on medium heels. . . . My ankle did not turn. . . . After I got up or was picked up, I observed the place where I had fallen was dark, greasy, and slippery looking. There seemed to be right much oil or grease or something where I was. . . . There was dirty grease and dirt and grease on my hose and on my dress and my arm, where I laid back on the floor, which appeared to be dark, greasy, and slick. . . . When the man first picked me up, I brushed off all I could get off the hose and dress and off my arm, . . . the oil went through my hose onto my knee. I fell on my right knee and it went through the hose onto my flesh and skin." She further testified that no one gave her any warning and there were no placards to indicate there was oil or grease on the floor. On cross-examination she said she did not look at the floor as she went down the aisle before she fell. As she put it: "I did not expect there to be anything on the floor."

The plaintiff's husband, in relating what he saw on arriving at the store immediately after her fall, stated that he examined the floor. He testified: "I looked all over it. There about where she was, all the way across, it was greasy. . . . In some places the oil and grease on the floor appeared to be dry. . . . It appeared to be fresh at some spots and dry at others. . . . In some places grease and smudges on the floor were heavier . . . than in others. . . . My wife showed me the place where she had slipped and fallen. . . . It looked like it had been sort of rubbed on, sort of smeared around a little. . . . The greasy spot near my wife covered a pretty good area in that section. . . . The place where I observed my wife had fallen was slick." The fall occurred during business hours on Saturday afternoon at about 4:30 o'clock.

The case comes here on appeal from judgment as of nonsuit entered at the close of the plaintiff's evidence.

H. L. Koontz and Clyde A. Shreve for plaintiff, appellant.
Smith, Sapp, Moore & Smith for defendant, appellee.

JOHNSON, J. The evidence in this case when analyzed in the light of the controlling principles of law is sufficient, we think, to make out a *prima facie* case of actionable negligence for the jury.

Those entering a store during business hours to purchase or look at goods do so at the implied invitation of the proprietor, upon whom the law imposes the duty of exercising ordinary care (1) to keep the aisles and passageways where customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose the customer to danger, and (2) to give warning of hidden dangers or unsafe conditions of which the proprietor knows or in the exercise of reasonable supervision and inspection should know. *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64; *Watkins v. Furnishing Co.,* 224 N.C. 674, 31 S.E. 2d 917; *Brown v. Montgomery Ward & Co.,* 217 N.C. 368, 8 S.E. 2d 199; *Parker v. Tea Co.,* 201 N.C. 691, 161 S.E. 209; *Bowden v. Kress & Co.,* 198 N.C. 559, 152 S.E. 625.

However, such proprietor is not an insurer of the safety of customers and invitees who may enter the premises, and he is liable only for injuries resulting from negligence on his part. *Pratt v. Tea Co.,* 218 N.C. 732, 12 S.E. 2d 242; *Bowden v. Kress & Co., supra.*

Moreover, the doctrine of *res ipsa loquitur* does not apply to injuries resulting from slipping or falling on the floor of a store which has been oiled. *Harris v. Montgomery Ward & Co.,* 230 N.C. 485, 53 S.E. 2d 536; *Parker v. Tea Co., supra; Bowden v. Kress & Co., supra.*

Therefore, it is not negligence *per se* to have an oiled floor in a store, or to apply oil to a floor, if it is applied in a reasonably prudent manner. The standard of care which the law requires of a storekeeper in oiling floors is that degree of care which persons of ordinary care and prudence are accustomed to use in oiling floors, having due regard both for the objects to be accomplished and the rights of those who are expected to frequent the store. Thus, in order for an injured person to recover in such a case, ordinarily there must be evidence sufficient to support the inference that from want of ordinary care on the part of the proprietor the floor was improperly oiled and left in an unsafe condition. *Parker v. Tea Co., supra; Bowden v. Kress & Co., supra.* See also: 38 Am. Jur., Negligence, Sec. 136, p. 798; 65 C.J.S., Negligence, Sec. 81, p. 589.

We think the evidence here, when viewed with the degree of liberality required on motion for nonsuit, was sufficient to sustain, though not necessarily to impel, a jury-finding of all the essential elements of actionable negligence: (1) That prior to the plaintiff's fall the defendant had applied or caused to be applied upon and allowed to remain on its basement

floor an oily floor dressing or covering of some type which was of a slick and slippery nature, and respecting which the defendant failed to exercise ordinary care by permitting it to be applied and to accumulate and remain on the floor in such quantities and condition, more in some places than in others and dry in some places and wet in others, so as to render unsafe passage along and about the aisles and display counters where customers and invitees were expected to go, thus creating a danger which in the exercise of ordinary care was not observable by the plaintiff but of which the defendant was chargeable with notice and failed to exercise due care to give plaintiff warning; and (2) that the plaintiff slipped and fell at a place in the aisle where, from want of due care on the part of the defendant, the oily substance had been applied in excessive quantity or left wet upon the floor without timely notice, and that the plaintiff's fall and injuries resulted from the unsafe condition so created and existing, and were proximately caused by the improper and negligent manner in which the oily floor dressing was so applied or left by the defendant on the floor without notice to the plaintiff.

That the evidence offered below is sufficient to carry the case to the jury is supported by well-considered decisions of this Court, among which these seem to be closely in point: *Bowden v. Kress & Co., supra; Parker v. Tea Co., supra; Anderson v. Amusement Co.*, 213 N.C. 130, 195 S.E. 386. Also, for numerous supporting decisions from other jurisdictions, see Annotations: 33 A.L.R. 181; 43 A.L.R. 866; 46 A.L.R. 1111; 100 A.L.R. 710; 162 A.L.R. 949.

In *Parker v. Tea Co., supra,* the controlling facts are strikingly similar to those shown by the evidence in the instant case. In the *Parker case,* the plaintiff slipped and fell in a grocery store as she was walking toward the meat counter. The fall occurred on Monday morning after the floor had been oiled the previous Saturday night. The gist of plaintiff's narrative of the occurrence is as follows: "Both feet slipped out from under me. . . . There was a damp place on the floor,—looked like oil. It appeared to be oil and had dried more in some places than in others. Where I stepped was one of the damp places. Some of the planks at this place looked practically dry, and then there were streaks on them that looked damp, as if it was damp with oil and it was more so in the place where I walked. . . . There seemed to be on part of the boards little streaks that didn't seem to be perfectly dry. I could detect the exact point where I stepped and at that point there was a greater accumulation of oil. . . . My hose had a big spot of oil on them." The evidence offered was held sufficient to support the inference that the floor was improperly oiled, and *Bowden v. Kress, supra,* was cited as controlling authority.

The defendant seeks to distinguish the instant case from *Parker v. Tea Co., supra,* on the ground that here there is no direct evidence, as in

the *Parker case,* that the defendant had caused the floor to be oiled. True, in the instant case, the plaintiff offered no direct testimony respecting when or by whom the alleged oily dressing was applied to the floor, or concerning the exact descriptive character of the substance found on the floor. Nor did anyone testify concerning the mode of procedure followed in applying the oil.

However, where, as here, a complaining party offers evidence tending to show a slick, oily floor condition, existing under circumstances pointing to some general type of previous oil treatment, showing fresh oil in some places and dry in others, thus indicating the application or accumulation of more oil in some places than others, we think the case may not be withdrawn from the jury simply because the plaintiff or her witnesses did not see the oil applied or know when or by whom it was applied or relate the precise details respecting the kind and quantities of oil applied or the mode of procedure followed in applying it. Where the facts in respect to these things are reasonably inferable from the plaintiff's evidence, as in the present case, it is not imperative, under pain of suffering a nonsuit, that the plaintiff go further and indulge in the exploratory procedure of looking for bystanders who were present when the floor was oiled, or calling to the stand employees of the defendant who may have first-hand knowledge of the method followed in applying the oil. The essentials of a *prima facie* case do not require any such intensity of proofs nor precision as to details. 38 Am. Jur., Negligence, Sec. 333; 65 C.J.S., Negligence, Sec. 243, pp. 1068 and 1074; *Hulett v. Great Atlantic & P. Tea Co.,* 299 Mich. 59, 299 N.W. 807; *Benesch & Sons v. Ferkler,* 153 Md. 680, 139 A. 557, cited in *Bowden v. Kress & Co., supra.*

In the instant case the existence of these elements of actionable negligence are reasonably inferable from the whole of the evidence. Pertinent as bearing thereon are these portions of the testimony of the plaintiff's husband, who said he examined the floor: "I looked all over it. . . . all the way across it was greasy. . . . In some places grease and smudges on the floor were heavier . . . than in others. . . . In some places the oil or grease on the floor appeared to be dry. . . . It appeared to be fresh at some spots and dry at others. . . . The place where I observed my wife had fallen was slick."

Also, an examination of the facts in *Parker v. Tea Co., supra,* discloses that the direct evidence that the floor was oiled, as well as the details of the procedure followed in applying the oil, was introduced by the defendant after the plaintiff had offered her evidence and rested her case, and it is apparent that the evidence so offered by the defendant was not of controlling or decisive importance on the question of nonsuit in the *Parker case.*

Factually distinguishable are the cases relied on by the defendant, chiefly among which are: *Pratt v. Tea Co., supra; Fanelty v. Rogers Jewelers, Inc.*, 230 N.C. 694, 55 S.E. 2d 493; *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180.

In *Pratt v. Tea Co., supra,* the evidence disclosed a greasy, dirty looking spot about 10 inches long and 7 or 8 inches wide. There was no evidence tending to show that the store floor had been oiled or that the spot was a part of or had its origin in any general type of oil treatment of the floor. Therefore, nothing else appearing, it was not inferable that the greasy spot was either (1) created by the defendant, or (2) had been there long enough for the defendant, in the exercise of ordinary care, to have discovered and removed it, or given warning of its existence. Thus, for want of these crucial proofs, the nonsuit below was affirmed.

Similarly, in *Fanelty v. Rogers Jewelers, Inc., supra,* the evidence disclosed that the plaintiff slipped on a slick spot or place on the terrazzo entryway outside the defendant's store door. There was no evidence tending to show who, if anyone, had placed a foreign substance of any kind on the floor of the entryway. It was not disclosed how long the slick spot had been there, nor did it appear to be part of a general type of oil, wax, or like treatment. Hence, in the absence of evidence as to how long the slick spot had been present, no inference of negligence on the part of the defendant was deducible from the single fact of a slippery spot on the terrazzo floor outside the defendant's door.

In *Barnes v. Hotel Corp., supra,* the plaintiff slipped on the marble floor in the hall entryway to the elevators on the third floor of the O. Henry Hotel in Greensboro. There, the nonsuit below was sustained for want of any evidence, direct or circumstantial, tending to show that "any unusual material had been used in cleaning or polishing the floor or that such material had been applied in an improper, unusual or negligent manner." It also appeared that the plaintiff had been a regular guest of the hotel for about 12 years, and she testified that as she came out of her room to the elevator entrance "she looked at the whole area and saw nothing out of the ordinary."

A number of decisions relied on by the defendant involve hazardous conditions which reasonably may have been produced by the act of a third party or weather conditions, or by other causes over which the storekeeper had no direct control—like puddles of loose oil or spots made by other foreign substances—under circumstances requiring the plaintiff to prove that the defendant proprietor was chargeable with notice of the dangerous condition. See *Fanelty v. Rogers Jewelers, Inc., supra; Pratt v. Tea Co., supra,* and cases cited.

In the instant case, however, there is no such factual background. Here, the evidence is sufficient to support the inference that the hazardous

condition complained of was created by or under the direction or sufferance of the defendant in connection with a general application of floor oil; therefore, if such permissive inference should be drawn by the jury, then it follows as a necessary corollary that knowledge of the hazardous condition so created by the defendant would be inferred. In such circumstances, it would be far afield to say that a defendant might by his own act create a hazardous condition and then demand that one injured thereby should be required to prove the defendant's knowledge of such condition. It is elementary in the trial of negligence cases that where the alleged dangerous condition is shown to have been created by the person claimed to be liable, no further notice to him is necessary. No one needs notice of that which he knows. 65 C.J.S., Negligence, Sec. 5, p. 354; *Hulett v. Great Atlantic & P. Tea Co., supra; Bury v. F. W. Woolworth Co.,* 129 Kan. 514, 283 P. 917. What is here said is in accord with the rule of liability defined and applied in *Pratt v. Tea Co., supra.*

For the reasons stated, the judgment below is

Reversed.

BARNHILL, J., dissenting: There is ample evidence in the record tending to show that the defendant's basement floor was oily at the place where plaintiff says she fell, and that the oil proximately caused her fall. But how long had the oil been on the floor at the time of the accident? This the record does not disclose. Who put the oil on the floor? As to this the record is silent. Plaintiff did not undertake to show who put the oil on the floor or how long it had been there. *Pratt v. Tea Co.,* 218 N.C. 732.

All agree that, to establish negligence on the part of the defendant, plaintiff must offer some evidence tending to show either that one of defendant's employees oiled the floor in such a careless and negligent manner that it created an unnecessary and additional hazard to customers entering the building, or that the additional hazard, being created by a third party, had existed for such a length of time that the owner knew or by the exercise of ordinary care should have known of its existence. Such proof is essential to plaintiff's cause of action. As I read the record, she has failed in this respect to make out a case for the jury.

The majority opinion is not sustained by the authorities cited. In *Parker v. Tea Co.,* 201 N.C. 691, and *Anderson v. Amusement Co.,* 213 N.C. 130, there was evidence that the slippery substance was applied by one of defendant's employees. In *Bowden v. Kress,* 198 N.C. 559, there was evidence that the unsafe condition had existed for more than a week—a time within which the defendant in the exercise of ordinary care should have discovered and eliminated the hazard. The numerous cases listed in the A.L.R. annotations cited in the majority opinion likewise follow the same rule; that is, the plaintiff must show that the hazard was created

by the defendant or had existed for such a length of time that he knew, or in the exercise of ordinary care should have known of its existence.

This case takes us a bowshot beyond any decision we have heretofore rendered. It holds, in effect, that when plaintiff proves there was oil or some other slippery substance on the floor where she fell the jury may, from this fact alone, infer that it was placed there by the owner or one of his employees. To this I cannot agree. I therefore vote to affirm.

WINBORNE and DENNY, JJ., concur in dissent.

HOUGH-WYLIE COMPANY, A CORPORATION, v. W. C. LUCAS, PEARLIE M. LUCAS AND A. B. COX, T/A PIEDMONT TRUCKING COMPANY, A PARTNERSHIP, JOE CAGLE AND DON ALEXANDER, INDIVIDUALLY, AND PIEDMONT-CAROLINA LINES, INC.

(Filed 22 August, 1952.)

Carriers § 11½—

A lease of intrastate motor vehicle common-carrier operating rights, approved by the Utilities Commission, does not release lessor, the holder of the certificate of convenience and necessity, from liability for nonperformance of franchise duties or torts incident to operation, and a shipper may hold lessor liable for lessee's failure to make prompt remittance of C.O.D. collections as required by G.S. 62-121.37. In the instant case the Utilities Commission, in approving the lease, did not attempt to relieve lessors of such obligations, nor would it have the power to do so. G.S. 62-121.26.

APPEAL by defendants W. C. Lucas, Pearlie M. Lucas, and A. B. Cox, trading as Piedmont Trucking Company, from *Patton, Special Judge,* November Extra Civil Term, 1951, of MECKLENBURG.

Civil action by plaintiff shipper against W. C. Lucas, Pearlie M. Lucas, and A. B. Cox, trading as Piedmont Trucking Company, as holders of intrastate motor vehicle common-carrier certificate of convenience and necessity, hereinafter referred to as lessors; and Piedmont-Carolina Lines, Inc., lessee of the operating rights evidenced by the certificate of convenience and necessity, hereinafter referred to as lessee, Joe Cagle and Don Alexander, principal officers of the lessee corporation.

The action arises out of the alleged failure of the lessee operating company to remit to the plaintiff shipper certain moneys collected by the lessee in making deliveries of goods shipped C.O.D. by the plaintiff, heard below on demurrer of the lessors for failure to state facts sufficient to constitute a cause of action as to them. G.S. 1-127.

The allegations of the complaint, pertinent to decision, are in substance as follows:

1. The lessors, at the times mentioned in the complaint, "were the holders of a Common Carrier Certificate issued by the North Carolina Utilities Commission (hereinafter referred to as the Utilities Commission) . . . by which" the lessors "were authorized to transport general commodities over certain regular routes."

2. "That by written lease dated April 17, 1948, the common-carrier rights referred to above were leased" by the lessors to the lessee corporation "for a period of five (5) years for a consideration of $150.00 per month."

3. That upon application of the lessors, "the North Carolina Utilities Commission, on July 12, 1948, was induced to approve the lease of said common carrier franchise rights to" the lessee corporation.

4. That the lessee operated under the operating rights of the lessors from the date of the lease until 31 December, 1950.

5. "That by accepting the lease of the franchise rights of" the lessors, the defendant lessee corporation "became bound to abide by all the statutory provisions applicable to the holders of such intrastate franchise, among them, the obligation to hold in trust, remittances received from C.O.D. collections as required by G.S. 62-121.37 and to remit said collections to the shipper within ten (10) days of receipt by the carrier, as required by the rules of the North Carolina Utilities Commission."

6. "That on June 26, 1950, October 26, 1950 and November 14, 1950" the lessee corporation "was required to appear before the North Carolina Utilities Commission on account of its failure to discharge its duty as a common carrier in respect to the segregation and prompt remittance of C.O.D. collections, for the issuance of worthless checks in payment of debts and claims arising out of the operating authority issued by the Commission, and for the mismanagement of the transportation business authorized by the Commission in a manner unworthy of the trust and confidence of the shipping public; that the lessors, . . . were given notice and made parties in said proceeding as owners of the franchise rights involved."

7. That between 6 September and 1 December, 1950, inclusive, the plaintiff shipped from its place of business in Charlotte, N. C., three shipments of merchandise to customers in Robbins and Asheboro, North Carolina, each shipment being over the line operated by the lessee, with waybills being marked C.O.D. and requiring the carrier to collect from the consignees on delivery the respective sums of $185.25, $763.58, and $1,157.54.

8. That the lessee corporation delivered these shipments to, and received payment in full from, each of the consignees, but failed to "handle

the money so received as a trust fund, but on the contrary, diverted it to some other use unknown to this plaintiff."

9. That the lessee has not remitted any of the collections to the plaintiff "although often requested to do so, and is indebted to plaintiff" in the full amount thereof, to wit: $2,106.37.

10. That in making each of the specified shipments, the defendant lessee "exercised the franchise rights issued to defendant" lessors and leased by them to the lessee corporation.

11. That the defendants Joe Cagle and Don Alexander, principal officers in active control of the lessee corporation, "in disregard of their obligation to treat C.O.D. collections as trust funds, and after having been specifically warned and instructed in regard to such collections by the Utilities Commission, and in violation of G.S. 62-121.37, did receive C.O.D. collections from the shipments above specified, did fail to handle said receipts as trust funds, but on the contrary, did misappropriate and misuse said funds and apply them to unlawful purposes, to the detriment of this plaintiff."

12. "That on the 14th day of December, 1950, the North Carolina Utilities Commission revoked and set aside, effective on and after December 31, 1950, any and all operations by" the lessee "under any authority granted it or approved by the Commission, and directed" the lessors "to immediately take appropriate action to safeguard the interests of the creditors and claimants with respect to any debts and claims against" the lessee operating corporation.

13. That the lessors "leased their common carrier franchise rights to a lessee managed by incompetent and irresponsible persons, and . . . failed to properly supervise the operation of their lease, even after the defalcations of said lessee had been called to their attention, and . . . failed to take adequate steps to safeguard the plaintiff and other users of the facilities operated by the defendants, pursuant to a franchise issued to" the lessors.

14. That the lessors "of the franchise rights conferred by common-carrier certificate C-9, are liable to plaintiff for damage sustained by plaintiff as a result of the wrongful acts and omission of their lessee and its agents."

From judgment overruling the demurrer, the lessor defendants excepted and appealed, assigning error.

Taliaferro, Clarkson & Grier for plaintiff, appellee.

Miller & Moser for defendants, appellants.

JOHNSON, J. The demurrer filed by the lessors presents for decision the question whether a lease of intrastate motor vehicle common-carrier

operating rights, approved by the Utilities Commission, releases the lessors, holders of the certificate of convenience and necessity, from liability for the nonperformance of franchise duties or torts incident to operations.

Decision turns in large part on construction and application of the provisions of Chapter 1008, Sessions Laws of 1947, codified as G.S. 62-121.5 through 62-121.42, known as the North Carolina Truck Act, hereinafter referred to as the Truck Act.

Subject to prescribed limitations, this Act empowers the Utilities Commission to grant to qualified applicants certificates of convenience and necessity to engage in the business of transporting property in intrastate commerce on the public highways of this State (G.S. 62-121.10, 62-121.11, and 62-121.13), and, subject to certain specified exceptions, the Act provides that no person shall engage in intrastate transportation of property by motor vehicle "until and unless such person shall have applied to and obtained from the Commission a certificate or permit authorizing such operation . . ." G.S. 62-121.15.

A certificate so issued by the Utilities Commission to a common carrier confers upon the holder the right and authority to operate on the routes and in the areas designated in the certificate. G.S. 62-121.16. It also confers upon the holder the protective benefits of the elimination of unauthorized competition and the prevention of infringement upon the operating rights granted by the certificates. See G.S. 62-121.9, 62-121.27, and 62-121.34.

However, the Act also provides that "there shall, at the time of issuance and from time to time thereafter, be attached to the privilege granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time require, . . ." G.S. 62-121.16.

It follows, then, that inherent in the acceptance of a certificate and the exercise of the rights and privileges evidenced thereby, is the correlative obligation to serve the shipping public faithfully in accordance with reasonable rules and regulations prescribed by the Utilities Commission (G.S. 62-121.6, 62-121.9, and 62-121.16) and in conformity with the requirements of other provisions of the Truck Act prescribing duties to be performed by the carrier for the protection of the shipping public, among which is the requirement that all C.O.D. moneys collected by a motor carrier shall be held in trust, for prompt remittance to the shipper as required by G.S. 62-121.37, which is in part as follows: "Property received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon deliv-

ery of such party, is hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, . . ."

Manifestly, then, so long as the holder of a certificate of convenience and necessity continues to enjoy the benefits of the operating rights evidenced by the certificate, such holder may not by lease or other device escape the obligation of performing faithfully the correlative duties due the public or evade liability for nonperformance.

True, it appears from the complaint in the instant case that the lease of the operating rights was approved by the Utilities Commission as required by the provisions of G.S. 62-121.26. But this statute does not confer upon the Utilities Commission the power to release the holder of a certificate of convenience and necessity from liability for the nonperformance of public duties incident to the certificate. And the Commission possesses no such power in the absence of a delegation thereof by the Legislature.

Besides, it does not appear that the Utilities Commission in approving the lease attempted to release the lessors from such liability, nor does it appear that the lessors sought release or expected to be released. On the contrary, it affirmatively appears from the complaint that the Commission contemplated that the holders of the certificate should remain liable for the nonperformance of the franchise duties owed the shipping public.

We conclude, therefore, that the public policy of this State, as expressed in the Truck Act, will not permit one to acquire from the Utilities Commission a franchise to operate as such common carrier and then, while enjoying the benefits thereof, absolve himself from liability for the nonperformance of the public duties incident to the franchise by lease of operating rights.

Thus, taking the complaint as true, as is the rule on demurrer, the lessor-holders of the certificate of convenience and necessity are liable and answerable jointly with the lessee-operator to the plaintiff shipper for losses sustained by reason of wrongful conversion of C.O.D. moneys collected by the lessee-operator company.

While this precise question does not appear to have been presented heretofore to this Court for determination, decision here reached is supported in principle by well-considered decisions of other courts of last resort. *Moody v. Coach Corp.*, 248 Ky. 180, 58 S.W. 2d 375; *Swallow Coach Lines v. Cosgrove*, 214 Ind. 532, 15 N.E. 2d 92; *Emerson v. Park* (Texas Civ. App.), 84 S.W. 2d 1100; *Frank Martz Coach Co. v. Hudson Bus Transp. Co.*, 133 N.J.L. 342, 44 A. 2d 488. See also: Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 1, Part 2, Sec. 491, p. 299, and Vol. 4, Part 1, Sec. 2155, pp. 86 and 87; *Aetna Casualty & Surety Co. v. Prather*, 59 Ga. A. 797, 2 S.E. 2d 115; *Dixie*

Stage Lines v. Anderson, 222 Ala. 673, 134 So. 23; *Attorney General ex rel. Corporation Com'r. v. Haverhill Gas-Light Co.,* 215 Mass. 394, 101 N.E. 1061; 60 C.J.S., Motor Vehicles, Sec. 84 (b), pp. 268 and 269, and Sec. 84 (c), p. 273; 23 Am. Jur., Franchises, Sections 6 and 33.

Decision here reached is also in accord with the policy and principles of our law as applied to common carriers by rail. Our decisions hold—and they are in accord with the overwhelming weight of authority elsewhere—that a common carrier by rail may not, without explicit governmental sanction, divest itself of liability for violations of contracts or of its general duty to the public, or for torts incident to operation of the road, by leasing it to another. *Aycock v. R. R.,* 89 N.C. 321; *Logan v. R. R.,* 116 N.C. 940, p. 947, 21 S.E. 959; *Pierce v. R. R.,* 124 N.C. 83, p. 93, 32 S.E. 399. *Cf. Phelps v. Windsor Steamboat Co.,* 131 N.C. 12, 42 S.E. 335.

In *Aycock v. R. R., supra,* with *Smith, C. J.,* speaking for the Court, it is said: "The defendant company, leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train."

In *Logan v. R. R., supra,* it is stated: "The lessor company remains liable for the performance of its public duties to private parties for the non-delivery of goods received by it for delivery, and for all acts done by the lessee in the operation of the road, notwithstanding the lease is authorized by the lessor's charter . . . No matter how many leases and subleases may be made, the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety of both persons and property so transported. . . . On the other hand the carrier, who simply substitutes, with the consent of the State, another in his place, cannot establish his own right of exemption from responsibility for the wrongs of the substitute unless he can show, not only explicit authority to lease the property, but to rid itself of such responsibility."

We have not overlooked the decision in *Anthony v. Express Co.,* 188 N.C. 407, 124 S.E. 753, cited and relied upon by the appellants. In that case it is held that no common law duty devolves upon a common carrier to act as the collecting agent of the shipper in respect to money collected on a C.O.D. shipment, and that therefore the obligation of the carrier to collect and remit rests entirely on contract, express or implied, between the shipper and the carrier. Thus on the basis of the rule applied in the *Anthony case,* the appellants insist that in the absence of contractual privity between the shipper and the lessors, the latter may not be held

answerable for the alleged default of the lessee operating company in failing to remit C.O.D. moneys due the plaintiff shipper.

However, the rule applied in *Anthony v. Express Co., supra,* is inapplicable here, for the reason that the express provisions of the Truck Act enjoins upon motor carriers the duty and obligation to hold in trust and faithfully remit to the shipper the proceeds of C.O.D. shipments. G.S. 62-121.37. And this duty, by virtue of another section of the Truck Act, being "attached to the privilege granted by the certificate" (G.S. 62-121.16), may not be separated therefrom by the expedient of a lease of operating rights.

The judgment below is

Affirmed.

HADLEY HORNER, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF BURLINGTON, v. THE CHAMBER OF COMMERCE OF THE CITY OF BURLINGTON, INC., THE CITY OF BURLINGTON.

(Filed 22 August, 1952.)

1. Costs § 5—

While ordinarily attorney fees are taxable as costs only when expressly authorized by statute, a court of equity, even without statutory authority, may order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit creating, preserving, protecting or increasing a common fund or common property.

2. Same: Taxation § 38a—

A suit instituted by a taxpayer to recover moneys illegally expended by a municipality upon refusal of the authorities to act, is basically equitable in nature, and where the taxpayer has successfully prosecuted the suit the court should allow a reasonable fee to his attorney out of the funds actually received by the city as a result of the suit, but no compensation or allowance of any kind may be made to the suing taxpayer for his time or effort.

APPEAL by plaintiff from *Parker, J.,* March-April Term, 1952, of ALAMANCE. Reversed.

Petition in the cause by plaintiff, who prosecuted this action on behalf of the taxpayers of the City of Burlington and recovered for the City certain funds paid by it, without sanction of law, to the defendant Chamber of Commerce, heard below on motion of the plaintiff for an allowance, from the funds collected, to be used in defraying the fees of his attorney.

The City of Burlington donated $2,000 of tax money to the defendant Chamber of Commerce. The City refused to take steps to recover

it. Thereupon the plaintiff instituted this action against the Chamber of Commerce to recover the money and joined the City as a nominal party to accept it. The action was resisted both by the Chamber of Commerce and the City. In the progress of the litigation the case was twice here on appeal. The decisions are reported in 231 N.C. 440, 57 S.E. 2d 789, and 235 N.C. 77, 68 S.E. 2d 660, where the background facts may be found. The latter appeal was from a judgment of the Superior Court decreeing that the tax money paid to the Chamber of Commerce, not being authorized by law, amounted to an illegal use of tax money, and it was decreed that the City recover from the Chamber of Commerce the amount so paid. The judgment was affirmed by this Court.

When the case went back to the Superior Court the plaintiff moved, on petition previously filed, for an award, from the proceeds of the recovery, of "a sum equal to the reasonable value of his attorney's services, to be used in defraying the fees of said attorney." The court was of the opinion that the plaintiff was not entitled to an allowance as a matter of law, and so ruled.

From judgment entered in accordance with the foregoing ruling, the plaintiff appealed, assigning error.

W. R. Dalton, Jr. for plaintiff, appellant.

W. D. Madry, and Young, Young & Gordon for defendant The City of Burlington, appellee.

JOHNSON, J. The question for decision is this: Can the plaintiff in a taxpayers' action, who has recovered for the benefit of a municipality public moneys unlawfully disbursed and otherwise lost, be awarded from the amount recovered and restored to the municipality a reasonable sum to be used in paying the fees of his attorney, without a statute expressly so providing?

The question here presented seems to be one of first impression with us. We have no statute expressly authorizing the allowance of an award to a plaintiff in a taxpayers' action, from the sum recovered, for the payment of attorney fees, and the precise question has not heretofore been presented to this Court for determination.

However, while ordinarily attorney fees are taxable as costs only when expressly authorized by statute (20 C.J.S., Costs, Sec. 218; G.S. 6-21; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578), nevertheless, the rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation,

protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him. 14 Am. Jur., Costs, Sec. 74.

This doctrine "originated in England in the courts of equity where costs as between solicitor and client were allowed out of the fund to solicitors of a complainant who had at their own expense created, preserved, or protected a fund and others were entitled to claim, and had claimed, in the result of their labor. In America, where no distinction between solicitors and barristers exists, the doctrine is extended to include all fees and expenses reasonably due by the successful litigant to his counsel for the latter's services in creating or preserving the common fund or protecting the common property." 14 Am. Jur., Costs, Sec. 74, p. 47. See also: Annotations, 49 A.L.R. 1149; 107 A.L.R. 751.

This "rule rests upon the ground that where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in its benefits should contribute to the expense." 14 Am. Jur., Costs, Sec. 74.

Strictly speaking, the doctrine rests, not upon the theory that the allowance is for attorney fees as such or as an element of court costs, but rather upon the principle of approval by the court, in the exercise of its chancery powers, of expenditures reasonably incurred in creating or preserving the fund or property. *Gay v. Davis,* 107 N.C. 269, 12 S.E. 194; *Banking Co. v. Leach,* 169 N.C. 706, 86 S.E. 701; 15 N.C.L.R., p. 333 *et seq.*

The rule has been recognized and applied by this Court in various classes of cases, most common among which are those involving allowances to pay fees for services furnished by attorneys to (1) next friends of infants or others under disability and (2) fiduciaries such as receivers, trustees, and those administering estates of decedents, respecting litigation involving either the creation or protection of the common fund or common property. *Gay v. Davis, supra; Lindsay v. Darden,* 124 N.C. 307, 32 S.E. 678; *Overman v. Lanier,* 157 N.C. 544, 73 S.E. 192; *In re Stone,* 176 N.C. 336, 97 S.E. 216; *Patrick v. Trust Co.,* 216 N.C. 525, 531, 5 S.E. 2d 724.

By what appears to be the decided weight of authority in other jurisdictions, the doctrine of allowance of attorney fees against the property or fund created or protected by attorneys' services extends to and embraces taxpayers' actions like the instant case. These, among other cases, appear to be persuasive and pertinent to decision here: *Shillito v. City of Spartanburg,* 214 S.C. 11, 51 S.E. 2d 95; *Kimble v. Board of Com'rs. of Franklin County,* 32 Ind. App. 377, 66 N.E. 1023; *Fox v. Lantrip,* 169 Ky. 759, 185 S.W. 136; *Council of Village of Bedford v. State ex. rel. Thompson, Hine & Flory,* 123 Ohio St. 413, 175 N.E. 607;

Regan v. Babcock, 196 Minn. 243, 264 N.W. 803; *Boyd County v. Cisco,* 237 Ky. 534, 35 S.W. 2d 849. See also: *State ex. rel. Bonner v. Andrews,* 131 Tenn. 554, 175 S.W. 563; *Konig v. Baltimore,* 128 Md. 465, 97 A. 837; *Universal Const. Co. v. Gore,* (Fla.) 51 So. 2d 429; *Pensioners Protective Ass'n. v. Davis,* 112 Colo. 535, 150 P. 2d 974; *Tenney v. City of Miami Beach,* 152 Fla. 126, 11 So. 2d 188; 44 C.J., p. 1440; 64 C.J.S., Municipal Corporations, Sec. 2171.

In *Shillito v. City of Spartanburg, supra,* the plaintiff, on behalf of himself and other taxpayers of the City of Spartanburg, successfully prosecuted an action challenging the constitutional validity of an act of the General Assembly providing for a special annual tax levy on property in the City for the benefit of the City Firemen's Pension Fund. There, by judgment of the lower court, affirmed on appeal, (1) the act was declared invalid, (2) the City was ordered to desist from further levies, and (3) it was further ordered that certain funds already collected from the levy be transferred to the city general fund, "subject only to payment of such attorney's fees as may be allowed the attorney for the plaintiff by the court. . . ." On the question of allowance for fees, it was held on appeal that the trial court, in the exercise of its equitable powers, could allow from the fund a reasonable sum for the taxpayers' attorneys, with this pertinent observation being made by the Court (51 S.E. 2d 95, 100): "This suit was not instituted by the respondent taxpayer in his individual capacity nor for his private gain, but was brought as a class action on behalf of all the taxpayers of the city of Spartanburg to recover the money collected under the unconstitutional statute of 1946; and the city of Spartanburg was made a defendant as trustee for all of its members. The action is in all respects one in equity. The right of a court of equity to subject a fund so recovered, and under the control of the court, to the reasonable costs of such creation or preservation, is well established. . . ." Then, after analyzing and reviewing a number of supporting decisions from other jurisdictions, *Fishburne, J.*, speaking for the Court, goes on to say (pp. 103 and 104): "In the case at bar, the respondent taxpayer in seeking counsel fees for his attorney does not base this claimed right upon any contract, express or implied. It is a right which is founded in equity and to be determined upon equitable principles. . . . The city of Spartanburg, acting under unconstitutional statute, collected these funds as *quasi*-trustee for the Firemen's Pension Fund. And this tax money would not be in the city treasury today had it not been for the public spirited course followed by respondent in bringing this taxpayers suit. . . . The fact that this money was not actually received by the Board of Trustees of the Firemen's Pension Fund and by such Board turned over to the custody of the court, is not a differentiating factor insofar as it

affects the source of the recognized power of equity to grant counsel fees. For all practical purposes, this fund was created, protected and preserved for the benefit of the taxpayers of the city of Spartanburg through the medium of the judicial machinery set in motion by the respondent. And reasonable counsel fees should be paid therefrom. It is only fair and right that this payment should be made."

In *Council of Village of Bedford v. State ex rel. Thompson, Hine and Flory, supra,* counsel fees were allowed for the taxpayers' attorney out of funds recovered, representing unauthorized disbursements of the Village. There, the Ohio Court, in affirming the decision below, said (175 N.E. 607, 608): "The action had certain characteristics of an equitable nature, being one brought for the use and benefit of those standing in the position of a *cestui que* trust, and not brought by the taxpayers in their individual capacity, or for their private gain, but rather, as suggested, in the discharge of a trust. It had also certain resemblance to an accounting, covering a number of items and transactions."

In the instant case, the action is basically equitable in nature and involved an examination by the lower court of numerous items of disbursement amounting to an accounting. See record and opinion in second appeal (235 N.C. 77). Also, in support of the proposition that in this jurisdiction a taxpayers' action like this one is considered equitable in nature, see *Waddill v. Masten,* 172 N.C. 582, 586, 90 S.E. 694, and cases there cited.

In *Fox v. Lantrip, supra,* an allowance for the taxpayer's attorney was made from the fund recovered against a county school superintendent for money wrongfully paid to him. We quote from the decision (169 Ky. 759, 766 and 767, 185 S.W. 136, 139):

"In the lower court the appellees moved the court to allow their attorneys, out of the fund recovered, a fee for their services in recovering this money for the county. This motion was overruled. . . . We think the motion should have been sustained, and a reasonable attorney fee allowed. It is very commendable that public-spirited citizens should endeavor to protect the taxpayers of a county from the efforts of an accommodating fiscal court to make unauthorized and unlawful appropriations of the public funds, and to seek to recover the money so illegally disbursed from the persons to whom it was wrongfully paid. And when, as in this case, the public authorities, whose duty it is to bring a suit to recover public funds wrongfully paid out, refuse to do so, and the duty is thus imposed on the citizen in his private capacity, he should be allowed his attorney fees if successful. Citizens should be encouraged to bring suits like this, and when they have succeeded in covering into the county treasury money for the benefit of the people of

the county that would otherwise be lost, it is no more than right and just that they should have these fees. If attorney's fees could not be allowed in cases like this, and a citizen were required to pay out of his own means attorneys' fees expended in collecting, for the benefit of the public, a public fund, there are not many citizens who would care to voluntarily incur this expense. They would rather bear the probably trifling personal loss sustained by the illegal appropriation than subject themselves to the much larger loss that would be incurred in attorney fees.

"We therefore think that when, upon demand, the authorities who should bring a suit like this fail or refuse to do so, and it is brought by private citizens, the court trying the case should, when the suit has been prosecuted to a final conclusion and the fund sought to be recovered has been actually collected, in whole or in part, and paid into the county treasury, make a reasonable allowance to the attorneys and direct the payment of the sum by the fiscal court. But in no case should any allowance be made unless the fund sought to be recovered has been recovered in whole or in part and actually paid into the country treasury, and then the fee allowed should be in proportion to the services rendered, as well as the amount recovered, but in no instance exceed the sum actually collected and paid into the treasury. If no money is recovered or paid into the country treasury, then no allowance should be made for attorney fees."

In the light of the authorities here cited, we conclude that where, as in the present case, on refusal of municipal authorities to act, a taxpayer successfully prosecutes an action to recover, and does actually recover and collect, funds of the municipality which had been expended wrongfully or misapplied, the court has implied power in the exercise of a sound discretion to make a reasonable allowance, from the funds actually recovered, to be used as compensation for the plaintiff taxpayer's attorney fees.

We are not unmindful that the power to make an allowance of counsel fees from a fund brought into court is susceptible of great abuse, and should be exercised with jealous caution, lest thereby the administration of justice be brought into disrepute. Nevertheless, with application of the rule here applied being restricted to cases in which taxpayers not only recover judgment for the wrongfully expended public moneys, but actually collect the moneys so misapplied, and then with the power of award being limited to items of reasonable attorney fees and expenses, so as to exclude compensation or allowance of any kind for the time and effort of the suing taxpayer, thus fixing it so the taxpayer may not capitalize on the suit, we see no real danger of abuse. These safeguards, it would seem, are sufficient to protect the public and responsible governmental agencies against the dangers of vexatious and trifling

litigation. And when a citizen, at the hazard of having to bear all expenses of the litigation in the event of an adverse decision, successfully prosecutes a taxpayers' action and actually recovers for the public treasury moneys otherwise lost, the beneficiary agency, as trustee for all the rest of the taxpayers, may be required on principles of equity and natural justice to contribute, from the funds collected, the reasonable value of the attorney's services.

For the reasons given, the judgment below is reversed and the cause is remanded to the Superior Court for further proceedings in accordance with this opinion.

Reversed.

NORA CLAYTON WELLS v. BENNEHAN CLAYTON, AN INSANE PERSON, WHO DEFENDS BY HIS GUARDIAN AD LITEM, CLYDE T. SATTERFIELD.

(Filed 22 August, 1952.)

1. Pleadings § 25—

An issue of fact is raised for the determination of the jury whenever a material fact, which is one constituting a part of plaintiff's cause of action or the defendant's defense, G.S. 1-172, G.S. 1-196, is alleged by one party and denied by the other.

2. Pleadings § 28—

Even though an issue of fact be raised by the pleadings, if the party having the burden of proof thereon fails to introduce any evidence, the adverse party is entitled to judgment on the issue.

3. Pleadings § 3a—

The plaintiff must allege in his complaint every fact necessary to constitute his cause of action. G.S. 1-122.

4. Pleadings § 25½—

Plaintiff must prove every material fact alleged by him if it is denied by the answer of defendant, but this rule does not apply to an immaterial allegation.

5. Same: Evidence § 42f—

If a fact essential to plaintiff's cause of action is admitted in the answer not only is plaintiff not required to prove same, but such fact is to be taken as true for all purposes connected with the trial whether or not the admission is introduced in evidence. G.S. 1-159.

6. Pleadings § 7—

To be sufficient, the answer must contain a denial of each material allegation of the complaint controverted by defendant, or a statement of new matter constituting an affirmative defense, or a statement of new matter constituting a counterclaim, G.S. 1-135. Such new matter may constitute both an affirmative defense and a counterclaim.

7. Pleadings § 13—

New matter in an answer constituting a counterclaim is to be taken as true for the purposes of the action unless it is actually controverted by a reply, G.S. 1-159, or by implication of law because not served upon plaintiff or his counsel as required by G.S. 1-140.

8. Same—

New matter in the answer not relating to a counterclaim is deemed controverted by plaintiff as upon direct denial or avoidance as the case may be without a formal reply, G.S. 1-159, although the court may require plaintiff, on defendant's motion, to reply to new matter constituting a defense by way of avoidance, G.S. 1-141.

9. Evidence § 8—

The defendant has the burden of proving an affirmative defense, or a controverted counterclaim.

10. Pleadings § 9—

A plea in confession and avoidance admits the cause of action alleged by plaintiff and sets up some new affirmative matter in avoidance of same.

11. Pleadings § 28—

Plaintiff is entitled to judgment as a matter of law upon a plea in confession and avoidance if defendant fails to prove the new matter alleged by him to avoid the confessed cause of action, regardless of whether the new matter constitutes a counterclaim or an affirmative defense.

12. Quieting Title § 2—

In a suit under G.S. 41-10 to quiet title, plaintiff is required to allege ownership of the land in controversy or that he has some estate or interest in it and that defendant has asserted some claim adverse to plaintiff's title, estate or interest, but plaintiff is not required to allege or show the specific circumstances giving rise to defendant's adverse claim unless it is essential for plaintiff to overcome such claim in order to establish his own title, estate or interest.

13. Same—Where defendant in action to quiet title fails to offer any evidence in support of plea in confession and avoidance, plaintiff is entitled to judgment.

Plaintiff alleged record title to the land in question and that defendant wrongfully claimed that he had contributed money for the purchase price and wrongfully asserted an interest in the land to the extent of his alleged contribution. Defendant admitted that plaintiff held record title but alleged that defendant had contributed his funds to the purchase price and that plaintiff held title, in part at least, as trustee for defendant. The answer was not served on plaintiff. *Held:* Defendant's admission of plaintiff's record title constitutes a confession of plaintiff's cause since the holder of record title must be assumed to be the true owner unless the contrary appears, and therefore defendant's answer set up new matter in confession and avoidance constituting a defense and counterclaim for reformation, and upon defendant's failure to introduce evidence in support of such new matter, plaintiff is entitled as a matter of law to judgment quieting her title as against the adverse claim of defendant.

14. Appeal and Error § 39c—

Where plaintiff is entitled to judgment as a matter of law, any error in the trial of the cause must be held harmless on defendant's appeal.

APPEAL by defendant from *Burgwyn, Special Judge,* and a jury, at February Term, 1952, of PERSON.

Statutory action to quiet title to realty against an adverse claim.

The complaint makes out this case in detail:

The plaintiff, Nora Clayton Wells, was divorced from her former husband, the defendant, Bennehan Clayton, before the commencement of this action. During the existence of their marriage, the plaintiff bought certain land in Roxboro Township, Person County, from Beatrice L. Latta, and took fee simple title to it in her own name under deeds duly recorded in the office of the Register of Deeds of Person County. Although the plaintiff paid the entire purchase price of the land with her own moneys and is its absolute owner, the defendant wrongfully "claims that he contributed a large portion of the funds which were used for the purchase of said property . . . and . . . that the plaintiff holds the land in trust for him to the extent of his contribution to the purchase price." This adverse claim substantially impairs the market value of the land.

The complaint prays that the plaintiff's fee simple title be quieted as against the defendant's adverse claim.

The answer admits that the plaintiff has record or paper title to the land in controversy, and "that the defendant claims an interest in the land adverse to the plaintiff." It then alleges this new matter in detail:

Prior to the execution of the deeds mentioned in the complaint, the plaintiff and the defendant agreed to buy the land in dispute together, and to take title to it in their joint names as tenants by the entirety. Pursuant to this agreement, the defendant paid a substantial portion of the purchase price of the property with his own funds. Despite this, the plaintiff, acting with the fraudulent intent of defeating the rights of the defendant, obtained title to the land in her own name alone. As a consequence of these matters, the plaintiff holds the record or paper title in trust for the benefit of herself and the defendant.

The answer prays "that the defendant and plaintiff be declared the owners in fee simple of the land described in the complaint" and "that the deeds to said property be reformed by inserting the defendant's name . . . therein" as a co-grantee with the plaintiff.

The answer was not served on the plaintiff or her counsel of record, and the court did not direct the plaintiff to reply to the new matter contained in it. The plaintiff did not, in fact, file any reply.

The defendant was adjudged insane subsequent to the conveyance of the land to the plaintiff and prior to the bringing of the action. In consequence, he defends through a guardian *ad litem.*

When the case was tried before the judge and a jury, the plaintiff testified that she "paid for the land" in controversy, and that no other person made any payment on it. She also introduced in evidence the deeds mentioned in the complaint, and the portion of the answer admitting "that the defendant claims an interest in the land adverse to the plaintiff." The defendant offered no testimony whatever.

The judge submitted this issue to the jury: "Is the plaintiff the owner of the premises described in the complaint free and clear of any claim or any right of the defendant to any part thereof or any interest therein?"

The jury answered the issue "Yes," and the judge entered judgment on this finding adjudging that the plaintiff owns the land in suit free from any claim on the part of the defendant.

The defendant excepted and appealed. His assignments of error assert that the judge erred in denying his motion for a compulsory nonsuit, in admitting the testimony of the plaintiff, and in charging the jury.

Burns & Long and R. P. Reade for plaintiff, appellee.

Victor S. Bryant, Robert I. Lipton, and Davis & Davis for defendant, appellant.

ERVIN, J. These propositions are well settled:

1. The law confers upon the parties to a civil action the right to a jury trial when, and only when, an issue of fact arises on the pleadings. G.S. 1-172; *Jeffreys v. Ins. Co.*, 202 N.C. 368, 162 S.E. 761; *Comrs. v. George*, 182 N.C. 414, 109 S.E. 77; *McQueen v. Bank*, 111 N.C. 509, 16 S.E. 270. An issue of fact arises on the pleadings whenever a material fact is maintained by one party and controverted by the other. G.S. 1-196; *Lupton v. Day*, 211 N.C. 443, 190 S.E. 722. A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense. *Adams v. Way*, 32 Conn. 160; *People v. Lake St. R. R. Co.*, 54 Ill. App. 348; *Hansen v. Sandvik*, 128 Wash. 60, 222 P. 205. Although an issue of fact may arise on the pleadings in a particular case, the trial judge may and should withdraw the issue from the consideration of the jury, and enter such judgment as either of the parties may have the right to demand upon the admissions of fact contained in the pleadings if no evidence is offered tending to sustain the allegation of the party having the burden of proof on the issue. *Forbes v. Mill Co.*, 195 N.C. 51, 141 S.E. 252; *McQueen v. Bank, supra; Judson v. Creighton*, 88 Neb. 37, 128 N.W. 651.

2. The plaintiff must allege in his complaint every fact necessary to constitute his cause of action. G.S. 1-122; *Potter v. Supply Co.*, 230 N.C. 1, 51 S.E. 2d 908; *Brown v. Hall*, 226 N.C. 732, 40 S.E. 2d 412. Moreover, he must prove every such fact if it is denied by the answer of the defendant. *King v. Coley*, 229 N.C. 258, 49 S.E. 2d 648; *Parsley &*

Co. v. Nicholson, 65 N.C. 207. But no proof is required of an immaterial allegation. *Jeffreys v. Ins. Co., supra;* 41 Am. Jur., Pleading, section 369; 71 C.J.S., Pleading, section 522.

3. A fact essential to the plaintiff's cause of action need not be proved if it is alleged in the complaint and admitted in the answer. *Light Co. v. Sloan,* 227 N.C. 151, 41 S.E. 2d 361; *Little v. Rhyne,* 211 N.C. 431, 190 S.E. 725; *Adams v. Beasley,* 174 N.C. 118, 93 S.E. 454; *McMillan v. Gambill,* 115 N.C. 352, 20 S.E. 474; *Hargrove v. Adcock,* 111 N.C. 166, 16 S.E. 16; *Jenkins, Admx., v. The N. C. Ore Dressing Co.,* 65 N.C. 563. The admission is as effectual as if the fact admitted were found by a jury, and such fact is to be taken as true for all purposes connected with the trial. G.S. 1-159; *Light Co. v. Sloan, supra; Leathers v. Tobacco Co.,* 144 N.C. 330, 57 S.E. 11, 9 L.R.A. (N.S.) 349; *Bonham v. Craig,* 80 N.C. 224. This is so even though the admission is not introduced in evidence. *Page v. Insurance Co.,* 131 N.C. 115, 42 S.E. 543; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 364.

4. An answer is a pleading designed to present the defendant's side of the case stated in the plaintiff's complaint. G.S. 1-124. To be sufficient, the answer of the defendant must contain one or more of the following things: (1) A denial of each material allegation of the complaint controverted by the defendant. (2) A statement of new matter constituting an affirmative defense to the cause of action stated in the complaint. (3) A statement of new matter constituting a counterclaim. G.S. 1-135; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 456. The new matter alleged in an answer in a particular case may constitute both an affirmative defense and a counterclaim. *Lancaster Mfg. Co. v. Colgate,* 12 Ohio St. 344. When an answer contains new matter constituting a counterclaim, such new matter is to be taken as true for the purposes of the action unless it is actually controverted by the reply of the plaintiff as required by G.S. 1-159, or unless it is deemed to be denied by the plaintiff as a matter of law without a formal reply on account of the neglect of the defendant to cause the answer to be served upon the plaintiff or his counsel of record as provided by G.S. 1-140. *Lawrence v. Heavner,* 232 N.C. 557, 61 S.E. 2d 697. When an answer contains new matter not relating to a counterclaim, the new matter is deemed controverted by the plaintiff as upon a direct denial or avoidance as the case may be without a formal reply. G.S. 1-159; *Wagon Co. v. Byrd,* 119 N.C. 460, 26 S.E. 144. The court possesses discretionary power, however, to require the plaintiff, on the defendant's motion, to reply to new matter constituting a defense by way of avoidance. G.S. 1-141.

5. The defendant has the burden of proving an affirmative defense, or a controverted counterclaim. *MacClure v. Casualty Co.,* 229 N.C. 305,

49 S.E. 2d 742; *Barber v. Edwards,* 218 N.C. 731, 12 S.E. 2d 234; *Jones v. Waldroup,* 217 N.C. 178, 7 S.E. 2d 366; *Williams v. Insurance Co.,* 212 N.C. 516, 193 S.E. 728; *Gin Co. v. Wise,* 200 N.C. 409, 157 S.E. 20; *Millsaps v. McCormick,* 71 N.C. 531. An answer may be in essence a plea in confession and avoidance. Such plea, as its name implies, admits the cause of action alleged by the plaintiff, and sets up some new affirmative matter in avoidance of the same. 41 Am. Jur., Pleadings, section 158; 71 C.J.S., Pleading, section 163. In other words, it confesses the validity of the plaintiff's claim and entitles the plaintiff to judgment thereon, except for the new affirmative matter alleged to avoid such claim. *Cohoon v. Swain,* 216 N.C. 317, 5 S.E. 2d 1; *Mitchell v. Whitlock,* 121 N.C. 166, 28 S.E. 292; *Staten v. Hammer,* 121 Iowa 499, 96 N.W. 964; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 461. As a consequence, the plaintiff is entitled to judgment as a matter of law on the cause of action stated in the complaint and admitted in the answer when the answer is in essence a plea in confession and avoidance and the defendant fails to prove the new affirmative matter alleged by him to avoid the confessed cause of action. *Cook v. Guirkin,* 119 N.C. 13, 25 S.E. 715; *McQueen v. Bank, supra; Rumbough v. Improvement Co.,* 109 N.C. 703, 14 S.E. 314. This is true even though the matter alleged in avoidance constitutes a counterclaim as well as an affirmative defense. *Barber v. Edwards, supra; Forbes v. Mill Co., supra.*

6. The General Assembly of 1893 enacted the statute now codified as G.S. 41-10 to avoid some of the limitations imposed upon the remedies formerly sought by a bill of peace or a bill *quia timet,* and to establish an easy method of quieting titles to land against adverse claims. McIntosh: North Carolina Practice and Procedure in Civil Cases, sections 986, 987. This statute provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." The statutory action to quiet title to realty consists of two essential elements. The first is that the plaintiff must own the land in controversy, or have some estate or interest in it (*Thomas v. Morris,* 190 N.C. 244, 129 S.E. 623); and the second is that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest. *Brinson v. Morris,* 192 N.C. 214, 134 S.E. 453; *Satterwhite v. Gallagher,* 173 N.C. 525, 92 S.E. 369; *Christman v. Hilliard,* 167 N.C. 4, 82 S.E. 949; *Rumbo v. Manufacturing Co.,* 129 N.C. 9, 39 S.E. 581; *Duncan v. Hall,* 117 N.C. 443, 23 S.E. 362. Despite statements to the contrary in cases in other jurisdictions, the plaintiff is not bound to show as an independent proposition in his statutory action to quiet title the invalidity and wrongfulness of the adverse claim. These matters are inseparably interwoven in the two essential elements set forth above. The claim of the defendant is

necessarily invalid and wrongful if it is adverse to the title, estate or interest of the true owner. The plaintiff is not required to allege or show the specific circumstances giving rise to the defendant's adverse claim, unless it is essential for the plaintiff to overcome such claim in order to establish his own title, estate or interest. Hence, it is ordinarily sufficient for the plaintiff to allege and show in general terms that the defendant is asserting some claim adverse to him. *Ramsey v. Ramsey,* 224 N.C. 110, 29 S.E. 2d 340.

The task of applying these rules to the instant case must now be performed. The complaint states every fact necessary to constitute a statutory action to quiet title to land against an adverse claim. It alleges that the plaintiff owns the land in controversy in fee simple, and that the defendant asserts some claim to such land adverse to the plaintiff's title. When all is said, the answer is in essence a plea in confession and avoidance. It admits that the plaintiff holds the record or paper title to the land in dispute, and that the defendant claims an estate or interest in such land adverse to the plaintiff. These admissions are tantamount to a confession of the cause of action alleged in the complaint. This is true for the very simple reason that the holder of the record or paper title to land must be assumed to be its true owner unless the contrary appears. *Hayes v. Cotton,* 201 N.C. 369, 160 S.E. 453; *Power Co. v. Taylor,* 196 N.C. 55, 144 S.E. 523; *Land Co. v. Floyd,* 171 N.C. 543, 88 S.E. 862; *Campbell v. Everhart,* 139 N.C. 503, 52 S.E. 201; *Bryan v. Spivey,* 109 N.C. 57, 13 S.E. 766; *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142; *Burnside v. Doolittle,* 324 Mo. 722, 24 S.W. 2d 1011.

The answer alleges this new matter to avoid the cause of action confessed: That the plaintiff holds the record or paper title in part at least as a trustee for the defendant. Such new matter constitutes both an affirmative defense by way of avoidance and a counterclaim by way of reformation. *Lawrence v. Heavner, supra; Cuthbertson v. Morgan,* 149 N.C. 72, 62 S.E. 744; *Manufacturing Co. v. Cloer,* 140 N.C. 128, 52 S.E. 305; *McLamb v. McPhail,* 126 N.C. 218, 35 S.E. 426; *Anderson v. Logan,* 105 N.C. 266, 11 S.E. 361. It must be deemed to be denied by the plaintiff on the present record.

As a consequence, the defendant had the burden of proving the new matter alleged by him by way of avoidance and counterclaim. He offered no evidence at the trial tending to establish the new matter. This being true, the plaintiff was entitled as a matter of law to have the trial judge withdraw the case from the consideration of the jury and to enter a final judgment quieting her title as against the adverse claim of the defendant. It necessarily follows that the errors, if any, committed by the trial judge in admitting the plaintiff's testimony, in passing on the sufficiency of

such testimony, and in charging the jury were harmless, and will not justify the award of a new trial.

For the reasons given, there is in law

No error.

MARY LOU MINTZ v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 August, 1952.)

1. Appeal and Error § 51a—

Where the Supreme Court holds on appeal that the evidence was sufficient to overrule defendant's motions to nonsuit, in the subsequent trial upon substantially the same evidence the question of the sufficiency of the evidence is foreclosed.

2. Evidence § 46e—

In describing a spiral stairway, a witness' statement that it went up "as a corkscrew would" *is held* competent as a shorthand statement of a composite fact.

3. Evidence § 26—

Testimony of a witness as to the condition of a spiral stairway almost two years prior to the time in question cannot be held incompetent as too remote when other witnesses have testified in substance that the condition of the stairway remained unchanged from that time down to the moment of plaintiff's injury.

4. Trial § 16—

Where, upon objection, the court withdraws an unresponsive answer of a witness and categorically instructs the jury not to consider it, the action of the court in striking out the answer and withdrawing it from the jury precludes prejudicial error.

5. Evidence § 26½—

Defendant introduced in evidence photographs of the stairway in question, taken some two and one-half years after the accident in suit. The plaintiff later introduced testimony to the effect that defendant changed or repaired the steps after the accident. *Held:* While plaintiff's evidence was not competent to show negligence on the part of defendant it was competent for the limited purpose of disproving the correctness of the photographs and to contradict defendant's witnesses who identified the photographs as true representations of the steps at the time of the accident.

6. Evidence § 46g—

Where plaintiff introduces evidence that her physical condition was a direct result of her fall, it is competent for medical expert witnesses to testify, upon personal knowledge based upon their examination and treatment of plaintiff subsequent to the accident, as to the nature and extent of her injuries, the effect of such injuries upon plaintiff's capacity to work, and the probable result of future medical or surgical treatment of plaintiff.

7. Evidence § 26—

In order to be competent in evidence, an experiment must be made under conditions substantially similar to those prevailing at the time and place of the occurrence in suit, and the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence, and the competency of experiment evidence is a preliminary question for the court to determine in the exercise of its discretion.

8. Same—

Where there is no evidence of probative force tending to show that the conditions under which an experiment was made were substantially the same as those existing at the time of the occurrence in suit, the record indicates that the court's ruling in excluding the experiment evidence was proper as a strictly legal question, and certainly does not support the view that the ruling rejecting the proffered evidence constitutes abuse of discretion.

APPEAL by defendant from *Sharp, Special Judge,* and a jury, at October Term, 1951, of BRUNSWICK.

Civil action by clerical employee of a railroad to recover damages of her employer for personal injuries allegedly suffered by her in the performance of the duties of her employment as the result of slipping and falling upon an ill-lighted, slick and unstable spiral stairway in an office building of her employer at Wilmington, North Carolina.

The complaint sets forth in specific detail factual averments warranting the conclusion that the plaintiff, Mary Lou Mintz, sustained disabling and permanent injuries to her spine as the proximate consequence of the failure of the defendant, Atlantic Coast Line Railroad Company, to exercise ordinary care to furnish her a reasonably safe place to do the work required of her. The answer admits the employment of plaintiff by defendant, denies actionable negligence on the part of defendant, and pleads contributory negligence on the part of plaintiff.

This case was before this Court at the Spring Term, 1951, and is reported in 233 N.C. 607, 65 S.E. 2d 120, where the pleadings are analyzed and the evidence at the first trial is stated. This Court held then that the testimony made the liability of defendant to plaintiff a question for the jury, but ordered a new trial because of error in the admission of evidence.

When the cause was heard anew, the parties offered substantially the same evidence as that presented by them at the original trial. These issues were submitted to the jury: (1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) If so, did the plaintiff by her negligence contribute to her injury, as alleged in the answer? (3) What damages, if any, is the plaintiff entitled to recover of the defendant?

The jury answered the first issue "Yes," the second issue "No," and the third issue "$39,000.00." The trial judge entered judgment for plaintiff in accordance with the verdict, and the defendant appealed.

J. Faison Thomson, John D. Bellamy & Sons, and Frink & Herring for plaintiff, appellee.

Poisson, Campbell & Marshall for defendant, appellant.

ERVIN, J. The defendant makes these assertions by its assignments of error:

1. That the court erred in refusing to dismiss the action upon a compulsory nonsuit. G.S. 1-183.

2. That the court erred in the admission of testimony offered by plaintiff.

3. That the court erred in the exclusion of testimony offered by defendant.

4. That the court erred in its instructions to the jury.

Counsel for the defendant argue with much earnestness and eloquence that the action ought to have been involuntarily nonsuited in the court below. Inasmuch as the evidence now before us is substantially the same as that presented and considered on the former appeal, we are constrained to hold that this question is foreclosed against the defendant by the decision on the former appeal adjudging the evidence sufficient to carry the case to the jury and to support a verdict for the plaintiff. *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864; *Randle v. Grady,* 228 N.C. 159, 45 S.E. 2d 35; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164; *Wall v. Asheville,* 220 N.C. 38, 16 S.E. 2d 397; *Simpson v. Oil Co.,* 219 N.C. 595, 14 S.E. 2d 638; *McGraw v. R. R.,* 209 N.C. 432, 184 S.E. 31; *Dixson v. Realty Co.,* 209 N.C. 354, 183 S.E. 382; *Groome v. Statesville,* 208 N.C. 815, 182 S.E. 657; *Masten v. Texas Co.,* 204 N.C. 569, 169 S.E. 158; *Madrin v. R. R.,* 203 N.C. 245, 165 S.E. 711; *Newbern v. Telegraph Co.,* 196 N.C. 14, 144 S.E. 375; *McCall v. Institute,* 189 N.C. 775, 128 S.E. 349; *Soles v. R. R.,* 188 N.C. 825, 125 S.E. 24; *Clark v. Sweaney,* 176 N.C. 529, 97 S.E. 474.

The assignments of error based on the admission of the testimony of the plaintiff's witnesses are discussed in the numbered paragraphs set forth below.

1. Upon being called on to describe "the general shape" of the stairway involved in this action, the plaintiff's witness B. B. Phillips, Jr., stated that it was "a spiral stairway, going up as a corkscrew would." The witness was an ordinary observer testifying to the results of his observation, and his evidence was admissible as a shorthand statement of a composite fact. *S. v. Sterling,* 200 N.C. 18, 156 S.E. 96; *Kepley v. Kirk,*

191 N.C. 690, 132 S.E. 788; *S. v. Skeen,* 182 N.C. 844, 109 S.E. 71; *S. v. Spencer,* 176 N.C. 709, 97 S.E. 155; *Bane v. R. R.,* 171 N.C. 328, 88 S.E. 477; *Board of Education v. Lumber Co.,* 158 N.C. 313, 73 S.E. 994. The appropriateness of his homely simile becomes apparent on a reading of the testimony of other witnesses who described the spiral stairway with technical precision.

2. The plaintiff's witness D. W. Merritt, who was employed by the defendant at its office building from 16 September, 1925, until 31 May, 1945, testified that during the entire period of his employment by defendant the steps of the spiral stairway "were slick and worn," some of the rods or spokes connecting the banister of the stairway with its steps were missing, and the stairway as a whole would shake when used. This evidence was received over the exception of the defendant, which stressfully insists that the interim between the date of the last observation of the witness, *i.e.,* 31 May, 1945, and the date of the plaintiff's alleged injury, *i.e.,* 10 April, 1947, prevents the evidence from having any logical tendency to show the condition of the stairway at the time of plaintiff's alleged injury or notice of such condition to the defendant. This contention is robbed of validity by the significant fact that other witnesses for the plaintiff, notably James E. Hearn, Jr., and E. A. Shands, testified in substance that the conditions depicted by Merritt remained unchanged down to the moment of the plaintiff's alleged injury. This being true, the testimony of Merritt was competent under the rule that evidence of conditions before an accident may be received where it is also shown that such conditions remained unchanged down to the occurrence of the accident. *Perry v. Manufacturing Co.,* 176 N.C. 68, 97 S.E. 162; *Millman v. U. S. Mortgage & Title Co. of New Jersey,* 121 N.J.L. 28, 1 A. 2d 265; *Louisville & N. R. Co. v. Frakes,* 11 Tenn. App. 593; 20 Am. Jur., Evidence, section 306; 38 Am. Jur., Negligence, section 313; 65 C.J.S., Negligence, section 230.

3. While he was undergoing cross-examination the plaintiff's witness S. T. Glover made this unresponsive answer to a question put to him by defendant's counsel: "The steps have been chipped at one time since the accident." The defendant forthwith moved to strike this answer, and the court promptly sustained the motion by giving this contemporary instruction to the jury: "Members of the jury, the court is allowing the motion of the defendant to strike from the evidence the answer of this witness to the effect that the steps have been chipped since April 10, 1947. That evidence is eliminated from this trial, and you will eliminate it from your consideration." We are satisfied that any danger that the unresponsive answer would work to the prejudice of the defendant was removed by the clear and emphatic language of the judge striking out the answer

and withdrawing it from the jury. *Medlin v. Simpson,* 144 N.C. 397, 57 S.E. 24; *Parrott v. R. R.,* 140 N.C. 546, 53 S.E. 432.

4. Witnesses for the defendant identified certain photographs made two and a half years after the accident as true representations of the steps of the spiral stairway at the time of the accident. The defendant introduced the photographs in evidence to illustrate the testimony of these witnesses. When she presented her rebuttal evidence, the plaintiff called to the stand A. G. Alderman and James E. Hearn, Jr., who testified in detail to facts indicating that about a week after the accident changes or repairs were made to the steps of the spiral stairway by the defendant, and that in consequence the photographs were not true pictures of the steps of the spiral stairway at the time of the accident. The defendant complains of the admission of the testimony of these witnesses concerning the changes or repairs. This evidence was not competent to show negligence on the part of the defendant on the occasion of the plaintiff's alleged injury. *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493; *Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 299; *Ledford v. Lumber Co.,* 183 N.C. 614, 112 S.E. 421; *Farrall v. Garage Co.,* 179 N.C. 389, 102 S.E. 617; *McMillan v. R. R.,* 172 N.C. 853, 90 S.E. 683; *Blevins v. Cotton Mills,* 150 N.C. 493, 64 S.E. 428; *Aiken v. Manufacturing Co.,* 146 N.C. 324, 59 S.E. 696; *Myers v. Lumber Co.,* 129 N.C. 252, 39 S.E. 960; *Lowe v. Elliott,* 109 N.C. 581, 14 S.E. 51. The record reveals, however, that the testimony was not presented or received for that purpose. The evidence that changes or repairs were made to the steps of the spiral stairway subsequent to the accident was offered by the plaintiff and admitted by the court for the express purpose of disproving the correctness of the photographs taken after the making of the changes or repairs, and contradicting the witnesses who identified the photographs as true representations of the steps of the spiral stairway at the time of the accident. We hold that the evidence was rightly received for this limited purpose. This conclusion finds explicit sanction in well considered cases in other jurisdictions where the precise question now before us was under consideration. *Northern Pac. R. Co. v. Alderson,* 199 Fed. 735, 118 C.C.A. 173; *Sample v. Chicago, B. & Q. R. Co.,* 233 Ill. 564, 84 N.E. 643; *Achey v. Marion,* 126 Iowa 47, 101 N.W. 435; *Standard Oil Co. v. Franks,* 167 Miss. 282, 149 So. 798. It likewise has implicit support in our own decisions. *Shelton v. R. R.,* 193 N.C. 670, 139 S.E. 232; *Beck v. Tanning Co.,* 179 N.C. 123, 101 S.E. 498; *Muse v. Motor Co.,* 175 N.C. 466, 95 S.E. 900; *Boggs v. Mining Co.,* 162 N.C. 393, 78 S.E. 274; *Pearson v. Clay Co.,* 162 N.C. 224, 78 S.E. 73; *Tise v. Thomasville,* 151 N.C. 281, 65 S.E. 1007.

5. The defendant complains of the receipt of the evidence of the plaintiff's witnesses Dr. Julian E. Jacobs and Dr. J. B. Cranmer, expert physi-

cians and surgeons, who based their testimony upon their own personal knowledge of the physical condition of the plaintiff obtained by them by examining or treating the plaintiff subsequent to the date of the accident. These medical experts described in minute detail the nature and extent of the plaintiff's injuries. Moreover, each of them expressed the opinion that the plaintiff's injuries were permanent in character and disabled her from doing any kind of work, and that the plaintiff's physical condition would not be improved by additional surgery. This evidence was competent under the rule that in personal injury actions, expert medical evidence is admissible to show the nature and extent of the plaintiff's injuries, the effect of such injuries on the plaintiff's capacity to work or to use his physical powers, and the probable result of future medical or surgical treatment of the plaintiff. *Dickson v. Coach Co.*, 233 N.C. 167, 63 S.E. 2d 297; *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818; *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496; *Green v. Casualty Co.*, 208 N.C. 767, 167 S.E. 38; *Dempster v. Fite*, 203 N.C. 697, 167 S.E. 33; *Baker v. International Shoe Co.*, 199 N.C. 379, 154 S.E. 667; *Butler v. Fertilizer Works*, 195 N.C. 409, 142 S.E. 483; *Dulin v. Henderson-Gilmer Co.*, 192 N.C. 638, 135 S.E. 614, 49 A.L.R. 663; *Taylor v. Power Co.*, 174 N.C. 583, 94 S.E. 432; *Ridge v. R. R.*, 167 N.C. 510, 83 S.E. 762, L.R.A. 1917E, 215; *Ferebee v. R. R.*, 167 N.C. 290, 83 S.E. 360; Stansbury on North Carolina Evidence, section 135; Rogers on Expert Evidence (3rd Ed.), section 130; 32 C.J.S., Evidence, section 534. In reaching this conclusion, we have not ignored the contention of the defendant that no evidence was adduced at the trial "purporting to connect the . . . physical condition of plaintiff with the . . . fall on the spiral stairway." This contention is untenable. The plaintiff deposed in person to many specific facts tending to show that her physical condition was the direct result of her fall on the spiral stairway. Besides, Dr. Jacobs expressed the opinion in response to a hypothetical question that the fall was sufficient to cause the plaintiff's injuries. This particular testimony of this medical witness was admitted without objection.

The defendant assigns as error the exclusion of the testimony of its witness M. W. Clark as to an experiment made by him and two other men more than two and a half years after the accident to test the stability of the banister or handrail of the spiral stairway. The rejected testimony was as follows: "Three of us stood on the steps, grasped the handrail in our hands, and pulled on it. It sustained the weight of three persons."

To be admissible in evidence, an experiment must satisfy this twofold requirement: (1) The experiment must be made under conditions substantially similar to those prevailing at the time of the occurrence involved in the action; and (2) the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such

occurrence. *Simpson v. Oil Co., supra; Caldwell v. R. R.,* 218 N.C. 63, 10 S.E. 2d 680; *S. v. Holland,* 216 N.C. 610, 6 S.E. 2d 217; *S. v. McLamb,* 203 N.C. 442, 166 S.E. 507; *S. v. Young,* 187 N.C. 698, 122 S.E. 667; *Draper v. R. R.,* 161 N.C. 307, 77 S.E. 231; *Arrowood v. R. R.,* 126 N.C. 629, 36 S.E. 151; *Cox v. R. R.,* 126 N.C. 103, 35 S.E. 237.

The rule obtains in this jurisdiction that "whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear." 32 C.J.S., Evidence, section 587; *S. v. Holland, supra; S. v. McLamb, supra.*

The record does not support the view that the ruling rejecting the proffered testimony constituted an abuse of discretion. Indeed, it indicates that the ruling was proper on the strictly legal ground that the defendant failed to show in an adequate manner a similarity in essential conditions on the two relevant occasions. *Caldwell v. R. R., supra;* 32 C.J.S., Evidence, section 590.

The only witness to the exact condition of the banister or handrail at the precise time of the experiment was Clark, who stated, in substance, that the appliance was then in an excellent state of repair. He also testified that he had inspected the building containing the spiral stairway "practically every year" since 1930, and that it was "his position" that there had "been no change in any parts or in the carrying capacity of the rail, spokes, and structure itself at any time before or after April 10, 1947," the day of the accident. When Clark's testimony is read aright in its entirety, however, it is plain that he had no personal knowledge of the exact condition of the banister or handrail at the time of the accident, and that in consequence "his position," *i.e.,* the attitude assumed by him in reference to the matter, was without probative force as against the testimony of the other witnesses to the effect that at that time a number of the rods or spokes supporting the banister or handrail were either bent out of shape or missing altogether.

A careful consideration of the assignments of error based on the charge shows that each of the challenged instructions conforms to approved precedents. For this reason, an elaboration of these assignments is unnecessary.

Since the trial was free of legal error, the judgment must be upheld.

No error.

ARTHUR E. WAYNICK v. MARC J. REARDON AND DUKE UNIVERSITY, INC.

(Filed 22 August, 1952.)

1. Trial § 23a—

If plaintiff's evidence and so much of defendants' evidence as is favorable to plaintiff, amounts to more than a scintilla of evidence tending to establish the affirmative of the issue, defendants' motions to nonsuit are properly overruled.

2. Hospitals § 6—

Where it appears that plaintiff did not select his surgeon but was operated upon by the assistant resident in surgery who was employed and paid by the hospital, such surgeon is an employee of the hospital and it is liable for such surgeon's actionable negligence in the performance of his duties in the scope of his employment.

3. Same: Physicians and Surgeons § 20—Evidence held sufficient for jury on issue of surgeon's negligence.

The evidence tended to show that plaintiff underwent a lumbar sympathectomy for peripheral vascular disease, which he was advised would take only some forty-five minutes, that he was in the operating room over seven hours, that during the course of the operation a vein was inadvertently punctured, that in an attempt to control the bleeding other perforations of the blood vessel occurred, that thereupon the chief of the surgical service of the hospital was called in, who, upon ascertaining the patient's condition, abandoned all efforts to repair the blood vessels, but tied off and cut the torn vessels together with connecting fibrous tissue *en masse*. The evidence further tended to show that the resulting interference with circulation caused gangrene in the patient's left leg, making it necessary to amputate it, first below the knee and later after a debridement, above the knee, and that later a blood clot in the right leg caused gangrene, making it necessary to amputate plaintiff's right leg. *Held:* The evidence was sufficient to be submitted to the jury on the issue of the surgeon's negligence in an action against the surgeon and against the hospital employing him.

JOHNSON, J., concurs in result.

APPEAL by plaintiff from *Williams, J.*, September Term, 1951, ALAMANCE.

Civil action to recover damages for alleged injury caused by the negligence of the defendants.

For convenience in narration, the defendant, Marc J. Reardon, will be referred to in the statement of facts and in the opinion as Dr. Reardon, and the term, Duke Hospital, will be used to designate the hospital service of the defendant, Duke University, Inc., and will include within its scope said corporate defendant.

On 18 August, 1947, plaintiff, suffering with fallen arches and pain in his feet, entered the orthopedic clinic of Duke Hospital, where he received

shoe supports and instructions to use specified home treatments. He was requested to return for further observation and accordingly returned to the clinic on 3 September, 1947. At that time all significant symptoms were restricted to his left foot. Upon further examination, plaintiff was referred to the surgical department, where an operation was suggested. He had never undergone surgery and greatly feared an operation. No hospital bed was then available and plaintiff returned to his home. He was notified of the availability of a bed and on 8 September, 1947, entered Duke Hospital as a patient and was assigned to a bed in Halstead Ward. At this time, the plaintiff was able to perform his usual work and to walk without apparent distress.

At the time plaintiff became a patient in Duke Hospital, Drs. Marc J. Reardon, S. S. Ambrose and J. W. Kelley were not engaged in private practice, but were pursuing post-graduate training at Duke Hospital and their duties in this capacity included the care and treatment of patients assigned to Halstead Ward. Dr. Reardon was classified as Assistant Resident in Surgery and in addition to his maintenance was paid a salary of $41.67 per month. Drs. Ambrose and Kelley were internes and aides or assistants to Dr. Reardon. The operative procedure at Duke Hospital was carried out by what is known as operating teams consisting of the doctor who actually uses the surgical tools and two or more assistants or helpers who aid him in the operation. Plaintiff, as a patient on Halstead Ward, had no choice of doctors.

The diagnostic considerations of plaintiff's condition ranged all the way from Buerger's disease to arteriosclerosis. No definite diagnosis was ever reached. It was, however, concluded that plaintiff had some type of occlusive vascular or peripheral vascular disease. One of the accepted forms of treatment for such a condition is a lumbar sympathectomy. This involves the removal by surgery of nerve tissue and ganglia which control the muscles of the blood vessels, thereby reducing the spasms of the blood vessels by paralyzing the muscles. This allows the vessels to open up and increases the flow of blood. The blood supply is controlled largely by the sympathetic nervous system. Whatever may have been the cause of plaintiff's trouble, his disease appeared to have been in the early stages. Of the non-operative treatments developed for plaintiff's condition, only pavorin was used.

Without a complete and satisfactory diagnosis, plaintiff was persuaded by agents of Duke Hospital to submit to what was described to him as a minor or simple operation requiring only a small incision in his back and the clipping of a nerve, which operation would necessitate his being in the operating room only 40 to 45 minutes. Instead, an incision, 8 inches in length, extending from the 9th rib to the rectus sheath was made in the body cavity through which all internal organs were lifted out of

the way for the purpose of exposing the left lumbar sympathetic nerve and ganglia. These are located along and in front of the backbone or spinal column. The operation proceeded without apparent difficulty and as the nerve and three ganglia were being removed, the nerve chain snapped and the fourth ganglion disappeared behind a mass of tissue. While exploring for the fourth ganglion, Dr. Reardon discovered that the two large vessels which control the flow of blood to and from the left lower extremities were bound together by a mass of fibrous tissue and he inadvertently punctured one of these large vessels. Profuse, massive and uncontrolled bleeding followed. The mass of fibrous tissue made these large vessels easy to tear and more difficult to separate and repair, and in his effort to part this mass of fibrous tissue, Dr. Reardon perforated or produced fissures in the vessels in a number of other places. The bleeding became more profuse and plaintiff's condition became precarious. Dr. Reardon then made an incision in plaintiff's left thigh, up near the groin, and from that point followed a blood vessel as close as possible to the point of bleeding and there tied off and ligated that vessel. This procedure failed to control the bleeding and it was discovered that both the big artery and the big vein had been damaged by several punctures or tears. Due to the protracted operative procedure and the great loss of blood, plaintiff was in a critical condition and in a state of shock. Dr. Reardon had undertaken this difficult operation when there was no supervisory surgeon available in the hospital for consultation, advice and aid. Dr. K. S. Grimson, who developed the most extensive operation which might be performed upon the sympathetic nervous system and who was the head of that branch of the surgical service of Duke Hospital, was not available. Dr. Deryl Hart, Chief of the Surgical Service of the hospital, was called from his home in an effort to save the patient's life. Dr. Hart had not undertaken a lumbar sympathectomy in five years.

When Dr. Hart arrived at the hospital, all operative procedure was at a standstill and the bleeding was temporarily controlled by means of a pack. Upon discovering the condition of the patient, Dr. Hart abandoned all efforts to repair the damaged blood vessels and directed all his attention toward saving the patient's life. In this emergency, Dr. Hart, with the aid of Dr. Reardon and his associates, tied off the fibrous tissue which included the torn blood vessels and clipped them *en masse*. With these main vessels severed, the blood supply to that area of patient's body was greatly diminished, and upon reacting from the anesthetic about 9 o'clock that night, plaintiff discovered he was paralyzed from his hips down. The only hope of an adequate blood supply to his lower left leg and thigh was the development of a collateral circulation by means of smaller blood vessels. This collateral circulation did not materialize and as a result, gangrene developed and Dr. Reardon amputated plaintiff's left leg below

the knee. Because of defects in this amputation, plaintiff suffered and sustained another operation by Dr. Reardon whereby his left leg stump was debrided. Later, it was necessary for Dr. Hart to reamputate plaintiff's left leg, removing the knee joint. Plaintiff next developed a myocardial infraction of the heart. Then, a blood clot in his right leg resulted in gangrene and plaintiff's right leg was amputated by Dr. Hart. From these operations and the suffering incident thereto, plaintiff acquired a drug habituation.

Excerpts from the pleadings received in evidence tend to show that the plaintiff neither authorized nor consented to the operations performed on him on 13 September, 1947, and that he "did not need or require any operation" at that time.

Plaintiff, for the first operations, was taken to the operating room before 9 o'clock in the morning and remained there until about 4:30 in the afternoon, during which time he was given by transfusions from 14 to 17 pints of blood. When pressed by plaintiff for an explanation of what happened during the operation, Dr. Reardon gave as his only comment, "I played hell; that is what happened."

Upon admission to the hospital, plaintiff weighed between 180 and 185 pounds. When discharged on 15 January, 1948, he weighed 94 pounds. Plaintiff was not a charity patient and all expenses of his hospitalization were fully paid.

At the close of plaintiff's evidence, the court overruled the motions of the defendants for judgment as of nonsuit, but such motions at the close of all the evidence were allowed as to both defendants. From the judgment entered, plaintiff excepted and appealed, assigning errors.

W. R. Dalton, Sr., D. E. Scarborough, and W. R. Dalton, Jr., for plaintiff, appellant.

E. C. Bryson and Fuller, Reade, Umstead & Fuller for defendants, appellees.

VALENTINE, J. The decisive question presented by this appeal is whether the evidence sufficeth to take the case to the jury.

Many variations of the rule defining the *quantum* of proof necessary to carry a case to the jury have been evolved through the years. *Davidson v. Telegraph Co.*, 207 N.C. 790, 178 S.E. 603; *Mitchell v. Saunders*, 219 N.C. 178, 13 S.E. 2d 242; *Stell v. Trust Co.*, 223 N.C. 550, 27 S.E. 2d 524; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Potter v. Supply Co.*, 230 N.C. 1, 51 S.E. 2d 908; *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757; *Maddox v. Brown*, 232 N.C. 244, 59 S.E. 2d 791. But the whole matter distilled and boiled down involves the process of placing all of plaintiff's

evidence and so much of defendant's evidence as is favorable to plaintiff in evenly balanced scales to see if such evidence weighs against nothing, and if, by this procedure, more than a scintilla of evidence favorable to the plaintiff is found, a jury question is presented. *Cox v. R. R.*, 123 N.C. 604, 31 S.E. 848; *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330; *Adcox v. Austin*, 235 N.C. 591. This principle applies with force to the record now under consideration.

It appears from the evidence, including excerpts from the pleadings, that at all times material to this litigation Dr. Reardon was an agent, servant and employee of Duke Hospital and was acting within the scope of his duty as such agent. It follows, therefore, if Dr. Reardon was guilty of actionable negligence, such negligence is imputable to his co-defendant and both are liable.

The plaintiff contends that the evidence supports many inferences of negligence, among which are these:

(a) That Dr. Reardon, without plaintiff's permission, made haste to perform a serious operation without having first obtained a fixed and definite diagnosis, and when there was no necessity for such an operation.

(b) That Dr. Reardon should not have undertaken such a serious operation without first determining that there was available in the hospital a more experienced and capable surgeon upon whom he could call for consultation and aid in case of difficulty.

(c) That Dr. Reardon extended the operative procedure too long and neglected to call for experienced surgical aid when he encountered a situation requiring skill outside the scope of his experience and beyond the range of his training.

(d) That the severe damage done to plaintiff's venal structure by Dr. Reardon resulted in so much loss of blood that Dr. Hart when summoned was unable to repair the damage, but directed his attention immediately toward saving the patient's life, with the result that plaintiff survived but suffered disastrous results.

(e) That Dr. Reardon performed a defective amputation of plaintiff's left leg.

(f) That Dr. Reardon's statement to the plaintiff, "I played hell; that is what happened," indicated a consciousness of carelessness in the performance of the operation.

We are constrained to agree with the plaintiff that whether Dr. Reardon proceeded with that degree of ordinary care required of him under the circumstances and conditions shown by the record was a question of fact for the jury. *Brewer v. Ring and Valk*, 177 N.C. 476, 99 S.E. 358; *Covington v. James*, 214 N.C. 71, 197 S.E. 701; *Butler v. Lupton*, 216 N.C. 653, 6 S.E. 2d 523; *Davis v. Wilmerding*, 222 N.C. 639, 24 S.E. 2d 337.

"The absence of expert medical testimony, disapproving the treatment or lack of it, is not perforce fatal to the case. There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein,* 227 N.C. 463, 42 S.E. 2d 616.

Hospitals and members of the medical profession are held in high esteem and in most cases enjoy the general affection of the public. They are, of course, entitled to every reasonable consideration, but there should not be drawn around them unnatural or artificial immunities to shield them against acts of negligence. They are not guarantors of effective cures or of perfect operative results. Nevertheless, the law of negligence holds a physician or surgeon liable for an injury to a patient proximately resulting from a want of that degree of knowledge and skill ordinarily possessed by other members of his profession, or for a failure to use reasonable care and diligence in the practice of his art, or for his failure to exercise his best judgment in the treatment of his patient. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356; *Davis v. Wilmerding, supra.* Every negligence case, like the proverbial tub, "must stand on its own bottom."

We, of course, express no opinion as to the truth or falsity of the evidence, but viewing it with that liberality required under the circumstances here presented, we reach the conclusion that the premissible inferences are such as to make the issue of liability one for the jury. Therefore, the judgment of nonsuit must be

Reversed.

JOHNSON, J., concurs in result.

STATE v. DOCK McCOY.

(Filed 22 August, 1952.)

1. Criminal Law § 67c—

In capital cases the Supreme Court will review the record and take cognizance of prejudicial error *ex mero motu.*

2. Homicide § 27a—

In a homicide prosecution, instructions of the court that the State had offered evidence of a threat made by defendant to kill deceased, that deceased was stabbed from the rear, and that while defendant and deceased were fighting, deceased's wife was begging defendant to spare her husband's life, *held* prejudicial when such statements are not supported by the evidence.

3. Criminal Law § 53d—

While an inaccurate statement of facts contained in the evidence should be called to the court's attention in apt time, where an instruction contains a statement of material fact not shown in the evidence, it must be held for reversible error even though not called to the court's attention.

4. Homicide § 16—

Proof by the State that defendant intentionally inflicted a wound with a deadly weapon, causing death, raises the presumptions that the homicide was unlawful and was committed with malice, constituting murder in the second degree, with the burden upon the State to show premeditation and deliberation in order to constitute the offense of murder in the first degree.

5. Homicide § 27b—

An instruction in a homicide prosecution to the effect that if the jury should find that at the time defendant struck the fatal blow defendant was so intoxicated that it was impossible for him to deliberate and premeditate, the law would reduce the grade of the offense from murder in the first to murder in the second degree, must be held for prejudicial error since there is no presumption of premeditation or deliberation and the burden was not upon defendant to show a reduction in the offense from first degree murder to second degree murder, but upon the State to establish premeditation and deliberation beyond a reasonable doubt.

APPEAL by defendant from *Moore, J.*, and a jury, November-December 1951 Term, SCOTLAND. New trial.

Criminal prosecution upon an indictment charging the defendant with the murder of one Raymond Hall.

The incidents leading up to the killing of Raymond Hall transpired at his home on 21 October, 1951. Present at the time were Hall, his wife, Amelia, their 11-year-old son, and Mary Alice Boyd, a blind sister of Amelia.

At about 11 o'clock in the forenoon, the defendant met Raymond Hall and his wife at the home of Hall's father, where they consumed about three quarts of liquor. Thereafter, the three crossed the highway to the home of Raymond Hall, and there the deceased and the prisoner drank more liquor. An argument developed between Hall and his wife over liquor which he claimed his wife had stolen and drunk. The argument passed from liquor to liver. Hall criticized his wife for not having cooked for him the liver he had purchased the night before. The defendant entered into this family argument and hot words followed. This argument in varying degrees of intensity continued until mid-afternoon, the defendant contending that Hall should not abuse his wife and Hall taking the position that it was none of the defendant's business. Amelia is a foster sister of the defendant and in his effort to shield her, he offered to take her home with him, if Hall no longer wanted her.

The bickering continued to the point where Hall threw a brick at the defendant, and both men ran out into the front yard, where they engaged in combat. Amelia followed the two men out of the house and in the fight McCoy was hit on the head and arm with an axe. Hall was cut in the neck in two or three places and hit by McCoy with an axe several times. McCoy then ran from the scene of the fracas and was observed by a deputy sheriff on the road some distance away. The officer went to the home and discovered the lifeless body of Raymond Hall in the front yard. A pocket knife was found near the body. The officer then overtook McCoy, who was still running, arrested him and took him back to the death scene. The officer observed that McCoy had been injured in the head and that blood was still running from the wound. McCoy told the officer that he and Hall had been fighting, but that he did not know that Hall was dead. The injury received by McCoy in the altercation was sufficient to produce partial paralysis in his right arm and side.

The arresting officer testified that McCoy had been drinking and that the wife of deceased was drunk. There was no evidence of a cessation of hostilities from the time the fight between the two men actually began and the moment the accused fled from the scene. McCoy contended that he neither cut Hall nor hit him with the axe.

From a verdict of guilty of murder in the first degree and a sentence of death, the defendant appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert B. Broughton, Member of Staff, for the State.

Gilbert Medlin for defendant, appellant.

VALENTINE, J. In this enlightened age the humanity of the law is such that no man shall suffer death as a penalty for crime, except upon conviction in a trial free from substantial error and in which the constitutional and statutory safeguards for the protection of his rights have been scrupulously observed. Therefore, in all capital cases reaching this Court, it is the settled policy to examine the record for the ascertainment of reversible error. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *S. v. Stovall,* 214 N.C. 695, 200 S.E. 426; *S. v. Moore,* 216 N.C. 543, 5 S.E. 2d 719; *S. v. Williams,* 216 N.C. 740, 6 S.E. 2d 492; *S. v. Page,* 217 N.C. 288, 7 S.E. 2d 559; *S. v. Morrow,* 220 N.C. 441, 17 S.E. 2d 507; *S. v. Brooks,* 224 N.C. 627, 31 S.E. 2d 754; *S. v. West,* 229 N.C. 416, 50 S.E. 2d 3; *S. v. Garner,* 230 N.C. 66, 51 S.E. 2d 895. If, upon such an examination, error is found, it then becomes the duty of the Court upon its own motion to recognize and act upon the error so found. *S. v. Sermons,* 212 N.C. 767, 194 S.E. 469. This rule obtains whether the prisoner be prince or pauper.

With this principle as a beacon or polar star, we proceed to a discussion of the inadvertences which appear to have crept into the charge of the court.

After reviewing the testimony relating to the quarrel between the man and his wife into which the prisoner had intruded, his Honor told the jury that the State had offered evidence tending to show "that during the course of the argument as to whether or not the deceased's wife would leave with the defendant, the defendant made the statement that if the deceased 'messed up with him' that he was going to kill him before he left." The court further told the jury that the State's evidence tended to show that the defendant "stabbed him from the rear, whereupon the deceased fell to the ground." And further, that the State offered evidence tending to show "that while the defendant was stabbing the deceased and while he was striking the deceased with the axe, that the deceased's wife was begging the defendant not to kill her husband."

A careful examination of the record fails to disclose any evidence in support of the above quoted excerpts from the charge. "The court should never give the jury instructions based upon a state of facts not presented by some reasonable view of the evidence produced on the trial, nor upon a supposed state of facts." *S. v. Wilson,* 104 N.C. 868, 10 S.E. 315. Such instructions only tend to mislead and confuse the jury. While an inaccurate statement of facts contained in the evidence should be called to the attention of the court during or at the conclusion of the charge in order that the error might be corrected, a statement of a material fact not shown in the evidence constitutes reversible error. *S. v. Love,* 187 N.C. 32, 121 S.E. 20; *Smith v. Hosiery Mill,* 212 N.C. 661, 194 S.E. 83; *S. v. Wyont,* 218 N.C. 505, 11 S.E. 2d 473; *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Supply Co. v. Rozzell,* 235 N.C. 631.

Hence, instructions to the jury that the State had offered evidence of a threat by the defendant to kill deceased, that the prisoner stabbed deceased from the rear, and that while the defendant and deceased were fighting, the wife of deceased was begging for the life of her husband, were erroneous and highly prejudicial to the defendant. These instructions furnished a strong basis for a finding that a murder was committed in cold blood, after deliberation and over the importunities of deceased's wife, and must be held for error.

The court below further instructed the jury in part as follows:

"So I charge you, Gentlemen, that if you find from the evidence and beyond a reasonable doubt, that the prisoner killed the deceased at the time and place in question, but you also find at the time this fatal blow was struck, that the prisoner was drunk and intoxicated; that the intoxication of the prisoner at the time was so great as to render it impossible

for him to form the wilful, deliberate and premeditated intent to take the life of the deceased, that is, that the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill, then he would not be guilty of murder in the first degree, but in that event the law would reduce the grade of the homicide from murder in the first degree to murder in the second degree. The mere intoxication of the prisoner will not excuse or palliate his offense unless he was in such a state of intoxication as to be incapable of forming this deliberate and premeditated intent. If he was, the grade of offense is reduced to murder in the second degree, but as I have already stated, this doctrine does not exist in reference to murder in the second degree nor as to manslaughter." This instruction also constitutes error.

The mere proof that a homicide was committed by defendant raises no presumption of murder in the first degree. Wherever the burden may rest on his plea of intoxication, the State must first offer testimony tending to show that the homicide was unlawful and was committed with malice and with premeditation and deliberation before defendant is put to any election as to what evidence, if any, he will offer.

Proof by the State that the defendant, with a deadly weapon, intentionally inflicted the wound which caused the death of deceased gives rise to two presumptions against him: (1) that the homicide was unlawful, and (2) was committed with malice. This constitutes murder in the second degree. If the State seeks a verdict of murder in the first degree, it must then offer evidence of premeditation and deliberation. The law never reduces the grade of a homicide from murder in the first degree to murder in the second degree for the simple reason that no evidence, however impelling in force, creates any presumption of premeditation and deliberation, save and except proof that the deceased was killed by defendant in the perpetration or attempted perpetration of a felony. *S. v. Dunheen,* 224 N.C. 738, 32 S.E. 2d 322.

The court, in effect, by the quoted instruction, charged the jury that if it found the defendant killed the deceased, then "mere intoxication" would not excuse or palliate the crime and defendant would be guilty of murder in the first degree, unless he has shown to the satisfaction of the jury that the intoxication "was so great as to render it impossible for him to form the wilful, deliberate and premeditated intent to take the life of deceased;" that only upon such finding would the law reduce the crime to murder in the second degree.

The proof required of the State in this instruction before the jury should consider defendant's evidence of intoxication is not sufficient to raise any presumption either of murder in the first degree or murder in

the second degree. That this instruction was prejudicial to the defendant would seem to be apparent.

For the errors pointed out, we conclude that the defendant is entitled to a new trial, and it is so ordered.

New trial.

STATE v. RUFUS LEONARD.

(Filed 22 August, 1952.)

1. Criminal Law § 21—

The crimes of malicious injury to personal property, G.S. 14-160, and perjury, G.S. 14-209, are not the same either in fact or in law, and therefore upon a plea of former jeopardy in a prosecution for perjury, based upon testimony of defendant in a former prosecution under G.S. 14-160, the court properly determines the plea as a matter of law, there being no necessity to submit an issue to the jury.

2. Same—

In a prosecution for malicious injury to personal property defendant testified that he was not at the place in question at the time. Defendant was acquitted on this charge. This prosecution for perjury was based upon this sworn statement of defendant in the former prosecution. *Held:* The former acquittal will not support a plea of former jeopardy in the prosecution for perjury, since the charge of perjury is not based on the assumption that defendant was guilty of the charge of malicious injury to personal property, and his acquittal upon that charge does not necessarily establish the fact that all material evidence given by him in that case was true.

APPEAL by defendant from *Rousseau, J.*, and a jury, September 1951 Term, DURHAM. No error.

The offense is alleged to have been committed on 20 June, 1951, when defendant was on trial upon a warrant alleging that he "did wilfully, maliciously and unlawfully damage the property of John L. Doles by overturning his automobile, a 1938 Chevrolet coach, in the extent of approximately $100.00."

The evidence of the State in that trial tended to prove that defendant was at Gate No. 1 of the Erwin Mill Plant in Durham, North Carolina, on 20 April, 1951, between 3:00 and 3:30 p.m., and that he at that time, in conjunction with others, turned over and damaged the automobile of John Doles.

Defendant, as a witness in his own defense, testified under oath that he was not at said Gate No. 1 on 20 April, 1951, between 3:00 and 3:30 p.m., and that he had no part in the damaging of said automobile. He relied upon an alibi and his testimony was corroborated by several witnesses.

The jury returned a verdict of not guilty of the charge of malicious injury to personal property.

Thereafter, defendant was arraigned and tried upon an indictment charging that on 20 June, 1951, he "did feloniously, wilfully, and unlawfully commit perjury upon the trial of an action in Superior Court in Durham County, wherein the State of North Carolina was plaintiff and Rufus Leonard was defendant, by falsely asserting on oath or solemn affirmation that on the 20th day of April 1951, between 3 and 3:30 P.M., he, Rufus Leonard, was not around Gate No. 1 of the Erwin Mill Plant in Durham, North Carolina, where an automobile belonging to Jno. Doles was turned over and that he, Rufus Leonard, had not been around the gate that day and that he had not had anything to do with turning the car over."

Upon the perjury charge, the State offered evidence that the defendant was properly sworn according to law in the previous trial, and that his testimony included an assertion that he was not at Gate No. 1 of the Erwin Mill Plant in Durham, North Carolina, at the time alleged, but was at some other place, and, therefore, had no part in the overturning and damaging of the car of John Doles. The State's evidence as it related to defendant's presence at said gate and his participation in the damage to the automobile was substantially the same at the perjury trial as at the trial for malicious injury to personal property, except that corroborative and cumulative evidence was added at the perjury trial.

Defendant's evidence was substantially the same at both trials.

There was a verdict of guilty on the perjury charge. From the judgment imposing a sentence in the State's prison, defendant appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., and Robert B. Broughton, Members of Staff, for the State.

Carl E. Gaddy, Jr., and Robert S. Cahoon for defendant, appellant.

VALENTINE, J. The following question is determinative of this appeal: Is the defendant, who has been acquitted by a jury of the charge of malicious injury to personal property, entitled to plead former jeopardy or *res judicata* as a defense to a charge of perjury alleged to have been committed by him at the former trial?

By an examination of the record, the court below as a matter of law could determine that the charge of perjury and the charge of malicious injury to personal property were not the same, both in fact and in law. Therefore, it was unnecessary to submit to the jury an issue presenting this phase of the case. *S. v. Dills,* 210 N.C. 178, 185 S.E. 677; *S. v.*

Midgett, 214 N.C. 107, 198 S.E. 613; *S. v. Davis,* 223 N.C. 54, 25 S.E. 2d 164; *S. v. Williams,* 229 N.C. 415, 50 S.E. 2d 4. In order for an acquittal to constitute a bar to a subsequent prosecution, the two crimes charged must be substantially identical. It is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense. *S. v. Nash,* 86 N.C. 650; *S. v. Taylor,* 133 N.C. 755, 46 S.E. 5; *S. v. Hankins,* 136 N.C. 621, 48 S.E. 593; *S. v. Davis, supra; S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594; *S. v. Williams, supra; S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871. The crimes of malicious injury to personal property and perjury as defined in *S. v. Smith,* 230 N.C. 198, 52 S.E. 2d 348, are two distinct offenses condemned by separate statutes, G.S. 14-160, and G.S. 14-209.

It appears that the evidence offered at the perjury trial was abundantly sufficient to convict the defendant of the charge of malicious injury to personal property, but the bill of indictment also charged that the defendant's false testimony included a statement that he was not at Gate No. 1 between 3:00 and 3:30 p.m. on the day in question. This allegation was supported by proof adequate to sustain a conviction upon the charge of perjury.

While in some jurisdictions it is held differently, the modern trend and better view appear to be that an acquittal of one charged with a crime does not preclude the State from prosecuting a charge of perjury based upon testimony given by him at the trial, although a conviction of perjury would necessarily import a contradiction of the verdict in the former case. *Slayton v. Commonwealth,* 185 Va. 371; 41 A.J., Perjury, sec. 53; 48 C.J., Perjury, sec. 98; *McDaniel v. State,* 13 Ala. App. 318, 69 So. 351; *Jay v. State,* 15 Ala. App. 255, 73 So. 137; *Teague v. Commonwealth,* 172 Ky. 665, 189 S.W. 908; *S. v. Cary,* 159 Ind. 504, 65 N.E. 527; *Allen v. U. S.,* 194 Fed. 664; *S. v. Vandemark,* 77 Conn. 201, 58 Atl. 715.

The charge of perjury upon which defendant was convicted is not necessarily based upon the assumption that he was guilty of the charge of malicious injury to personal property. His acquittal upon that charge does not necessarily establish the fact that all material evidence given by him in that case was true. 147 A.L.R. 1000, 1001, and cases there cited. A verdict of acquittal is not a finding by the jury that the defendant's evidence was true. It is merely a declaration that the jury upon all the evidence is not satisfied beyond a reasonable doubt of defendant's guilt. Therefore, we cannot hold that a verdict of acquittal is equivalent to an affirmative finding that all of defendant's testimony at the former trial was true. Surely, the law should not permit a defendant by his own perjured testimony to secure a verdict in his favor, with immunity from a charge of perjury, while other witnesses testifying in his defense would

be subject to conviction and punishment for false swearing. Such a doctrine would place a premium upon perjury and a penalty upon probity.

Public policy recognizes the principle of *res judicata* in criminal cases, but at the same time it requires that perjurers be brought to trial and punished. To hold that a person could go into a court of justice and by perjured testimony secure an acquittal and by that acquittal be shielded from a charge of perjury would be a dangerous doctrine. *Slayton v. Commonwealth, supra; Jay v. State, supra; Yarbrough v. State,* 79 Fla. 256, 83 So. 873.

In Brill's Cyclopedia Criminal Law, Vol. 2, Chap. 25, para. 859, it is said: "If a defendant in a criminal prosecution testifies falsely in his own behalf he may be convicted of perjury though he was acquitted of the offense there charged, at least when the testimony as to which perjury is charged is as to a collateral or subordinate matter, not to a mere denial of guilt, so that the conviction of perjury does not in effect amount to a direct contradiction of the judgment of acquittal in the former prosecution." This same principle is laid down in the following and many other cases: *Youngblood v. U. S.,* 266 Fed. 795; *Allen v. U. S., supra; S. v. Smith,* 119 Minn. 107, 137 N.W. 295; *People v. Niles,* 300 Ill. 458, 133 N.E. 252.

In the instant case, the defendant could have been convicted under the perjury indictment by a showing that he was in fact at Gate No. 1 of the Erwin Mill Plant between 3:00 and 3:30 p.m. on 20 April, 1951, and that this fact was in contradiction of his sworn testimony at the former trial. This proof alone would not have been sufficient to have convicted him on the charge of malicious injury to personal property.

The law and good conscience encourage witnesses and litigants to give true and accurate testimony and demand that they always tell "the truth, the whole truth, and nothing but the truth." It is also a policy of the law that swift and certain punishment be visited upon those who stoop to false swearing. Jury verdicts and judgments of the court should be fair and free from fraud. This can only be accomplished by strict enforcement of the laws condemning perjury. Niceties and refinements cannot be allowed to shield one who bears false witness, either for himself or against his neighbor. If a defendant can procure an acquittal and enjoy immunity from prosecution for false swearing as to testimony upon which a verdict of not guilty is based, the plan and purpose of the law would be defeated.

Both the brief of the State and that of the defendant are well prepared and show a great amount of research, but it appears that the cases throughout the country preponderate in favor of the conclusion we have here reached.

We have carefully examined all exceptions in the record and find no error which justifies the awarding of a new trial.

No error.

STATE v. M. D. TAYLOR.

(Filed 22 August, 1952.)

1. Intoxicating Liquor § 9d—

The direct, unimpeached testimony of an undercover agent for the State Alcoholic Beverage Control Board that he purchased intoxicating liquor from defendant is competent in a prosecution under the Turlington Act, G.S. 18-1, *et seq.*, and defendant's contention of variance between indictment and proof on the ground that the indictment related to the Turlington Act and the officer's sole duty related to the enforcement of the State's Alcoholic Beverage Control Act, G.S. 18-36, *et seq.*, is feckless. The official status of the witness did not render him incompetent to testify as to a violation of the Turlington Act, and further, such officer is authorized to see that all laws relating to the sale and control of alcoholic beverages are observed.

2. Criminal Law § 52b—

Where the State's evidence is clear, unambiguous and susceptible only to the conclusion of guilt, and defendant offers no evidence, the court may charge the jury that if it finds beyond a reasonable doubt that the evidence offered by the State is true, the burden being upon the State to so satisfy them, then the jury should return a verdict of guilty as charged, otherwise to return a verdict of not guilty.

3. Criminal Law § 52a (2)—

The failure of the solicitor to subpoena one of the two witnesses present at the time the offense was committed is immaterial.

4. Criminal Law § 53l—

A party desiring an instruction that the testimony of a biased witness should be scrutinized must aptly tender written request therefor, and his oral request made at the conclusion of the charge is too late.

5. Criminal Law § 53j—

An instruction that the jury "may" scrutinize the testimony of an interested witness instead of "should" scrutinize such testimony, *held* not prejudicial.

APPEAL by defendant from *Rousseau, J.*, and a jury, February Term, 1952, FORSYTH.

Criminal prosecution upon a bill of indictment charging that the defendant did transport, deliver, furnish, sell, possess and possess for the purpose of sale intoxicating liquor in violation of the Prohibition Law.

On or about 10 October, 1951, two undercover investigators of the State Alcoholic Beverage Control Board were assigned to the area including the city of Winston-Salem. Shortly after 9 o'clock on the evening of 6 December, 1951, while these officers were staying at a motor court in the western part of the city, one of them called a telephone number and requested that a fifth of whiskey be delivered to the motor court. At the conclusion of this conversation, both agents went out from the motor court to a point on Grove Park Street, where the defendant, with another man, drove up in a 1951 black Plymouth automobile. The right front door of the automobile was opened and the defendant sold one of the agents a fifth of tax-paid whiskey at the price of $6.00. One agent made the purchase while the other looked on and both returned to the motor court. After the liquor was sold, the defendant drove off in the direction he was headed.

Later, on the same night, the other undercover agent called the same telephone number and requested that another fifth of liquor be delivered to Room 505 at the motor court. This agent was told to come to the same spot where the first liquor was purchased and that his order would be filled in ten minutes. In exactly ten minutes, this agent was at the designated point when the defendant again drove up, this time alone, in the same automobile bearing the same license number. The defendant then sold to this agent another fifth of the same brand of tax-paid liquor at the same price. Only one of the undercover agents was present at the last sale.

Of the two undercover investigators, only the one who made the last purchase and who was also present when the first purchase was made testified. Both bottles of liquor bore the same brand label and were, without objection, received in evidence. The bottles were not examined by the investigators for fingerprints. The car from which the liquor was delivered on both occasions bore North Carolina license number R-71721.

A local enforcement officer testified that on the day the case was tried in the Municipal Court in Winston-Salem, the defendant gave him an automobile key and he thereupon went to some point in the city and obtained a 1951 black 4-door Plymouth automobile bearing 1951 North Carolina license number R-71721.

At the close of the State's evidence the defendant demurred and moved for judgment as in case of nonsuit. This motion was denied. The defendant offered no evidence, but renewed his motion for judgment of dismissal.

There was a verdict of guilty as charged in the bill. Judgment was pronounced upon the verdict and defendant appealed, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Higgins & McMichael and Richmond Rucker for defendant, appellant.

VALENTINE, J. Defendant based his motion for judgment as of nonsuit upon the theory that there was a fatal variance between the allegations in the bill of indictment and the State's evidence. He strongly argues that the bill of indictment was based upon the Turlington Act, G.S. 18-1, *et seq.*, and that the proof tended to support a violation of the State Alcoholic Beverage Control Act, G.S. 18-36, *et seq.* The bill of indictment makes no reference to any statute. Defendant urges in support of his contention that the sale of liquor was made to an undercover investigator of the State Alcoholic Beverage Control Board whose duties are confined to the enforcement of the statutory law under which he operates. This argument overlooks the fact that the evidence of a violation of the law is the important thing and not the official status of the witness giving the evidence. As a matter of fact, one who had no connection with any agency of the State could have testified that an unlawful sale of liquor was made and such testimony, unimpeached, would be sufficient to justify a conviction.

In the present case, the State based no part of its case upon a presumption, but upon the physical facts of the transportation, delivery, possession and sale of the intoxicating liquor. Matters relating to the position of the witness with respect to the governmental agency are without effect, except for the purpose of attacking the veracity of the witness. All the evidence tended to show that the defendant on two separate occasions, after nine o'clock at night, possessed, transported and sold a fifth of tax-paid liquor. This established the illegality of the sale and was abundantly sufficient to take the case to the jury and support a verdict. *S. v. Clark*, 234 N.C. 192, 66 S.E. 2d 669; *S. v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684; *S. v. Ellers*, 234 N.C. 42, 65 S.E. 2d 503.

It is and has been, since the enactment of the Turlington Act, a violation of the law in North Carolina to transport, sell, possess, and possess for the purpose of sale intoxicating liquor, except as specified in the Alcoholic Beverage Control Act. The bill of indictment unquestionably is sufficient to support a conviction under the evidence offered by the State. *S. v. Davis*, 214 N.C. 787, 1 S.E. 2d 104.

The unlawful liquor transactions engaged in by the defendant under the testimony of the State upon the night in question is condemned both by the Turlington Act and by the Alcoholic Beverage Control Act. *S. v. Barnhardt*, 230 N.C. 223, 52 S.E. 2d 904; *S. v. Wilson*, 227 N.C. 43, 40 S.E. 2d 449; *S. v. Carpenter*, 215 N.C. 635, 3 S.E. 2d 34; *S. v. Davis, supra; S. v. Epps*, 213 N.C. 709, 197 S.E. 580; *S. v. Langley*, 209 N.C.

178, 183 S.E. 526. As a matter of fact, all undercover agents of the State Alcoholic Beverage Control Board are authorized "to see that all the laws relating to the sale and control of alcoholic beverages are observed and performed." G.S. 18-39.

This statutory law furnished full authorization for the procedure used by the State's witness and placed upon him the duty of enforcing the provisions of both the Turlington Act and the Alcoholic Beverage Control Act. The State's evidence was clear, unambiguous and susceptible of only one construction. Therefore, it was not error for the court to charge the jury that if it found beyond a reasonable doubt that the evidence offered by the State was true, the burden being upon the State to so satisfy them, then it would be their duty to return a verdict of guilty as charged; otherwise, to return a verdict of not guilty. *S. v. Baker,* 229 N.C. 73, 48 S.E. 2d 61; *S. v. Dickens,* 215 N.C. 303, 1 S.E. 2d 837; *S. v. Langley, supra.*

The solicitor has the duty of developing the case for the State and he may call any or all of the witnesses subpoenaed for the prosecution, but his failure to call a particular witness does not constitute reversible error. *S. v. Harris,* 166 N.C. 243, 80 S.E. 1067; *S. v. Smallwood,* 75 N.C. 104.

The defendant strongly argues that the court committed error in that portion of the charge which relates to the evidence of the undercover agent by failing to instruct the jury to scrutinize his testimony as that of an interested or biased witness. The defendant made no request in writing for special instructions on this point. His oral request made at the conclusion of the charge was too late. *S. v. Hicks,* 229 N.C. 345, 49 S.E. 2d 639; *S. v. Spencer,* 225 N.C. 608, 35 S.E. 2d 887; *S. v. Spillman,* 210 N.C. 271, 186 S.E. 322. However, the presiding judge substantially complied with this belated request by saying to the jury, "Yes, sir, gentlemen, you may scrutinize his credibility; but if you find what he said is true, and beyond a reasonable doubt, it would be your duty to return a verdict of: 'Guilty as charged.'" *S. v. Love,* 229 N.C. 99, 47 S.E. 2d 712.

The use of the word "may" instead of "should" in this excerpt from the charge is not prejudicial. *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215; *Felton v. Felton,* 213 N.C. 194, 195 S.E. 533; *Rector v. Rector,* 186 N.C. 618, 120 S.E. 195; *Jones v. Commissioners,* 137 N.C. 579, 50 S.E. 291; *Manufacturing Co. v. Brower,* 105 N.C. 440, 11 S.E. 313; *Johnston v. Pate,* 95 N.C. 70; *Pelletier v. Saunders,* 67 N.C. 261.

A careful examination of the authorities relied upon by the appellant discloses no principle of law which militates against the position here stated. On the whole record, it appears that the defendant had a fair trial and that there is no reversible error.

No error.

C. R. LANCE AND W. N. LANCE v. C. M. COGDILL, TRADING AS COGDILL LIMESTONE COMPANY, GEORGE G. WESTFELDT, THOMAS D. WESTFELDT, AND MRS. LOUISE W. McILHENNY.

(Filed 22 August, 1952.)

1. Boundaries § 6—

The fact that the clerk in a processioning proceeding erroneously concludes that the answers converted the proceeding into an action to try title to realty, and thereupon transfers the cause to the civil issue docket for trial, does not deprive the Superior Court of jurisdiction to determine the processioning proceeding.

2. Same—

What is the true dividing line between two contiguous tracts of land is a question of law for the court; where such line is actually located on the premises is an issue of fact for the jury.

3. Boundaries § 3b—

A call in a deed for a natural boundary, such as the meandering of a particular creek, controls a call for course and distance "with the meanderings of said creek," and when the verdict of the jury, interpreted in the light of the evidence and the charge, constitutes a finding in effect that the meanderings of the creek was the true dividing line, it supports judgment in conformity therewith.

4. Deeds § 8

The public record of a registered and probated deed raises a rebuttable presumption that the original was duly executed and delivered, but the charge of the court in this case that the record constituted *prima facie* evidence that the deeds were actually executed and delivered but that the burden rests upon those claiming thereunder to prove that the originals were actually executed and delivered, even though the record was unassailed by the adverse party, *is held* not prejudicial in view of the theory of trial, the verdict and judgment.

APPEAL by plaintiffs from *Bobbitt, J.*, and a jury, November Term, 1951, HENDERSON. No error.

On 12 October, 1951, B. B. Bible, as court surveyor, filed a map showing the respective lines claimed by both plaintiffs and defendants.

It is the contention of plaintiffs that the true dividing line between the lands of plaintiffs and the lands of defendants is a straight line beginning at point "B" as shown on the court map and running South 45 degrees 39 minutes West to a point where said line crosses Kimsey Creek.

The defendants contend that the true dividing line follows the run or meanders of Kimsey Creek from point "B" on said court map to a point where Kimsey Creek intersects the line claimed by plaintiffs near point "2."

Both plaintiffs and defendants offered documentary and oral evidence in support of their respective contentions. The following issue was sub-

mitted to the jury: Are the plaintiffs (the petitioners) the owners and entitled to the possession of all or any part of the land lying within the disputed area, that is, the area as shown on the court map beginning at B and extending along the line 1 to 2 to point where said line crosses Kimsey Creek, and thence with Kimsey Creek back to the beginning at B?

This issue was answered "No," and judgment was rendered accordingly, from which plaintiffs appealed, assigning errors.

J. W. Haynes and Monroe M. Redden for plaintiffs, appellants.

J. E. Shipman and R. L. Whitmire for C. M. Cogdill, defendant, appellee.

Geo. H. Wright, John F. Shuford, and Bernard & Parker for George G. Westfeldt, Thomas D. Westfeldt, and Mrs. Louise W. McIlhenny, defendants, appellees.

VALENTINE, J. This action was instituted before the clerk as a processioning proceeding under G.S. Chapter 38 to fix and determine the true boundary line between the lands of plaintiffs and the lands of defendants. Upon the filing of answers by defendants the clerk, acting upon the assumption that the answers converted the proceeding into an action to try title to real property, transferred the cause to the civil issue docket for trial of the issues raised. But the premature transfer did not deprive the Superior Court of jurisdiction to try the cause at term before a jury. *Woody v. Barnett*, 235 N.C. 73.

When the answers filed by the defendants are correctly analyzed, it becomes apparent they do not change the essential nature of the proceeding. The action is now, as in the beginning, a processioning proceeding.

The defendants admit that the plaintiffs are the owners of the land described in the pleading lying on the northwest side of Kimsey Creek and assert that the true boundary line, under the record title of the parties, is the run or meanders of said creek. They further assert that if this is not true, then the run of said creek has become the true line by operation of law by virtue of the fact they have been in the open, notorious and adverse possession of all of the adjoining lands lying on the southeast side of the creek up to the run thereof for the statutory periods necessary to vest them with title and fix the run of the creek as the present boundary line. Appreciation of this fact materially simplifies the questions raised for decision on this appeal.

What is the true dividing line between two contiguous tracts of land is a question of law for the court. Where that line, as determined by the court, is actually located on the premises in controversy is an issue of fact for the jury. It is the province of the court to declare the first and that of the jury to ascertain the second. *Greer v. Hayes*, 216 N.C. 396, 5 S.E.

2d 169; *Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440; *McCanless v. Ballard,* 222 N.C. 701, 24 S.E. 2d 525; *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633.

So, then, what is the true dividing line between the two contiguous tracts of land owned by plaintiffs and defendants? The deeds in the chain of title relied on by plaintiffs contain the call, "Beginning in the meanders of Kimsey Creek in line of M. J. Lance and corners with Westfeldt and runs South 45 degrees West with the meanders of said creek 125 poles to the Westfeldt line." While the exact wording of the call may vary in the several deeds, the call is the same, "South 45 degrees West with the meanders of said creek 125 poles." This is the line at issue. Its termini are admitted. If the line is run according to the call and distance, it embraces within the deeds of plaintiffs lands lying on the southeast of the creek claimed by defendants. If the meanders of the creek are followed from one terminus to the other, the creek is, of course, the true dividing line. The real controversy is as to which call is controlling.

Whenever natural objects, such as rivers, creeks, rocks and the like, are distinctly called for and satisfactorily proved, they become landmarks, to which preference must be given because the certainty which they afford excludes the possibility of mistake. It follows that in case of a conflict, a call for courses and distances must always yield to one for a natural object. The course and distance controls only in the event the natural object cannot be located. *Cherry v. Slade,* 7 N.C. 82; *Brown v. Hodges,* 233 N.C. 617, 65 S.E. 2d 144, and cases cited.

There is abundant evidence in the record that Kimsey Creek has not altered its course; that the channel thereof is now the same as it has been for the past 50 or 60 years. While the issue in respect thereto submitted to the jury is not in the form best adapted to a processioning proceeding (*Greer v. Hayes, supra; McCanless v. Ballard, supra*), the answer thereto, when interpreted in the light of the evidence and the charge of the court, constitutes a finding in effect that the "meanders" of the creek between the two admitted corners has not changed and is the true boundary line between the lands of the plaintiffs and the lands of the defendants. We, therefore, deem the verdict sufficient to support the judgment.

In this connection we note that the plaintiffs or their predecessors in title in prior actions alleged that said stream was and is the true dividing line. Whether the judgments entered in those actions are *res judicata* as contended by defendants we need not now decide, for in any event the judgment in this action puts an end to the controversy.

When a deed is duly probated and recorded as required by law, the public record thereof is admissible in evidence and raises a rebuttable presumption that the original was duly executed and delivered. *Land Bank v. Griffin,* 207 N.C. 265, 176 S.E. 555; *Cannon v. Blair,* 229 N.C.

606, 50 S.E. 2d 732; Stansbury, Evidence, 229. Ordinarily, in actions involving title to real property the instrument as recorded in the public registry, unless assailed by the party against whom it is offered, is accepted as due proof of its genuineness. Even so, here the court in respect to the several deeds offered in evidence by plaintiffs charged the jury that while the record of a deed constitutes *prima facie* evidence that the original deed was actually executed and delivered in words and figures as the record of such deed tends to show, the burden rested on plaintiffs to prove that the several original deeds constituting plaintiffs' alleged chain of title were actually executed and delivered.

It may well be, as contended by plaintiffs, that the repetitious statement of this principle left the jury under the impression that the records alone were not sufficient, but that plaintiffs were required to go forward and offer additional evidence of the execution and delivery of the originals. Even so, we do not perceive that this constitutes any substantial error. Plaintiffs' title was admitted. The charge of the court in respect to the stream as the line was clear and to the point. The jury in a trial free of substantial error on the determinative question has resolved the conflicting evidence in favor of the defendants. Its verdict is fully sustained by the record. Therefore, the judgment entered must be affirmed.

No error.

STATE v. FRED PEACOCK.

(Filed 22 August, 1952.)

1. Intoxicating Liquor § 9d—

Direct evidence by two witnesses that they purchased one-half gallon of nontax-paid liquor from defendant is sufficient to take the case to the jury in a prosecution for unlawful possession and possession for the purpose of sale.

2. Criminal Law § 42h—

A witness may use notes made by him, or in his presence or under his direction, for the purpose of refreshing his memory. In the instant case objection that the witness read his notes to the jury rather than used them to refresh his memory *held* not supported by the record.

3. Same—

While notes used by a witness to refresh his memory should be available to the opposing counsel for the purpose of cross-examining the witness relative thereto, it is incumbent upon counsel to request an examination of the notes or make some other effort to make them available.

4. Criminal Law § 42c—

Whether a party should be allowed to cross-examine a witness relative to a collateral matter not contained in the witness' examination in chief

rests in the sound discretion of the presiding judge, and the court's ruling thereon will not be disturbed in the absence of abuse of discretion.

5. Intoxicating Liquor § 9c—

The admission of testimony of an officer that he had on previous occasions examined defendant's premises for the purpose of discovering intoxicating liquor will not be held prejudicial when on cross-examination it is disclosed that no liquor was found on such occasions and that defendant was exonerated by a jury of all charges growing out of such previous examinations, since the testimony is more favorable to defendant than to the State.

6. Criminal Law § 78e (1)—

An exception to the entire charge is ineffectual as a broadside exception.

7. Criminal Law § 81c (2)—

An exception to the charge will not be sustained when the charge is without reversible error when construed contextually.

ERVIN, J., dissenting.

APPEAL by defendant from *Sharp, Special Judge,* and a jury, December 1951 Criminal Term, JOHNSTON.

Criminal prosecution upon an indictment charging defendant with the unlawful possession and possession for the purpose of sale of one-half gallon of nontax-paid whiskey.

On 7 October, 1951, at about 11:30 a.m., two officers of the State Alcoholic Beverage Control Board went to the defendant's place of business and called for the defendant. When he appeared, they made known to him their desire to procure some liquor. Arrangements were made with the defendant for the purchase of a half gallon jar of liquor at the price of $5.00. To complete the purchase, one of the officers gave defendant a $10.00 bill and received $5.00 in change. The officers inquired about the quality of the liquor and were told that it was as good as could be bought anywhere. Defendant gave instructions to another man, who went in the direction of defendant's tobacco barn and returned with a half gallon jar of liquor and delivered it to the officers. Defendant did not actually hand the liquor to either of the agents, but was in the immediate vicinity when the delivery was made. The officers made plans with defendant for a later purchase of a case of liquor (12 jars) at the price of $22.00 or $30.00.

Both officers testified using, over defendant's objection, notes made by one of them in the presence of the other immediately after the purchase of the liquor. Defendant also complained that he was not permitted to cross-examine the witnesses with respect to the notes.

A former deputy sheriff testified that he had on previous occasions searched defendant's premises for liquor. However, on cross-examination it was developed that defendant was exonerated from any criminal offense

growing out of the searches so made. The examination of this witness accounted for ten of defendant's exceptions.

The defendant offered no evidence.

From an adverse verdict and sentence, defendant appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert B. Broughton, Member of Staff, for the State.

Shepard & Wood and Albert A. Corbett for defendant, appellant.

VALENTINE, J. There was direct evidence by two witnesses that they purchased one-half gallon of nontax-paid liquor from the defendant. This evidence was abundantly sufficient to repel defendant's motion for judgment as of nonsuit and to take the case to the jury. *S. v. Hart,* 116 N.C. 976, 20 S.E. 1014; *S. v. Utley,* 126 N.C. 997, 35 S.E. 428; *S. v. Carlson,* 171 N.C. 818, 89 S.E. 30; *S. v. Oakley,* 176 N.C. 755, 97 S.E. 616; *S. v. Sigmon,* 190 N.C. 684, 130 S.E. 854.

This brings us directly to a consideration of defendant's other exceptive assignments of error.

Defendant objected to the use of notes and memoranda by the two officers, claiming that the witnesses were reading the notes to the jury and not using them for the purpose of refreshing their memories, and further that the notes and memoranda were not offered in evidence. While there is some justification for this contention, on the whole record it fairly appears that each of the witnesses was using the notes for the purpose of calling to mind all the details surrounding the purchase of the liquor. The use of notes to quicken the memory is well recognized procedure in this jurisdiction, if the memorandum is one which had been made by the witness, or in his presence, or under his direction. *Story v. Stokes,* 178 N.C. 409, 100 S.E. 689; *S. v. Coffey,* 210 N.C. 561, 187 S.E. 754; *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114. Under certain circumstances, even notes of the testimony of a witness given at a former trial may be read to him for the purpose of refreshing his memory. *S. v. Smith, supra.* "It is quite immaterial by what means the memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however, mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause." *Jewett v. U. S.,* 15 F. 2d 955 (1926).

It is customary for such notes to be made available to the opposing counsel so that he may examine and cross-examine relative thereto, but in this case the record fails to disclose any effort on the part of defendant to obtain the notes or to use them in cross-examination. In the absence

of a request for an examination of the notes or some other effort to make them available, defendant's exceptions based upon this phase of the examination are without merit. *Manufacturing Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32; Stansbury, paragraph 32, page 48.

Defendant assigns as error the failure of the court to permit his cross-examination of a witness concerning his testimony before the grand jury and the court's refusal to allow his attorney to use the bill of indictment and the notation on the back thereof in his argument to the jury. The purpose of this effort was to impeach the witness. The examination in chief made no reference to the bill of indictment and since this cross-examination was manifestly for the purpose of impeachment, its method and duration rested in the sound discretion of the presiding judge, and in the absence of an abuse of discretion, this exception must also fail. *S. v. Beal*, 199 N.C. 278, 154 S.E. 604; *S. v. Stone*, 226 N.C. 97, 36 S.E. 2d 704; *S. v. Edwards*, 228 N.C. 153, 44 S.E. 2d 725.

Defendant strongly argues that reversible error was committed, when the court allowed a former deputy sheriff to give evidence of previous visits to and examination of defendant's premises for the purpose of discovering the presence of unlawful liquor. This examination disclosed no evidence of the presence of liquor on defendant's premises and the cross-examination revealed that defendant had been exonerated by a jury of all charges growing out of such previous examinations. The probative value of this evidence was more favorable to the defendant than to the State and an exception thereto is of no value. The defendant also complains that the court erred in failing to instruct the jury to disregard the evidence of this witness. Since this evidence was admitted by the court below and held competent upon this appeal, the defendant has no cause for complaint on this point.

The court's definition of "reasonable doubt" was in accord with the decisions of this Court. *S. v. Schoolfield*, 184 N.C. 721, 114 S.E. 466; *S. v. Palmore*, 189 N.C. 538, 127 S.E. 599; *S. v. Sigmon, supra; S. v. Harris*, 223 N.C. 697, 28 S.E. 2d 232; *S. v. Flynn*, 230 N.C. 293, 52 S.E. 2d 791.

The defendant challenges this language of the charge: "When the State makes out a *prima facie* case the defendant must then decide whether he will take the risk of an adverse verdict on that evidence by relying on the weakness of the State's case, or whether he will go forward with evidence and attempt to explain away the evidence against him." While the latter part of this excerpt may be subject to criticism, it does not appear harmful when considered contextually with the charge as a whole. *S. v. Shackleford*, 232 N.C. 299, 59 S.E. 2d 825; *S. v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871; *S. v. Brannon*, 234 N.C. 474, 67 S.E. 2d 633.

In this connection, it should be pointed out that the State offered direct and specific testimony that the liquor in question was of the nontax-paid variety, the possession or sale of which is unlawful irrespective of the markings or lack of markings on the container in which it is found. This was sufficient to take the case to the jury and support a verdict irrespective of the application of the *prima facie* rule.

The appellant not only has the duty of showing error, but he must show that the error adversely affected a substantial right of his (*Trust Co. v. Parker,* 235 N.C. 326; *S. v. Birchfield,* 235 N.C. 410; *Hodges v. Malone & Co.,* 235 N.C. 512), and that a new trial would probably result in a different verdict. *S. v. Bullins,* 226 N.C. 142, 36 S.E. 2d 915; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 704; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604.

The defendant also assigns as error "that the court failed in its charge to the jury to state in a plain and correct manner the evidence given in the case and explain the law thereon as required by G.S. 1-180." Here, defendant failed to point out any particular respect in which the charge failed to comply with the statute, and for that reason this exception is regarded as a broadside, too general to merit consideration. *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921. This is true notwithstanding the fact that defendant in his brief undertakes to particularize the manner in which the charge had failed. In such matters, the record and not the defendant's brief governs the application of the rule. However, when considered contextually, the charge is without reversible error. *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Meares,* 222 N.C. 436, 23 S.E. 2d 311; *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Vicks,* 223 N.C. 384, 26 S.E. 2d 873.

The undisputed evidence is that the defendant sold liquor and received the benefits, even though he used another medium for the transportation of the liquor from its place of hiding to the hands of the witness.

We have examined all assignments of error appearing in the record and in them find no reversible error. On the whole record, it appears that the case was fairly tried in substantial compliance with the applicable rules of law.

No error.

ERVIN, J., dissenting: In my judgment, the receipt of the testimony that law enforcement officers had previously searched the premises of the accused for liquor constituted prejudicial error, warranting a new trial. This testimony had a tendency to produce in the minds of the jurors the conviction that the accused was an habitual violator of the prohibition laws, who had managed in times past to escape the just retribution of the law.

IN THE MATTER OF B. F. HUMPHREY, RESPONDENT.

(Filed 22 August, 1952.)

1. Insane Persons § 4—

In an inquisition of lunacy, conflicting evidence as to respondent's mental capacity to manage his affairs raises an issue for the jury, and the jury's negative finding in proceedings free from error is conclusive.

2. Evidence § 51—

The question of whether a witness should be qualified as an expert rests in the sound discretion of the trial court, and its ruling thereon, supported by evidence, will not be disturbed in the absence of abuse of discretion.

3. Insane Persons § 4—

A cerebral hemorrhage is a mental illness within the meaning of G.S. 35-1.1, and in an inquisition of lunacy in which there is no evidence of mental incapacity other than that resulting from a cerebral hemorrhage, a charge defining mental incapacity in the language of that statute is without error.

4. Appeal and Error § 39f—

A charge must be considered in its entirety with a view to harmonizing all its component parts, and when it is without prejudicial error when so construed an exception thereto will not be sustained.

APPEAL by petitioner from *Carr, J.*, and a jury, November Term, 1951, ONSLOW. No error.

This proceeding was commenced by a petition filed under G.S. 35-2 by J. D. Heath, a nephew of the respondent.

Petitioner alleges that B. F. Humphrey is incompetent from want of understanding to manage his own affairs, by reason of mental disorders and physical weakness; that he is the owner of valuable real and personal properties, most of which is located in Onslow County; that in the operation of respondent's business, matters have developed which make it necessary for some person to take over the properties and operate the same in the interest and for the benefit of the respondent. Petitioner prays that an inquisition issue for the ascertainment of respondent's mental competency to manage his own affairs and that a guardian be appointed, if it be determined that the respondent is incompetent.

Notice was issued and duly served upon B. F. Humphrey. Thereafter, respondent filed an answer in which he denied the material allegations of the petition, asserted his competency to manage his own affairs, and prayed that the prayer of petitioner be denied and the proceeding be dismissed at the cost of petitioner.

The proceeding came on for hearing before the Clerk of Superior Court of Onslow County, and the following issue was submitted to the jury: "Is the said B. F. Humphrey incompetent from want of understanding to manage his affairs by reason of mental weakness?" The jury answered, "No."

Whereupon, the clerk adjudged that the respondent is competent to manage his own affairs, dismissed the action, and taxed petitioner with the costs.

Petitioner appealed to the Superior Court of Onslow County, where the proceeding came on for trial *de novo* at the November 1951 Term. Again, both petitioner and respondent offered evidence in support of their respective contentions. After the charge of the court, the following issue was submitted to and answered by the jury: "Is the said B. F. Humphrey incompetent from want of understanding to manage his own affairs?" Answer: "No." The court adjudged that respondent is competent to manage his own affairs and dismissed the action, taxing the costs against the petitioner.

From this judgment, petitioner appealed, assigning errors.

Jones, Reed & Griffin and Summersill & Summersill for petitioner, appellant.

Warlick & Ellis and John R. B. Matthis for respondent, appellee.

VALENTINE, J. At the trial in the Superior Court, both petitioner and respondent offered evidence tending to support their respective contentions. Three doctors and twelve lay witnesses testified for petitioner, while three doctors and eight lay witnesses testified for respondent. All of the testimony tended to show that respondent in 1938 had suffered a cerebral hemorrhage resulting in partial paralysis, and had suffered a similar attack in 1950. The doctors testifying for petitioner described the physical and, to some extent, the mental condition of respondent, but neither asserted an opinion that respondent was mentally incapable of managing his own affairs. However, several lay witnesses for petitioner advanced the opinion that respondent was mentally incompetent of managing his business affairs. On the other hand, each of the doctors who testified for respondent gave as his opinion that respondent was mentally capable of managing his own affairs. *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312. In this opinion all of respondent's lay witnesses concurred. *In re Will of Brown,* 203 N.C. 347, 166 S.E. 72; *S. v. Witherspoon,* 210 N.C. 647, 188 S.E. 111. Hence, a jury question was squarely presented (*Clark v. Laurel Park Estates,* 196 N.C. 624, 146 S.E. 584; *Pendergraft v. Royster,* 203 N.C. 384, 166 S.E. 285) with the burden of the issue upon the petitioner. 28 A.J. 752; *Odom v. Riddick,* 104 N.C. 515, 10 S.E. 609.

Petitioner in the progress of the trial noted a number of exceptions, the first of which relates to the competency of Dr. W. E. Shoemaker to testify as an expert. The qualifications and competency of this witness were fully inquired into by the court and upon all the evidence introduced bearing upon this question, the court held that Dr. Shoemaker was an expert and allowed him to testify as such with respect to the mental condition of respondent. The question of competency of this witness rested in

the sound discretion of the presiding judge and is not reviewable on appeal, except upon a showing that the court abused its discretion, or upon a showing that there was no evidence to support the findings of the court. *Pridgen v. Gibson,* 194 N.C. 289, 139 S.E. 443; *S. v. Combs,* 200 N.C. 671, 158 S.E. 252; *LaVecchia v. Land Bank,* 218 N.C. 35, 9 S.E. 2d 489; *S. v. Smith,* 221 N.C. 278, 20 S.E. 2d 313; *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114. It appears that the court's discretion in this respect was not abused and that his Honor's ruling was based upon sufficient evidence.

There was no evidence in the record that the respondent was an inebriate, that he suffered from senile dementia, or that he was mentally defective in any way except that which was caused by a cerebral hemorrhage resulting in partial paralysis. Hence it was unnecessary for the court to charge the jury upon any other phase of mental incapacity.

The method by which the court illustrated the meaning of "the greater weight of the evidence" could not, in view of the whole charge, have prejudiced the petitioner and his exception thereto is without substantial merit.

The petitioner complained of the definition used by the court in describing "mental incapacity." On this question the court said, "that incompetency from want of understanding to manage one's own affairs means that a person is suffering with a mental illness which so lessens the capacity of that person to use the customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary, or advisable, for him to be under treatment, care, supervision, guidance or control." Petitioner's exception on this point is also without merit. The definition used by the court is substantially in the language prescribed by G.S. 35-1.1 and is therefore a valid instruction, especially since there was no evidence of any mental incapacity except that which arose from the cerebral hemorrhage. A cerebral hemorrhage, such as that suffered by the respondent, is a mental illness within the terms of the statute and its application to the facts in this case. *Bailey v. Insurance Co.,* 222 N.C. 716, 24 S.E. 2d 614; *McGregor v. Assurance Corp.,* 214 N.C. 201, 198 S.E. 641.

A charge must always be considered in its entirety and with a view to a harmonization of all of its component parts. *White v. Hines,* 182 N.C. 275, 109 S.E. 31; *Sutton v. Melton,* 183 N.C. 369, 111 S.E. 630; *Mewborn v. Rudisill Mine, Inc.,* 211 N.C. 544, 191 S.E. 28; *Ripple v. Stevenson,* 223 N.C. 284, 25 S.E. 2d 836.

We think that the charge of the court, when analyzed in the light of the applicable rules, fully complies with G.S. 1-180 and is free from reversible errror. The case has been submitted to two juries, both of which decided in favor of the respondent, and a careful perusal of the entire record fails to justify a new trial. Therefore, the verdict will be upheld and the judgment sustained.

No error.

GEORGE PONIROS AND CARRIE PONIROS v. NELLO L. TEER COMPANY.

(Filed 22 August, 1952.)

1. Trial § 49—

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the presiding judge, and the court's denial of the motion will not be disturbed on appeal in the absence of a showing of abuse. G.S. 1-207.

2. Appeal and Error § 39b—

Ordinarily error relating to an issue not reached by the jury is harmless.

3. Appeal and Error § 6c (5)—

An exception to the charge on the ground that it "did not give the contentions of the plaintiffs with equal dignity with those of defendant" as required by G.S. 1-180 *held* ineffectual as a broadside exception in that it fails to point out any particular contention or series of contentions given or omitted by the court as the basis for the exception. Rule of Practice in the Supreme Court 19 (3).

APPEAL by plaintiffs from *Williams, J.*, and a jury, October Term, 1951, of ORANGE.

Civil action to recover damages for injury to real property, due to the alleged negligence of the defendant contractor while conducting blasting operations in connection with a highway construction project near plaintiffs' property.

The plaintiffs own certain real estate located on State Highway No. 70 in Orange County. The defendant company, under contract with the N. C. State Highway and Public Works Commission, changed the grade and widened the roadway near the plaintiffs' property, and in doing so used dynamite in blasting operations.

It is alleged by the plaintiffs, and evidence was offered tending to show, that in one of these blasting operations rocks were blown upon, against and through the buildings and improvements of the plaintiffs, thereby causing substantial damage. The plaintiffs also complain that two wells which had furnished adequate water for their domestic use and also for their needs in operating a filling station were adversely affected and damaged by reason of the nearby blasting, which they contend was done in a negligent manner.

The defendant, denying all allegations of negligence, alleges, and at the trial offered evidence tending to show, that the plaintiffs were damaged by only one blast—the one which threw rocks upon and against some of plaintiffs' buildings, and as to this, that the blast exploded in an unusual and unforeseen manner, with the defendant being free of negligence in respect thereto. But that even so, the defendant sent a crew of workmen to the premises and repaired all damage done.

Upon these conflicting allegations, and the evidence *pro* and *con* offered by the parties, the trial court submitted the case to the jury on these issues, and the jury responded as indicated:

"1. Was the property of the plaintiffs damaged by the negligence of the defendant as alleged in the complaint? Answer: No.

"2. What amount in damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: ....."

From judgment on the verdict, decreeing that plaintiffs take nothing by their action, they appeal, assigning errors.

C. S. Hammond and L. J. Phipps for plaintiffs, appellants.

Fuller, Reade, Umstead & Fuller and W. P. Farthing for defendant, appellee.

JOHNSON, J. The plaintiffs' first group of exceptive assignments of error relate to the refusal of the trial court to allow their motions to set aside the verdict and grant a new trial upon the ground that the verdict is contrary to the greater weight of the evidence.

These motions were directed to the sound discretion of the presiding judge, whose rulings, in the absence of abuse of discretion, are not reviewable on appeal. No abuse of discretion is shown. G.S. 1-207; *Goodman v. Goodman,* 201 N.C. 808, 161 S.E. 686; *Ziglar v. Ziglar,* 226 N.C. 102, 36 S.E. 2d 657; *Muse v. Muse,* 234 N.C. 205, 66 S.E. 2d 689. It follows, then, that these exceptions are without merit.

The only remaining exceptive assignment brought forward relates to the charge of the court on the issue of damages. Here it is urged by the plaintiffs that the trial court "did not give the contentions of the plaintiffs with equal dignity with those of the defendant," as required by G.S. 1-180 as rewritten by Chapter 107, Session Laws of 1949. Since the issue of negligence was answered in favor of the defendant, the jury did not reach the issue of damages. And ordinarily the rule is that error committed in charging on an issue not reached by the jury is treated as harmless. *Bruce v. Flying Service,* 234 N.C. 79, bot. p. 86, 66 S.E. 2d 312. Besides, the exception is in general terms and does not specify or direct the attention of the Court to any particular contention or series of contentions given or omitted by the presiding judge as the basis of the error or errors assigned. Thus the exception is broadside. Rule 19 (3), Rules of Practice in the Supreme Court, 221 N.C. p. 553 *et seq.; Albritton v. Albritton,* 210 N.C. 111, 185 S.E. 762; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175.

Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1952

A. COREY, H. B. GAYLORD, A. R. ROBERSON, C. C. FLEMING, A. W. LILLEY, P. C. BLOUNT, JR., J. C. KIRKMAN, MRS. ARTHUR WALLACE LILLEY, MRS. J. C. KIRKMAN, MRS. CAMILLE RAWLS, MRS. CLAIR FLEMING, O. W. HAMILTON, MRS. O. W. HAMILTON, J. M. HASSELL, W. J. HOLLIDAY, JR., C. GLASS, J. C. WILLIAMS, MRS. ADDIE WILLIAMS, J. O. DAVENPORT, SNEEDE L. DAVENPORT, DELLA G. HOOTEN, BEN PEELE, MRS. BEN PEELE, BENNY STYONS, MRS. BENNY STYONS, MURIEL HOLLIDAY, MRS. J. H. HOLLIDAY, H. A. SEXTON, MRS. P. C. BLOUNT, MRS. W. W. WALTERS, MRS. P. C. BLOUNT, JR., MRS. J. H. MIZELLE, R. E. GURGANUS, E. D. BROWN, MRS. E. D. BROWN, MRS. HENRY GRIFFIN, MRS. BETTY L. HASSELL, J. T. COLTRAIN, T. T. COLTRAIN, MRS. LIZZIE SMITHWICK, JOE DAVIS, MRS. JOE DAVIS, BOB MOORE, MRS. MAE WATERS, MRS. CLYDE BROWN, MRS. DELLA ASKEW, C. A. ASKEW, EVA GRAY ASKEW, HENRY MODLIN, C. T. GAINES, W. B. GAYLORD, MRS. W. B. GAYLORD, MRS. W. C. ELLIS, R. E. LAMB, ELIZABETH LAMB, MRS. MAE ROBERSON, JAMES B. HOLLIDAY, DALLAS G. HOLLIDAY, G. M. ANDERSON, ARNOLD C. BROWN, MRS. ARNOLD C. BROWN, J. H. MIZELLE, W. R. PRICE AND EFFIE HOLLIDAY AND W. C. ELLIS v. L. W. HARDISON, MAYOR, AND LUTHER HUGH HARDISON AND JAMES LONG, COMMISSIONERS OF THE TOWN OF JAMESVILLE.

(Filed 17 September, 1952.)

1. Elections § 9—

The provision of a statute fixing the time for holding an election is mandatory, and an election held at any other time is absolutely void. In this case an act amending a municipal charter (Sec. 4, Chap. 596, Session Laws of 1945) so as to provide for a primary election prior to the general election (Chap. 232, Session Laws of 1951) was enacted 9 March, 1951. No primary election was held 9 April, nor general election 1 May. *Held:* The court had no authority to enter a consent judgment calling for an election in 1952, and an election held under the provisions of such consent judgment is void.

2. Courts § 2—

Parties cannot by consent invest a court with a power not conferred upon it by law.

3. Judgments § 25—

When a court has no authority to act, its acts are void and may be treated as nullities anywhere, at any time, for any purpose.

4. Contempt of Court § 2b—

The violation of a provision of a judgment which is void cannot be made the basis for contempt.

5. Same: Elections § 18a—

Refusal of municipal officers to surrender their offices in accordance with the results of an election held pursuant to the provisions of a decree of court cannot be made the basis for contempt proceedings, since upon the hearing of the order to show cause the court must first adjudicate the rights of the parties to the offices and such adjudication can be made only in a direct proceeding for that purpose. G.S., Chap. 1, Art. 41.

APPEAL by plaintiffs from *Frizzelle, J.*, at Chambers in Snow Hill, North Carolina, on 19 April, 1952, in action pending in the Superior Court of MARTIN County.

Proceeding as for contempt.

This controversy arises out of the events and statutes mentioned in the numbered paragraphs set forth below.

1. The Town of Jamesville is a municipality of Martin County, North Carolina.

2. The municipal charter provides in express terms that the commissioners of the town "shall . . . appoint a registrar and two judges of election" to conduct elections in the municipality, and "canvass the returns" of such elections, and "enter the events on the minutes . . . of the town." 1945 Session Laws of North Carolina, Chapter 596, Sections 5 and 8.

3. The defendant L. W. Hardison was elected mayor of Jamesville and the defendants Luther Hugh Hardison and James Long were elected commissioners of Jamesville at a general municipal election held on the first Tuesday in May, 1949, in strict conformity to the following provision of the municipal charter: "There shall be an election for the Town of Jamesville on the first Tuesday in May, one thousand nine hundred and forty-five, and biennially thereafter for the purpose of electing a mayor and three commissioners, who shall hold their respective offices for two years and until their successors have been elected and qualified." 1945 Session Laws of North Carolina, Chapter 596, Section 4.

4. The defendants duly qualified for their respective offices, and entered upon the discharge of the duties annexed to such offices, and are still in the possession of such offices, claiming title to them.

5. Prior to the first Tuesday in May, 1951, to wit, on 9 March, 1951, the General Assembly of North Carolina amended the charter of the Town of Jamesville so as to provide that "all candidates to be voted for at all general municipal elections, at which time a mayor and five commissioners, . . . are to be elected, shall be nominated by a primary election" to be "held on the fourth Monday preceding the general election." The amendatory statute, which is embodied in Chapter 232 of the 1951 Session Laws of North Carolina, specifies that the primary election shall be held by the "officers of election appointed for the general municipal election . . . under the same rules and regulations . . . as are required for the general municipal elections"; that "any person desiring to become a candidate for nomination by the primary for the office of mayor or commissioner shall, at least ten days prior to the primary election, file with the town clerk a statement of his candidacy" conforming to a specified form; and that "no other names shall be placed upon the general ballot" for the general municipal election "except those nominated" in the primary election.

6. No person filed with the town clerk any statement of his candidacy for nomination for the office of mayor or commissioner in the primary election appointed by Chapter 232 of the 1951 Session Laws for the fourth Monday preceding the general election fixed by Chapter 596 of the 1945 Session Laws for the first Tuesday in May, 1951. Moreover, the primary election and the general municipal election set by these statutes for these occasions were not held.

7. On 20 September, 1951, the plaintiffs, who are residents and qualified voters of the Town of Jamesville, made demand on defendants "that an election . . . be held immediately . . . for the purpose of electing a mayor and board of commissioners for the town."

8. The demand was ignored, and on 9 November, 1951, the plaintiffs brought this action against the defendants, praying that a *mandamus* issue requiring the defendants "in their official capacities as mayor and acting board of commissioners of the Town of Jamesville . . . to call an election, and take . . . (the) . . . steps necessary to have an election of a mayor and five commissioners for the Town of Jamesville to serve until the next regular election."

9. After pleadings were filed by all parties, His Honor W. H. S. Burgwyn, the presiding judge, entered a judgment "by consent" at the November Term, 1951, of the Superior Court of Martin County, adjudging that "the plaintiffs are entitled to the relief demanded in said *mandamus* proceeding," and ordering Mrs. Mae Waters, as registrar, and Clyde Glass and Wilmer Holliday, as judges of election, to hold a primary election on Monday, 14 January, 1952, and a general municipal election on the first Tuesday in February, 1952, in accordance with the procedure

prescribed by Chapter 232 of the 1951 Session Laws and the other statutes of North Carolina relating to elections for the purposes of nominating and electing "a mayor and commissioners of the Town of Jamesville . . . to hold office until the regular election . . . in 1953."

10. Mrs. Mae Waters, Clyde Glass, and Wilmer Holliday, who purported to act as officers of election, undertook to hold a primary election and a general municipal election for the Town of Jamesville for the purposes specified in the preceding paragraph at the times named in the judgment. Their proceedings in this connection conformed strictly to the provisions of the judgment, and were sufficient in form to show that Arthur Wallace Lilley was nominated and elected mayor of Jamesville and that P. C. Blount, Tilman Coltrain, J. Oscar Davenport, Royal Gurganus, and O. W. Hamilton were nominated and elected commissioners of Jamesville.

11. Subsequent to these events, Lilley, Blount, Coltrain, Davenport, Gurganus, and Hamilton took the oaths prescribed by law for municipal officers, and called on the defendants to surrender to them the offices of mayor and commissioners of Jamesville, together with the records and funds of the municipality. The defendants refused to comply with the request on the ground that they rightfully occupied such offices.

12. The plaintiffs thereupon filed a verified motion in the cause asserting that the refusal of the defendants to surrender the municipal offices, records, and funds to Lilley, Blount, Coltrain, Davenport, Gurganus, and Hamilton tended "to defeat, impair, impede, and prejudice the rights and remedies of the plaintiffs in this action," and thus procured a judicial order requiring the defendants to appear before His Honor, J. Paul Frizzelle, the judge holding the Superior Court of Martin County, and show cause why they should not be punished as for contempt of court. The defendants filed a voluminous answer under oath wherein they asserted in specific detail that no primary election was held in Jamesville on the fourth Monday preceding the first Tuesday in May, 1951, because they had no knowledge whatever of the enactment of Chapter 232 of the 1951 Session Laws "until after the time for holding the primary therein provided for had elapsed"; that no general election was held in Jamesville on the first Tuesday in May, 1951, because the municipal officers were prohibited by Chapter 232 of the 1951 Session Laws from placing on the general ballot the names of any candidates other than those nominated by the primary thereby established; that they have been advised by counsel learned in the law and verily believe that the judgment signed by Judge Burgwyn at the November Term, 1951, and the supposed primary and general municipal elections conducted thereunder are nullities because primaries and elections held at times other than those fixed by statute are absolutely void; that they have likewise been advised by

counsel learned in the law and likewise verily believe that they are in the rightful occupation of the public offices, records, and funds of the Town of Jamesville under the relevant statutes, to wit, G.S. 160-27 and section 4 of Chapter 596 of the 1945 Session Laws, because such statutes stipulate in substance that they are entitled to hold their respective offices until their successors shall be duly elected and qualified; and that they have acted in good faith with respect to all things in controversy.

13. When the show cause order was heard, Judge Frizzelle found as a fact that the acts of the defendants in refusing to surrender the public offices, records, and funds of the Town of Jamesville to Lilley, Blount, Coltrain, Davenport, Gurganus, and Hamilton were not contemptuous, but, on the contrary, were done in good faith. He concluded as matters of law that the consent judgment rendered at the November Term, 1951, and all proceedings had thereunder are void, and that the defendants are not subject to punishment as for contempt. He thereupon entered an order discharging the show cause order.

14. The plaintiffs appealed, assigning the entry of Judge Frizzelle's order as error.

Peel & Peel for plaintiffs, appellants.

Robert H. Cowen, Albion Dunn, and J. L. Emanuel for defendants, appellees.

ERVIN, J. The appeal raises this solitary question: Did Judge Frizzelle err in adjudging the defendants not subject to punishment as for contempt?

The plaintiffs set the proceeding as for contempt in motion on the theory that the refusal of the defendants to surrender the public offices, records, and funds of the Town of Jamesville to Lilley, Blount, Coltrain, Davenport, Gurganus, and Hamilton runs counter to this portion of the statute codified as G.S. 5-8 (1): "Every court of record has power to punish as for contempt . . . any clerk, sheriff, register, solicitor, attorney, counselor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or misconduct by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed, or prejudiced."

An act or default is not punishable by a court of record as for contempt under this statutory provision unless these three essential elements concur:

1. The alleged contemnor must be a clerk, sheriff, register, solicitor, attorney, counselor, coroner, constable, referee, or other person appointed or selected to perform a ministerial or judicial service.

2. He must be guilty of neglect or violation of duty, or of misconduct in the performance of such service.

3. His neglect or violation of duty or his misconduct in such respect must have a tendency to defeat, impair, delay, or prejudice the rights or remedies of a party to a cause or matter pending in the court.

The plaintiffs maintain that Judge Frizzelle erred in holding the defendants not subject to punishment as for contempt. They advance these arguments to sustain their position: That the consent judgment rendered by Judge Burgwyn at the November Term, 1951, of the Superior Court of Martin County and the primary and election held by Mrs. Mae Waters, Clyde Glass, and Wilmer Holliday thereunder imposed upon the defendants as incumbents of the offices of mayor and commissioners of the Town of Jamesville the judicial duty to adjudge Lilley, Blount, Coltrain, Davenport, Gurganus, and Hamilton to be their duly elected successors, and the ministerial duty to surrender to them as such the public offices, records, and funds of the municipality; that the defendants violated these duties; and that the violation of these duties by the defendants tended to defeat, impair, delay, or prejudice the rights or remedies of the plaintiffs as parties to this cause to have Lilley, Blount, Coltrain, Davenport, Gurganus, and Hamilton placed in possession of the public offices, records, and funds of the Town of Jamesville.

The position of the plaintiffs is untenable for the very simple reason that the consent judgment and all proceedings had thereunder are void, and imposed no duties whatever upon the defendants.

When it adopted Section 4 of Chapter 596 of the 1945 Session Laws, the Legislature clearly contemplated that the general municipal election thereby authorized and required should be held on the first Tuesday in May in the odd numbered years, and at no other time; and when it enacted Chapter 232 of the 1951 Session Laws, the Legislature plainly intended that the primary election thereby authorized and required should be held on the fourth Monday preceding the general municipal election, and at no other time.

These things being true, the primary held on Monday, 14 January, 1952, and the election held on the first Tuesday in February, 1952, fall under the condemnation of the rule that where a statutory provision fixing the time for holding a public election is mandatory, a public election held at some other time is absolutely void. *Rodwell v. Harrison,* 132 N.C. 45, 43 S.E. 540; *S. v. Osborne,* 14 Ariz. 185, 125 P. 884; *Simpson v. Teftler,* 176 Ark. 1093, 5 S.W. 2d 350; *Merwin v. Fussell,* 93 Ark. 336, 124 S.W. 1021; *Kimberlin v. State,* 130 Ind. 120, 29 N.E. 773, 14 L.R.A. 858, 30 Am. S. R. 208; *Gossard v. Vaught,* 10 Kan. 162; *Doores v. Varnon,* 94 Ky. 507, 22 S.W. 852; *State v. Webb,* 49 Mo. App. 407; *State ex rel. White v. Ruark,* 24 Mo. App. 325; *State ex*

rel. Sibbald v. Brickell, 59 N.J.L. 420, 36 A. 1032; *People ex rel. Smith v. Schiellein,* 95 N.Y. 124; *Brewer v. Davis,* 9 Humph. (Tenn.), 208, 49 Am. D. 706; *Cartledge v. Wortham,* 105 Tex. 585, 153 S.W. 297.

The validity of this conclusion is not diminished in any degree by the circumstance that the primary and election were held in obedience to the consent judgment. In the very nature of things, a court lacks jurisdiction to authorize or compel the holding of an invalid primary, or a void election. The parties to a cause cannot by consent invest a court with a power not conferred upon it by law. *Dees v. Apple,* 207 N.C. 763, 178 S.E. 557; *Saunderson v. Saunderson,* 195 N.C. 169, 141 S.E. 572. When a court has no authority to act, its acts are void, and may be treated as nullities anywhere, at any time, and for any purpose. *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108.

The order holding the defendants not subject to punishment as for contempt under G.S. 5-8 (1) is correct for the additional reason that the supposed right to have Lilley, Blount, Coltrain, Davenport, Gurganus, and Hamilton placed in possession of the public offices, records, and funds of the Town of Jamesville is not a right or remedy available to the plaintiffs as parties to this cause. It is manifest that the court cannot recognize or enforce this supposed right without first adjudging that the claims of Lilley and his associates to the offices of mayor and commissioners of Jamesville are superior to those of the defendants. This matter is not open to determination in this case. This is so because the title to a public office can only be determined in a direct proceeding brought for that purpose under the statutes incorporated in Article 41 of Chapter 1 of the General Statutes. *Freeman v. Ponder,* 234 N.C. 294, 67 S.E. 2d 292.

There is no factual or legal basis for any suggestion that the election held on the first Tuesday in February, 1952, was conducted under the provisions of Section 14 of Chapter 596 of the 1945 Session Laws.

For the reasons given, the order of Judge Frizzelle is

Affirmed.

FRED EDMONDS AND WIFE, MARY C. EDMONDS, v. OTTIS HALL AND WIFE, LETHA HALL.

(Filed 17 September, 1952.)

1. Injunctions § 4l—

By subsidiary injunction proceedings a party to an action may be restrained from committing an act respecting the subject of the action which would render judgment therein ineffective; but continuance of such restraining order must be based upon findings that there is probable cause plaintiff will be able to establish the right asserted in the main action and

that there is reasonable apprehension of irreparable loss unless such temporary order remains in force. G.S. 1-485 (2).

2. Appeal and Error § 40d—

The presumption that the court found facts sufficient to support its decree does not obtain where the judgment contains a recital of the specific facts upon which the challenged decree is based.

3. Injunctions § 8—

Findings that a valid controversy exists between the parties and that the rights of plaintiffs to the relief sought in the main action would be defeated if defendants were permitted to commit the act sought to be restrained *held* insufficient to support an order continuing the subsidiary injunction to the hearing, there being no finding that plaintiffs probably will be able to establish the right to the relief sought in the main action or that failure to restrain plaintiffs would probably result in irreparable loss to defendants.

4. Injunctions § 8—

Where order continuing a temporary injunction to the hearing is not based upon sufficient findings, the order continuing the temporary restraining order will be set aside, but the temporary order will remain in full force and effect pending further orders of the lower court.

APPEAL by defendants from *Bobbitt, J.*, holding the Superior Courts of the Nineteenth Judicial District, at Chambers in Asheville, 13 May, 1952, from MADISON.

Civil action for injunctive relief to restrain the defendants from obstructing an alleged permissive roadway which leads through a mountain gorge, from the plaintiffs' farm, across the defendants' lands out to the public road, pending determination of a companion proceeding instituted by the plaintiffs before the Clerk to have the roadway established as a cartway under the provisions of G.S. 136-68 *et seq.*

By temporary order signed the day the summons was served, the defendants were restrained from obstructing the roadway until the further order of the court. Later, when the show cause order came on for hearing, the judge, after hearing and considering the affidavits offered by both sides, found facts in pertinent part as follows:

1. ". . . that there is a valid controversy existing between the plaintiffs and defendants as to whether or not the cartway described in the petition is the only practical and feasible way over which the petitioners can secure access to the public highway from their farm lands described in the petition lying south of the gorge which is alleged to be the only feasible way out for a cartway to said public highway";

2. "that a valid controversy exists between said plaintiffs and defendants as to whether the point where said cartway now runs is the only place where a cartway could be located so as to enable the plaintiffs to reach said public highway from their said farm lands and that the defendants

have begun blocking or are threatening to block the construction of said cartway through said gorge where the same has been used as such by the plaintiffs and their predecessors in title for more than fifty years and there is a further controversy as to whether or not there are other places on the defendants' lands located at different points than where there has been an attempt by the defendants to block said cartway feasible for the construction of a house";

3. "that a special proceeding has been instituted by the plaintiffs before the Clerk of the Superior Court of Madison County to lay off a cartway from plaintiffs' lands lying south of the defendants' lands and that the Clerk of said Court has duly entered an order appointing jurors and ordering them to lay off a cartway from defendants' said lands to the public highway"; and

4. "that the defendants have begun the construction of a house site and are contemplating the immediate construction of a residence thereon which would completely block said cartway at the point in said gorge described in said petition and that the rights of the plaintiffs to have said matter in controversy finally determined in the cause would be defeated by the construction of a residence at the point contemplated in said gorge."

Upon the foregoing findings Judge Bobbitt entered an order continuing the temporary restraining order until the final determination of the special proceeding to establish the cartway.

To the entry of the order the defendants excepted and appealed therefrom to this Court.

Carl R. Stuart for defendants, appellants.

Calvin R. Edney and Geo. M. Pritchard for plaintiffs, appellees.

JOHNSON, J. The defendants' only exception is to the order continuing the temporary restraining order until the final determination of the cartway proceeding. Therefore the single question presented by this appeal is whether the facts found by the court below are sufficient to sustain the order. *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179.

The rule that prevailed under the old equity practice is stated thus by *Pearson, J.,* in *Parker v. Grammer,* 62 N.C. 28: "Where there is reason to apprehend that the subject of a controversy in equity will be destroyed, or removed, or otherwise disposed of by the defendant, pending the suit, so that the complainant may lose the fruit of his recovery, or be hindered and delayed in obtaining it, the court, in aid of the primary equity, will secure the fund by the writ of sequestration, or the writs of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause."

Substantially the same rule applies under the present practice, but, by virtue of the Code of Civil Procedure, adopted in 1868, it is extended to cases in which legal, as well as equitable, relief is sought and it is necessary to preserve the property until the right thereto can be adjudicated.

Our present statute, which stems from the original Code, provides that "Where, during the litigation, it appears by affidavit that a party thereto is doing, or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffective," an order may issue to restrain such act until the rights of the parties can be determined. G.S. 1-485 (2).

And a court of equity, or a court in the exercise of its equity powers, may use the writ of injunction as a remedy subsidiary to and in aid of another action or special proceeding. *Wilson v. Alleghany Co.,* 124 N.C. 7, 32 S.E. 326, and cases there cited; 43 C.J.S., Injunctions, Sec. 13; 28 Am. Jur., Injunctions, Sec. 14. See also 43 C.J.S., Injunctions, Sec. 19. However, in such cases, in order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined. *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80. See also McIntosh, N. C. P. & P., Sec. 873.

In the present case the record contains a recital of specific facts found by the judge upon which the challenged decree is based. This being so, the plaintiffs may not call to their aid the rule that where no request is made for specific findings, and none are recited, the presumption is that the court found facts sufficient to support the decree. *Hall v. Coach Co.,* 224 N.C. 781, 32 S.E. 2d 325; *Young v. Pittman,* 224 N.C. 175, 29 S.E. 2d 551. Here the plaintiffs are bound by the court's recital of facts as found. And these in substance are that: "a valid controversy" exists between the plaintiffs and defendants respecting these three questions: (1) whether the only feasible way out from the plaintiffs' farm to the public road is by statutory cartway across the defendants' lands; (2) whether the location as sought by the plaintiffs—which the defendants are attempting to obstruct by the erection of a house—is the only feasible location for the proposed cartway; and (3) whether there is any other feasible place on the defendants' lands for the erection of their proposed house. True, these specific findings are followed by a general finding or conclusion that the rights of the plaintiffs to have the controversy deter-

mined in the cartway proceeding would be defeated by permitting the defendants to construct the house at the point contemplated by them. Nevertheless, it is manifest that the recited findings in their totality are insufficient to support the decree continuing the temporary restraining order until the final determination of the cartway proceeding.

The findings are silent on the essential question whether probable cause exists that the plaintiffs will be able to establish the asserted primary right. And nowhere is it found that irreparable loss, or its equivalent, may reasonably be apprehended unless the temporary restraining order is continued to the final hearing.

In this state of the record, it appears that the order appealed from was erroneously entered and must be set aside, and it is so ordered. The cause will be remanded to the court below for such further proceedings and orders as may be appropriate, on motion of the interested parties, under the usual practice and procedure and in accord with this opinion.

As to the temporary restraining order issued by Judge Bobbitt the day the summons was issued, the facts found therein appear to be sufficient to sustain it. Besides, it stands unchallenged by the defendants. Therefore it will remain in full force and effect pending further order of the court below.

Error and remanded.

C. M. BURGESS v. G. E. TREVATHAN.

(Filed 17 September, 1952.)

1. Appeal and Error § 2—

Ordinarily, an appeal from an order allowing a motion for the joinder of an additional party will be dismissed as fragmentary and premature.

2. Appeal and Error § 1—

Even where an appeal is dismissed as premature, the Supreme Court may exercise its discretionary power to express an opinion upon the question sought to be presented.

3. Insurance §§ 24e, 51—

Where insured property is destroyed or damaged by the tortious act of another, the owner of the property has a single and indivisible cause of action against the tort-feasor for the total amount of the loss.

4. Same—

When insurer pays insured either in full or in part for the loss of insured property, insurer is subrogated *pro tanto* in equity to the right of the insured against the tort-feasor causing the loss.

5. Same—

Where insurer pays the loss in full, the insurer is the real party in interest, G.S. 1-57, and must prosecute the action in its own name as a necessary party plaintiff to enforce its right of subrogation against the tort-feasor destroying the property. Even so, insured may be joined as a proper party, G.S. 1-68, since it cannot be ascertained until after verdict establishing the amount of damages whether insurer is the sole owner.

6. Same—

Where the insurance covers only a portion of the loss, insured is a necessary party plaintiff in any action against the tort-feasor and may recover the full amount of the loss without the joinder of the insurer, even though insured would hold the proceeds of the judgment as trustee for the benefit of insurer to the extent of the insurance paid, but nevertheless insurer is a proper party to such action and may be brought into the action at the instance of insurer or the tort-feasor in the exercise of the court's discretionary power to make new parties.

7. Parties § 10a—

It is the purport of the code of civil procedure that all persons having interests in the action either by way of rights or by way of liabilities be joined so that a single judgment may be rendered effectively determining all such rights and liabilities, and to this end the court has discretionary power to bring in additional parties plaintiff or defendant. G.S. 1-68, G.S. 1-69, G.S. 1-73.

APPEAL by plaintiff from *Williams, J.*, at April Term, 1952, of BEAUFORT.

Civil action wherein the owner of an insured automobile sues an alleged tort-feasor for injury to his person and damage to his automobile, and wherein the alleged tort-feasor seeks to bring into the case as an additional party an insurance company which has indemnified the owner for only a part of the damage to the automobile.

The American Security Insurance Company issued to the plaintiff, C. M. Burgess, a policy of motor vehicle insurance, insuring the plaintiff's Buick automobile against damage by collision. While the Buick was being driven by the plaintiff along a public highway in Pitt County, North Carolina, it struck a stray mule owned by the defendant, G. E. Trevathan. The collision resulted in personal injury to the plaintiff and damage to his automobile. The American Security Insurance Company forthwith paid the plaintiff the insurance money specified in the policy, but the amount of the insurance money was sufficient to cover only a portion of the damage to the Buick automobile. Subsequent to the payment of the insurance money, the plaintiff brought this action against the defendant to recover $500.00 for personal injury and $888.36 for damage to his automobile under a complaint alleging that such injury and damage proximately resulted from the negligent failure of the defendant to keep his mule from wandering on the highway. The defendant an-

swered, denying actionable negligence on his part and pleading contributory negligence on the part of the plaintiff. After the complaint and answer were filed, the defendant moved that the American Security Insurance Company be made a party plaintiff, and the presiding judge entered an order granting such motion. The plaintiff thereupon excepted and noted an appeal to the Supreme Court, assigning the entry of the order as error.

Dan H. Jones and Martin V. Horton for the plaintiff, appellant.
Lewis & Rouse and Rodman & Rodman for the defendant, appellee.

ERVIN, J. This appeal falls under the ban of the general rule that ordinarily an order allowing a motion for the joinder of an additional party is not appealable. In consequence, it must be dismissed. *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669; *Colbert v. Collins,* 227 N.C. 395, 42 S.E. 2d 349; *Insurance Co. v. Motor Lines, Inc.,* 225 N.C. 588, 35 S.E. 2d 879; *Morgan v. Turnage Co.,* 213 N.C. 425, 196 S.E. 307; *Wilmington v. Board of Education,* 210 N.C. 197, 185 S.E. 767; *Barbee v. Cannady,* 191 N.C. 529, 132 S.E. 572; *Joyner v. Fiber Co.,* 178 N.C. 634, 101 S.E. 373; *Armfield Co. v. Saleeby,* 178 N.C. 298, 100 S.E. 611; *Etchison v. McGuire,* 147 N.C. 388, 61 S.E. 196; *Bernard v. Shemwell,* 139 N.C. 446, 52 S.E. 64; *Sprague v. Bond,* 111 N.C. 425, 16 S.E. 412; *Emry v. Parker,* 111 N.C. 261, 16 S.E. 236; *Sneeden v. Harris,* 107 N.C. 311, 12 S.E. 205; *Lane v. Richardson,* 101 N.C. 181, 7 S.E. 710; *White v. Utley,* 94 N.C. 511.

While this course must be pursued, we will nevertheless exercise our discretionary power to express an opinion upon the question which the plaintiff attempts to raise by his fragmentary and premature appeal. *Cement Co. v. Phillips,* 182 N.C. 437, 109 S.E. 257; *Bargain House v. Jefferson,* 180 N.C. 32, 103 S.E. 922; *Taylor v. Johnson,* 171 N.C. 84, 87 S.E. 981; *Jester v. Steam Packet Co.,* 131 N.C. 54, 42 S.E. 447; *S. v. Wylde,* 110 N.C. 500, 15 S.E. 5; *Guilford County v. The Georgia Company,* 109 N.C. 310, 13 S.E. 861.

This question is as follows: Where the owner of an insured automobile brings an action for damage to his automobile and injury to his person against the supposed tort-feasor whose negligence allegedly caused the damage and injury, may the court, on motion of the supposed tort-feasor, bring into the case as an additional party an insurance company which has indemnified the owner for only a part of the damage to the automobile?

Counsel for plaintiff insist with much earnestness that an insurance company which pays the insured only a part of his loss is not a proper party to an action brought by the insured against the tort-feasor causing

the loss, and that consequently the question ought to be answered in the negative. Upon the hearing of the motion in the court below, the presiding judge rejected this contention and answered the question in the affirmative. In our opinion, the ruling of the judge is correct.

When all is said, it is evident that counsel for the plaintiff, whose industry and zeal merit commendation, have misinterpreted certain decisions of this Court, and have been thus induced to take an unsound position on the question under consideration. The decisions, which are cited below, establish these indisputable propositions:

1. Where insured property is destroyed or damaged by the tortious act of another, the owner of the property has a single and indivisible cause of action against the tort-feasor for the total amount of the loss. *Insurance Co. v. Motor Lines, Inc., supra; Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 646, 64 A.L.R. 656; *Powell v. Water Co.,* 171 N.C. 290, 88 S.E. 426, Ann. Cas. 1917 A, 1302.

2. When it pays the insured either in full or in part for the loss thus occasioned, the insurance company is subrogated *pro tanto* in equity to the right of the insured against the tort-feasor. *Insurance Co. v. R. R.,* 193 N.C. 404, 137 S.E. 309; *Ins. Co. v. R. R.,* 179 N.C. 255, 102 S.E. 417; *Insurance Co. v. Reid,* 171 N.C. 513, 88 S.E. 779; *Powell v. Water Co., supra; Insurance Co. v. R. R.,* 165 N.C. 136, 80 S.E. 1069; *Cunningham v. Railroad,* 139 N.C. 427, 51 S.E. 1029, 2 L.R.A. (N.S.) 921. See, also, in this connection: 29 Am. Jur., Insurance, section 1336, and 46 C.J.S., Insurance, section 1209.

3. Where the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under the statute codified as G.S. 1-57, which specifies that "every action must be prosecuted in the name of the real party in interest." *Insurance Co. v. Motor Lines, Inc., supra; Underwood v. Dooley, supra; Insurance Co. v. Lumber Co.,* 186 N.C. 269, 119 S.E. 362; *Powell v. Water Co., supra; Cunningham v. Railroad, supra; Insurance Co. v. Railroad Co.,* 132 N.C. 75, 43 S.E. 548.

4. Where the insurance paid by the insurance company covers only a portion of the loss, the insured is a necessary party plaintiff in any action against the tort-feasor for the loss. The insured may recover judgment against the tort-feasor in such case for the full amount of the loss without the joinder of the insurance company. He holds the proceeds of the judgment, however, as a trustee for the benefit of the insurance company to the extent of the insurance paid by it. The reasons supporting the rule stated in this paragraph are that the legal title to the right of action

against the tort-feasor remains in the insured for the entire loss, that the insured sustains the relation of trustee to the insurance company for its proportionate part of the recovery, and that the tort-feasor cannot be compelled against his will to defend two actions for the same wrong. *Ins. Co. v. R. R., supra* (179 N.C. 255, 102 S.E. 417); *Powell v. Water Co., supra; Insurance Co. v. R. R., supra* (165 N.C. 136, 80 S.E. 1069). See, also, in this connection: 29 Am. Jur., Insurance, section 1358, and 46 C.J.S., Insurance, section 1211.

These things being true, the decisions cited furnish plenary support for the proposition that an insurance company indemnifying the insured for only a part of the loss is not a necessary party to an action brought by the insured against the tort-feasor to recover the full amount of the loss. But they are not authority for the plaintiff's contention that the insurance company in such case is not a proper party to such action. Indeed, two of them, to wit, *Insurance Co. v. Motor Lines, Inc.*, and *Ins. Co. v. R. R.* (179 N.C. 255, 102 S.E. 417) sanction by implication at least the observation of that great master of North Carolina procedural law, Professor Atwell Campbell McIntosh, that "there would seem to be no valid objection to joining the insured and the insurer as parties under the general provision for the joinder of parties, so that all interested parties could be before the court." McIntosh on North Carolina Practice and Procedure in Civil Cases, section 218.

The soundness of Professor McIntosh's observation is obvious if due heed is paid to the relevant statutes. The code of civil procedure is bottomed on the basic concept that a court ought to bring before it as parties in a particular action all persons who may have interests either by way of rights or by way of liabilities in the subject matter of the action so that a single judgment may be rendered effectually determining all such rights and liabilities for the protection of all concerned. It provides in express terms that "all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative" (G.S. 1-68); and that "all persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved." G.S. 1-69.

Since an insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor to recover the total amount of the loss, it has a direct and appreciable interest in the subject matter of the action, and by reason thereof is a proper party to the action. *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390; 67 C.J.S., Parties, section 1. This being so, the insurance com-

pany in such case may be brought into the action by the court in the exercise of its discretionary power to make new parties at the instance of the insured or the tort-feasor either in the capacity of an additional plaintiff who has an interest in the subject of the action and in obtaining the relief demanded in it, or in the capacity of an additional defendant whose presence is necessary to a complete determination of the rights of all persons who may have an interest in the result of the litigation. G.S. 1-73; *Insurance Co. v. Motor Lines, Inc., supra; Lake Erie & W. R. Co. v. Falk,* 62 Ohio St. 297, 56 N.E. 1020; *Barnhill v. Brown,* 58 Ohio App. 188, 16 N.E. 2d 478. Undoubtedly the more effective procedure in such situation is for the party desiring to bring the insurance company into the action to move that it be made an additional party defendant and required to answer, setting up its claim arising through subrogation. *Schaller v. Chapman* (Ohio App.), 66 N.E. 2d 266.

We deem it not amiss to observe in closing that the insured may be properly joined as a party defendant under G.S. 1-69 even in an action where the insurance company sues the tort-feasor to enforce subrogation on the theory that the insured has been indemnified by it for the full amount of the loss. This is true because "it frequently is not ascertainable until the verdict establishes the amount of the damages whether insurer is the sole or partial owner of the cause of action, since, if the amount of damages set by the jury is less than the insurance paid, insurer is the sole owner, whereas, if the amount is greater, insurer is only a partial owner." *Patitucci v. Gerhardt,* 206 Wis. 358, 240 N.W. 385.

Appeal dismissed.

CHARLIE S. MORGAN v. PERCY E. SAUNDERS.

(Filed 17 September, 1952.)

1. Automobiles § 13—

Ordinarily, a driver who is himself observing the law of the road has the right to assume that the driver of a car approaching from the opposite direction will turn to its right so that the vehicles may pass in safety, and is not required to anticipate a negligent breach of this duty by the driver of such other vehicle, but this right is not absolute but may be qualified by particular circumstances, such as the proximity and movement of such other vehicle and the condition and width of the road.

2. Automobiles § 18h (2)—Evidence held not to show actionable negligence on part of driver in collision with car traveling in opposite direction.

Plaintiff was a passenger in defendant's car. The evidence tended to show that defendant had his car under control and was driving on the right side of the highway at a lawful speed following another car traveling in the same direction, that a third vehicle approached from the opposite

direction at excessive speed in the center of the highway, forced the first car partially off the hard surface, continued in the center of the highway and struck defendant's car, resulting in personal injuries to plaintiff. *Held:* Defendant's motion to nonsuit was properly allowed, since he was not under duty to anticipate negligence on the part of others, and in the absence of anything to show that the driver of the oncoming car was in a helpless condition or unable to turn his car to the right, he may not be held negligent if he continued to drive carefully with his car under control on his side of the road, on the reasonable assumption that the driver of the other car would drive to the right in time to pass in safety.

Nor would the fact that the defendant occasionally turned his head in conversing with the occupants of his car be regarded as importing negligence under the circumstances here appearing.

APPEAL by plaintiff from *Morris, J.*, April Term, 1952, of CHOWAN. Affirmed.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant in the operation of an automobile.

Plaintiff was a guest passenger in defendant's automobile when it was struck by another automobile driven by Patrick Eubanks. The collision occurred near Edenton about 9:30 p.m., on a two-lane highway, pavement 20 feet wide. Plaintiff was seated on the left rear seat of defendant's automobile with his wife beside him, and the defendant and his wife were on the front seat, the defendant driving.

According to plaintiff's evidence the defendant was driving 30 or 35 miles per hour, in the right traffic lane, and had his automobile under control. An automobile driven by John Miller, plaintiff's brother-in-law, was proceeding in same direction as defendant and about 100 yards in front. The plaintiff's wife testified she observed the Eubanks car approaching very rapidly from the opposite direction when it was about 100 yards away. "It was in the middle of the highway, swerving to and fro." The defendant did not change the direction of his automobile. There was nothing to prevent his turning off the pavement to the right. The night was clear and the lights on both automobiles were burning.

The Eubanks car struck defendant's automobile, apparently a glancing blow, and "bounced over on its shoulder." The left front fender, radiator and bumper of defendant's automobile received the force of the blow. After the accident the defendant's automobile was still on the right side of the highway near the edge of the pavement. The plaintiff was thrown to the floor of the automobile and seriously injured. Miller testified the Eubanks car passed him about 100 yards from where it struck defendant's automobile, and at that time it was traveling fast and in the middle of the highway. Miller turned off 2 feet on the shoulder and the automobiles passed in safety.

Plaintiff's wife testified defendant would turn his head in talking to the other occupants of the automobile. "There were times that he turned completely around in speaking to me, and also to Mr. Morgan and to his (defendant's) wife. That was the situation right at the time of the accident." She further testified that when from the rear seat she saw this car coming in the center of the highway neither she nor her husband said anything to defendant about it. "He was driving his own automobile."

There was an allegation in the answer that a release had been executed by plaintiff for a consideration, and there was a reply by plaintiff setting out matters in avoidance. But no evidence on this point was offered in the trial.

Eubanks was not sued.

At the conclusion of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed, and from judgment dismissing the action, plaintiff appealed.

John H. Hall for plaintiff, appellant.

John F. White and Pritchett & Cooke for defendant, appellee.

DEVIN, C. J. The plaintiff contends that the nonsuit below should be reversed for the reason that evidence was offered tending to show that shortly before the time of the collision the defendant Saunders was not keeping a proper lookout in the direction he was driving, and that if he had observed the approaching automobile in time he could have driven off the pavement to the right and avoided the collision.

However, the plaintiff's evidence also showed that the defendant was driving on his right side of the highway, at a moderate rate of speed, had his automobile under control, and that after it was struck by the Eubanks automobile it still remained on the right side of the highway near the edge of the pavement.

Under the circumstances here made to appear should the conduct of the defendant be held for negligence that he kept his automobile in the proper lane, on his right side of the road when meeting another automobile coming from the opposite direction, apparently acting on the assumption that the driver of the approaching automobile would observe the law and pass in safety?

It has several times been stated by this Court that the driver of an automobile who is himself observing the law (G.S. 20-148) in meeting and passing an automobile proceeding in the opposite direction has the right ordinarily to assume that the driver of the approaching automobile will also observe the rule and avoid a collision. *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840; *James v. Coach Co.,* 207 N.C. 742, 178 S.E. 607;

Hancock v. Wilson, 211 N.C. 129 (134), 189 S.E. 631; *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707; *Brown v. Products Co., Inc.,* 222 N.C. 626, 24 S.E. 2d 334; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593; Mitchie Auto Law, sec. 95; 2 Blashfield, sec. 919. "Neither is under a duty to the other to anticipate a violation of the rule by him. When the driver of one of the automobiles is not observing the rule, as the automobiles approach each other, the other may assume that before the automobiles meet, the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety." *Shirley v. Ayers,* 201 N.C. 51, 158 S.E. 840.

In *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707, where the facts were in many respects similar, demurrer to the complaint was sustained. The Court said: "The plaintiff is driving an automobile along the highway in rear of defendants' automobile proceeding in the same direction. A third automobile appears on the scene coming rapidly from the opposite direction, meeting the automobile of defendants and plaintiff. The third automobile is being driven on the left side of the highway, that is, on the same side as that of defendants and plaintiff. In that situation the driver of defendants' automobile continued in his own lane of traffic, to the right of the center of the highway . . . From an analysis of the factual situation alleged, it does not appear that the driver of defendants' car could reasonably have foreseen that the maintenance of his position on the right side of the highway, in his proper lane of traffic, in the face of the approaching third automobile, would result in injury to the plaintiff . . . The driver of defendants' automobile had the right to assume that the driver of the third car would turn to his right and into his proper lane of traffic in time to avoid collision."

There was nothing in evidence in the instant case to show that the driver of the Eubanks car was in a helpless condition or unable to turn his automobile to the right of the center of the road in passing the Saunders automobile whose lights were plainly visible, or that in the sudden emergency which arose the duty devolved upon Saunders to drive off the pavement. The pavement was 20 feet wide. Eubanks had ample room to turn (*Brown v. Products Co., Inc., supra*). The plaintiff might well have concluded that the safest course was to remain in his proper lane of travel under the assumption that the other driver would observe the law in time to pass in safety, rather than attempt to change the situation by a sudden turning.

While it is the duty of the driver of an automobile to keep a reasonably careful lookout, he is not required to anticipate negligence on the part of others and his failure so to do does not ordinarily constitute an act of negligence on his part. *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355.

Notwithstanding the defendant conversed with the other occupants of his automobile, it is not perceived, if he had refrained from so doing, that the rules of reasonable prudence would have required him to do more than drive slowly, keep his automobile under control, and remain in his own proper lane of travel, assuming that the driver of the approaching vehicle would observe the law and pass in safety. He was justified in acting on this assumption until such time that it appeared that a collision was unavoidable. *Shirley v. Ayers, supra.* However, the right of a motorist to assume the driver of a negligently operated automobile will observe the law in time to avoid collision is not absolute, but may be qualified by the particular circumstances at the time, such as the proximity and movement of the other vehicle and the condition and width of the road. *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593; *Brown v. Products Co., Inc.*, 222 N.C. 626, 24 S.E. 2d 334. Furthermore, when confronted by the sudden emergency of the approach of another automobile negligently operated, the driver of an automobile who is in no respect at fault, is not usually held to the same degree of deliberation and circumspection as under ordinary conditions. *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562. The fact that neither plaintiff nor his wife called the defendant's attention to the approach of the other automobile for the reason that "he was driving his own automobile," would seem to indicate they understood he was aware of the approach of the lighted automobile of Eubanks, plainly visible when a hundred yards away. *Taylor v. Rierson,* 210 N.C. 185, 185 S.E. 627, cited by plaintiff, is not in point.

Considering all the facts in evidence and the inferences to be drawn therefrom, we conclude the judgment of nonsuit should not be disturbed.

Affirmed.

WILLIAM A. WINSLOW v. LUCILLE JORDAN.

(Filed 17 September, 1952.)

Evidence § 29½—

Plaintiff is entitled to introduce in evidence any specific admission contained in the answer, together with such allegations of the complaint as illustrate or clarify the facts admitted, and no more, and the admission in evidence of allegations of the complaint denied by the answer and which have no direct explanatory relationship to the specific admissions in the answer, constitutes prejudicial error. An admission in the answer that the highway at the point in question was being rebuilt is not an admission that defendant negligently applied her brakes or otherwise mishandled her vehicle. An admission that plaintiff was slightly injured and that at the

time of the accident he was employed, is not an admission of particularized serious and permanent injuries and specified elements of damage.

APPEAL by defendant from *Grady, Emergency Judge,* and a jury, February Special Term, 1952, PERQUIMANS. New trial.

Civil action for personal injury damages.

Upon issues of negligence, contributory negligence, and damages, the plaintiff was awarded damages. From a judgment upon the verdict, the defendant appealed, assigning errors.

W. S. Oakey, Jr., for plaintiff, appellee.

J. Henry LeRoy for defendant, appellant.

VALENTINE, J. The defendant assigns as error the rulings of the trial judge in permitting, over her objections, the plaintiff to introduce in evidence paragraphs 4, 6 and 7 of the complaint.

Paragraph 4 of the complaint is as follows: "That the said defendant further carelessly and recklessly and negligently failed to drive her said car on the half of the roadway which had been finished with a final top coat, but upon approaching that place in the road where the plaintiff was working she carelessly and negligently drove over on the unfinished half of the pavement to her right, which said portion was in a slick condition, having been coated with a thin binding coat of wet asphalt preparatory to application of the final thick coat; and so the plaintiff is informed, believes and avers she negligently applied her brakes while on the said coated surface, or otherwise mishandled the said motor vehicle, losing control and causing the same to skid or run off the paved surface and run into the plaintiff in such violent manner as to throw him bodily a distance of more than 30 feet into the woods on the side of the road, seriously and permanently injuring the plaintiff in his legs, back, neck and head, breaking his right leg and rendering him totally unconscious."

To this paragraph of the complaint, defendant answered: "4. Answering section 4, defendant avers that she drove her automobile on the right side of the road which was then being used by the traffic and which, as she understood it, was the side of the road upon which she should operate a motor vehicle. *It is further admitted that the road at this point was being rebuilt,* all of which was well known to the plaintiff, in connection with which there was no sign or other directions suggesting to the defendant that she drive other than on the right side of the road. It is also admitted that, as the defendant eventually discovered, the right side of the road was in a very slick condition brought about by the application of a coat of oil or some other substance, applied by the plaintiff or those

with whom he was connected in highway work. Except as herein admitted section 4 of the complaint is denied. In this connection the defendant avers that while she was operating her said automobile on the aforesaid slippery portion of the road the plaintiff attempted to cross said road directly in front of her approaching car, at which time the defendant applied brakes but found that, because of the slippery condition of the road, she was unable to stop her car in the ordinary distance, and as a result of plaintiff's placing himself directly in front of defendant's car a collision occurred between said car and the plaintiff, from which plaintiff was slightly injured." (Italics ours.)

Paragraph 6 of the complaint is as follows: "That as a direct and proximate result of the said collision, caused by the negligence of the defendant, plaintiff sustained painful, serious and permanent injuries including a broken bone in the right leg below the knee, bruises and other injuries to the head and neck, and serious, painful and, it is believed, permanent injuries to his lower back, which said injuries consisted of a tearing of the muscles and ligaments and other tissues and causing the plaintiff great suffering which continues to the present day; has incurred long and expensive medical care, was confined to his home for many weeks and unable to engage in any sort of work for more than six months. The plaintiff is informed, believes and avers that the said injuries are permanent in nature and will permanently and seriously impair and damage his earning capacity and result in great and lasting loss to himself and his family which is dependent upon him, all of which is due to the negligence of the defendant."

To this paragraph of the complaint, defendant answered: "6. *It is admitted that the plaintiff was slightly injured, as aforesaid.* Except as herein admitted section 6 of the complaint is denied." (Italics ours.)

Paragraph 7 of the complaint is as follows: "That at the time of the said event herein complained of the plaintiff was gainfully employed by the North Carolina State Highway and Public Works Commission at a wage of $..... That in addition thereto the plaintiff was engaged in farming operations which had to be abandoned due to the said collision and the results thereof and from which farming operations the plaintiff, in view of the good crop season during the present year, believes that a profit of more than $2,000.00 would have been received by him during the said crop year. And that also the plaintiff was employed by the estate of E. S. White at a monthly wage of $75.00 for maintenance of property of the said estate and that all the said sources of income were completely lost to the plaintiff, which, in addition to medical expenses already incurred and which are still continuing, amount to a sum in excess of $3,500.00. And that the defendant, through her negligence as alleged

and otherwise, has further seriously and permanently damaged the plaintiff to an extent of at least $15,000."

To this paragraph of the complaint, defendant answered: "7. *It is admitted that at the time herein mentioned the plaintiff was employed by the N. C. State Highway and Public Works Commission, in connection with the re-surfacing of said road.* Except as herein admitted section 7 of the complaint is denied." (Italics ours.)

Plaintiff was properly allowed to offer in evidence as admissions of the defendant the excerpts above indicated by italics. It was also proper for the plaintiff to offer from his complaint such portions as serve to explain or clarify the specific admissions in the answer, but no more. It was prejudicial error for the court to allow the plaintiff to offer parts of his complaint which were denied in the answer and which had no direct explanatory relationship to the specific admissions in the answer. The effect of this ruling was to allow the plaintiff to make evidence for himself by the production of self-serving declarations and violated the well-established principle of evidence recognized by the uniform decisions of this Court. *Lupton v. Day,* 211 N.C. 443, 190 S.E. 722.

All facts alleged in the complaint and controverted by the answer are fact issues. "The denial in the answer of the fact alleged in the complaint puts the controverted fact in issue, and neither is the denial evidence against nor the plaintiff's allegation evidence for the truth of the disputed fact to be determined by the jury." *Lupton v. Day, supra; Jackson v. Love,* 82 N.C. 405.

This Court has consistently held that a party may offer in evidence such parts of his adversary's pleading as contain admissions of distinct and separate facts relative and pertinent to the inquiry, without being required to introduce the accompanying qualifying or explanatory matter. *Sears, Roebuck & Co. v. Banking Co.,* 191 N.C. 500, 132 S.E. 468.

And when an answer contains a categorical admission of a fact alleged, the plaintiff may offer such admission in evidence and so much of the allegation of his complaint as illustrates or clarifies the fact admitted. The same rule holds when there is a qualifying admission in an answer, and such portion of the corresponding allegation of the complaint as tends to explain the relevancy of the admission may also become competent. *Lewis v. R. R.,* 132 N.C. 382, 43 S.E. 919; *Modlin v. Insurance Co.,* 151 N.C. 35, 65 S.E. 605.

However, this rule has not been extended to permit a plaintiff to introduce as competent evidence his own allegation of a material fact which the defendant denies in his answer.

In the case at bar, the answer nowhere admits liability. Defendant bases her defense upon lack of negligence on her part and asserts that the contributory negligence of the plaintiff was a proximate cause of such

injury as he sustained and prevents his recovery. Therefore, it was reversible error to receive in evidence, over objection, any part of the complaint except such portions as were necessary to explain and clarify the specific admissions in the answer.

On this appeal, it is unnecessary to discuss the other exceptions appearing in the record.

For the errors pointed out, the defendant is entitled to a new trial, and it is so ordered.

New trial.

E. J. KING, MRS. C. M. GEORGE, WALTER TUCKER, AND MRS. R. A. WALL v. COY SMITH.

(Filed 17 September, 1952.)

Cemeteries § 5—

The right of action for the desecration of the grave of an ancestor vests in the next of kin as of the time the tort is committed, ascertained in accordance with the statutes of distribution, and therefore, great-grandchildren whose parents are dead may maintain the action notwithstanding that at the time the tort was committed there was living a grandchild of the ancestor. G.S. 65-15. The construction of "next of kin" to mean "nearest of kin" applies to the construction of a will and not to a right of action created by law resting upon blood relationship to a deceased person.

APPEAL by defendant from *Rudisill, J.*, June Term, 1952, SURRY. Affirmed.

Civil action to recover damages for the wrongful desecration of the graves of plaintiffs' ancestors, heard on demurrer.

Plaintiffs allege that the bodies of their great-grandfather and great-grandmother, Tommy King and wife, were interred in the Tommy King graveyard near Pilot Mountain; that defendant acquired property adjacent to said graveyard and thereafter, in violation of G.S. 65-15, destroyed said graves and exposed the remains of their said ancestors by leveling off the hill on which the graveyard was located; that he then gathered up the remains and reinterred them at another place so that the remains or the graves in which they were interred cannot be identified. Other amplifying allegations are contained in the complaint. They further allege that they are the next of kin of said Tommy King and wife.

The said decedent left surviving, or there were surviving at the time the alleged tort was committed, a granddaughter, Mrs. M. J. Snyder, and plaintiffs, who are great-grandsons and great-granddaughters. Plaintiffs are not children of Mrs. Snyder but trace their lineage through children of the Kings other than her parents. Mrs. Snyder and plaintiffs instituted an action against defendant on the cause of action set out in

the complaint. Mrs. Snyder died in 1948. Plaintiffs thereupon took a voluntary nonsuit in the original action and instituted this action within twelve months thereafter.

The defendant, after answering, demurred to the complaint for that the plaintiffs are not the real parties in interest and no cause of action exists in their favor for said alleged tort for that "it appears from the complaint and the amendment thereto that at the time of the alleged tort and wrong of the defendant Mrs. M. J. Snyder was the nearest living relative and the next of kin of the deceased Tommy King and wife, Mrs. Tommy King, and that any cause of action arising in 1946 for the alleged desecration of the graves of Tommy King and wife was then in favor of Mrs. M. J. Snyder, who was then living and who died in 1948."

The demurrer was overruled and defendant excepted and appealed.

John H. Blalock and Woltz & Barber for plaintiff appellees.

Folger & Folger for defendant appellant.

BARNHILL, J. The defendant does not challenge the sufficiency of the complaint for that it does not state facts sufficient to constitute a cause of action for the wrongful desecration of the graves of the Kings. That is, he does not assert that the complaint fails to allege a tort for which resulting damages may be recovered by the real party in interest. *S. v. Wilson,* 94 N.C. 1015; 10 A.J. 514, 15 A.J. 841; Anno. 21 A.L.R. 651; 42 L.R.A. 721n. His demurrer is bottomed upon the theory that at the time the alleged wrongful act was committed plaintiffs were not then next of kin of the Kings and are not now next of kin of Mrs. Snyder; and that therefore they are not now and have never been possessed of any right of action founded on the tort alleged in the complaint.

The complaint alleges facts sufficient to constitute a cause of action for the wrongful desecration of the graves of the Kings and the demurrer, for present purposes, admits the facts alleged. The defendant contends, however, that this cause of action vested in those who were next of kin at the time the wrongful act was committed. His position in this respect is sound. If Mrs. Snyder was at that time the sole next of kin then she and she alone acquired the right to maintain an action founded on the alleged tort. But such is not the case. It is true she was the nearest of kin, but that does not mean that she was the sole next of kin.

If the graves of the ancestors of plaintiffs were desecrated as alleged, then the cause of action created thereby vested in the next of kin of the Kings who were then living, but, in ascertaining who are the next of kin, it must be determined: first, who were the nearest of kin in equal degree; second, were there others who, if living, would be kin in equal degree; and third, did those who, if living, would be kin in equal degree, leave

children or other lineal descendants surviving at the time the right accrued. If it appears that there were others who, if living, would be kin in equal degree and that they left children surviving, then such children are deemed next of kin by representation and are vested with the same right which would have accrued to the parent had he or she been living at the time the right accrued. *In re Estate of Poindexter,* 221 N.C. 246, 20 S.E. 2d 49, 140 A.L.R. 1138; *In re Estate of Mizzelle,* 213 N.C. 367, 196 S.E. 364.

It follows that the plaintiffs are now, and were at the time the alleged wrong was committed, next of kin of the Kings for the purpose of determining who are the real parties in interest entitled to maintain this action.

It is true that when the right sought to be enforced is created by will, we ordinarily construe "next of kin" to mean "nearest of kin." *Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24. But when, as here, the right of action is created by law and rests upon blood relationship to a deceased person, those who may assert the right are those who would take under the statutes of distribution, and they are to be ascertained as of the date the cause of action arose. We need not now discuss the underlying reasons for the distinction. It is sufficient to say that it does exist and that, therefore, former decisions of this Court construing the meaning of "next of kin" in cases arising out of contests over bequests in wills have no application here.

The judgment overruling the demurrer is

Affirmed.

PAUL S. MEEKER AND WIFE, EDNA MEEKER, v. THELMA R. WHEELER.

(Filed 17 September, 1952.)

1. Ejectment § 15—

Where, in an action to recover possession of real property and damages for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, plaintiff has the burden of proving title in himself and trespass by defendant, and must rely upon the strength of his own title which he may establish by any of the various methods specified in *Mobley v. Griffin,* 104 N.C. 112.

2. Ejectment § 17—

Where plaintiffs seek to establish title by showing a common source of title and a better title from such common source under trustee's deed pursuant to foreclosure of a deed of trust executed by the common source, *held* plaintiffs' failure to offer in evidence the deed of trust or some record of it leaves a *hiatus* in the chain of title notwithstanding the recital in the

trustee's deed that it was given pursuant to foreclosure of the recorded deed of trust, and nonsuit is properly entered.

3. Mortgages § 32f—

Presumption of regularity in foreclosure of a deed of trust does not arise until the deed of trust or some record thereof is offered in evidence, and mere recital in the trustee's deed that it was given pursuant to foreclosure of a registered deed of trust is insufficient for this purpose.

APPEAL by defendant from *Crisp, Special Judge,* at May "A" Civil 1952 Term, of BUNCOMBE.

Civil action for the recovery of real and personal property—the real property phase being tried as a common law action in ejectment.

Plaintiffs allege in their complaint that they purchased from Robertson Wall, Trustee, all the land and premises together with the personal property described in a certain deed that has been duly recorded in office of register of deeds of Buncombe County, North Carolina, in deed book 710 at page 341, to which reference is made, and a copy of same is attached and marked Exhibit A; that since the purchase of said property by plaintiffs from the trustee they have demanded possession thereof from defendant, but she has refused to surrender possession; and that they are the owners and entitled to the possession thereof.

"Exhibit A" designated "Appendix A" purports to be a deed from Robertson Wall, Trustee, party of the first party, and Paul S. Meeker and wife, Edna Meeker, parties of the second part, registered in Book 710 at page 341, as aforesaid. And among the recitals therein is the following: "That whereas, on the 26th day of May, 1949, Stuart H. Elmer and wife, Marie C. Elmer, and Lewis A. Wheeler and wife, Thelma R. Wheeler, executed and delivered to Robertson Wall, Trustee a certain deed of trust which is recorded in the office of the register of deeds for Buncombe County, North Carolina, in Book of Mortgages and Deeds of Trust No. 460 at page 205."

Defendant, answering, denies the allegations set forth in the complaint. And for further defense, counterclaim, and cross action, defendant avers, among other things: "1. That under date of May 26, 1949, the defendant, jointly with her husband Lewis A. Wheeler, who is now deceased, and Stuart H. Elmer and his wife, Marie C. Elmer, purchased and received deed from the plaintiffs, Paul S. Meeker and wife Edna S. Meeker, to the following described property . . . said deed being recorded in Register of Deeds office for Buncombe County, North Carolina, in deed book 676 at page 192, and . . . by this reference is hereby . . . made a part of this paragraph.

"2. That, by survivorship and the will of Lewis A. Wheeler, the defendant acquired all the right, title and interest of Lewis A. Wheeler in the

hereinbefore described property subsequent to the above stated date of purchase of same from the plaintiffs, and by Bill of Sale dated the 2nd day of August, 1950, the defendant acquired all the right, title and interest of Stuart H. Elmer and his wife, Marie C. Elmer, and the personal property described in the hereinbefore referred to deed."

Upon the trial in Superior Court plaintiffs offered in evidence, among other things: (1) The original deed from Robertson Wall, Trustee, as referred to in, and made a part of, the complaint, as duly registered.

(2) Paragraphs 1 and 2 of defendant's further answer, counterclaim and cross action hereinabove set forth.

(3) Evidence tending to show that plaintiffs made demand upon defendant for possession of the property described in the complaint, and that she refused to surrender such possession.

Defendant offered no evidence.

Motions of defendant for judgment as of nonsuit aptly made were overruled. She excepted.

Defendant then took voluntary nonsuit as to her counterclaim, and moved for peremptory instruction in her favor on the issue submitted. Motion overruled. Exception.

The court submitted the case to the jury on this issue: "Are the plaintiffs the owners of and entitled to the possession of the real property and personal property as referred to and described in the complaint?"

Thereupon the court gave peremptory instruction that if the jury believe "What all the evidence in this case tends to show, you will answer this issue that is being submitted to you 'Yes.'" Defendant excepted.

The jury, for its verdict, answered the issue "Yes." And from judgment signed in accordance with the verdict, defendant excepted and appeals to Supreme Court, and assigns error.

Carl W. Greene for plaintiff, appellees.

Sanford W. Brown and William V. Burrow for defendant, appellant.

WINBORNE, J. Defendant assigns as error, and properly so, (1) the denial of her motions, aptly made, for judgment as of nonsuit, (2) the refusal of her request for peremptory instruction in her favor on the issue submitted to the jury, and (3) the giving of peremptory instruction in favor of plaintiffs. These are all based upon the theory that plaintiffs have failed to make out *prima facie* case of title to the land sought to be recovered.

When in an action for the recovery of land, and for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to title of plaintiff and as to trespass by defendant,—the burden of proof as to each being on plaintiff.

Mortgage Corp. v. Barco, 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson,* 227 N.C. 56, 40 S.E. 2d 451.

In such action plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142, and applied in numerous cases,—some of the late ones being *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *McDonald v. McCrummen,* 235 N.C. 550, 70 S.E. 2d 703.

In the *Mobley case* it is said that "the plaintiff may safely rest his case upon showing such facts and such evidences of title as would establish his right to recover, if no other testimony were offered. This *prima facie* showing of title may be made by either of several methods."

The 6th rule is pertinent to case in hand, that is, that plaintiffs may connect the defendant with a common source of title, and show in themselves a better title from that source. See cases there cited, and of later cases see *Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29.

It is apparent that plaintiffs here have undertaken to bring the present case within this rule. They offer in evidence admission by defendant that she and others obtained deed from plaintiffs, and then they offer a deed to themselves from a trustee, purporting to act under power of sale contained in a deed of trust, which they say was given by defendant and others to secure indebtedness to plaintiffs for balance of purchase of the land. But neither the deed of trust nor any record of it is offered in evidence. This creates a break in their chain of title.

While there is a presumption of law in favor of the regularity in the exercise of the power of sale in a mortgage or deed of trust, *Edwards v. Hair,* 215 N.C. 662, 2 S.E. 2d 859, and cases cited, there must first be evidence of a deed of trust in which power of sale is given. Mere recital in the trustee's deed purporting to be pursuant to sale under power of sale given in a recorded deed of trust, does not span the *hiatus* in the chain of title created by failure to offer in evidence the registered deed of trust or a record of it.

Manifestly this action has been prosecuted under misapprehension of applicable principles of law. If proof be available plaintiffs may yet make out a case of *prima facie* title in a new action. See last paragraph in *McDonald v. McCrummen, supra.*

But on this record, motions for nonsuit should have been allowed. Hence the judgment below is

Reversed.

J. B. SMITH v. J. PRITCHARD BARNES AND GATLINBURG REAL ESTATE COMPANY.

(Filed 17 September, 1952.)

1. Brokers § 10—Alleged agreement of defendant broker to split commission with plaintiff held void for want of consideration.

Allegations to the effect that plaintiff was given the right by the owners to sell their property, and that defendant broker agreed to pay plaintiff one-half the commission if defendant procured a purchaser, with evidence that plaintiff was given exclusive right to sell the property for only forty-eight hours and that defendant procured a purchaser after the expiration of that period when the property was listed with real estate brokers generally, *is held* insufficient to sustain recovery by plaintiff, and nonsuit was correctly entered, since there was no consideration for defendant's agreement to split the commission upon the facts alleged. Evidence to the effect that plaintiff and defendant agreed to pool their efforts and split the commission regardless of which one procured the purchaser does not alter this result, when such evidence is not based upon allegation.

2. Contracts § 5—

Where the sole consideration for a contract is the mutual promise of the parties, it is necessary that such promise be binding on both, and where it is binding only on one it cannot constitute a sufficient consideration for the promise of the other.

3. Pleadings § 24c—

Proof without allegation is as unavailing as allegation without proof.

APPEAL by plaintiff from *Armstrong, J.*, May Term, 1952, of HAYWOOD.

This is an action to recover from the defendants the sum of $1,375, or one-half the commission paid to them for selling the Skyland Cottages located in Haywood County.

The plaintiff alleges that during September, 1951, he conferred with the owners of the Skyland Cottages and was employed to aid them in the sale of their property, and for his services he was to receive a commission of five per cent of the sale price of the property; that thereafter the defendant, J. Pritchard Barnes, came to see him and conferred with him in regard to the sale of the property, representing himself as being President of the Gatlinburg Real Estate Company; that "it was agreed between the plaintiff and the defendant, J. Pritchard Barnes, that the said J. Pritchard Barnes and the Gatlinburg Real Estate Company, the defendants herein, should have the right to offer said Skyland Cottages . . . for sale, and that if said sale could be made, the plaintiff was to have one-half of the commissions that might be received for the sale of said property."

The sum and substance of the plaintiff's evidence in the trial below was as follows: The owners, in September, 1951, gave the plaintiff a written

agreement, good for forty-eight hours, authorizing him to sell the property known as the Skyland Cottages for $55,000, and agreeing to pay him a commission of five per cent for making such sale; that at the time the agreement was procured the plaintiff thought his brother, who lived in Gatlinburg, Tennessee, would be interested in buying the property. He immediately contacted his brother who informed him he was not interested in the property but suggested that he send a Mr. Barnes, a real estate agent in Gatlinburg, to see him. The plaintiff is not a licensed real estate agent but is cashier of the First State Bank of Hazelwood. Mr. Barnes called on the plaintiff at his office in the bank, on 24 September, 1951. The plaintiff testified that on that occasion Mr. Barnes "asked me how would I split the commissions with him since he had the purchaser and I immediately replied 50-50; Mr. Barnes and I agreed there on that occasion to a division of the commissions if he located a purchaser." Counsel then said, "State whether or not you had the same sort of agreement with him if you located the purchaser?" Plaintiff replied, "Yes sir."

After the plaintiff and the defendant Barnes finished their conference in the plaintiff's office on the above date, it was disclosed that the prospective purchaser, a Mr. Eastes, had accompanied Mr. Barnes to Hazelwood to inspect the property in question. The three of them inspected the property that same day and Mr. Eastes took a thirty day option from the owners and made a deposit of $100. When this option was given by the owners of the property, the forty-eight hour agreement with the plaintiff had expired and the property was listed for sale with all the real estate concerns in the vicinity and with some in Asheville. Exclusive of the plaintiff's services, in connection with procuring the thirty day option to Mr. Eastes, he only offered the property to his brother and to one other person. After the failure of Mr. Eastes to exercise his option, the plaintiff never communicated with the defendant Barnes until about the middle of December at which time he made inquiry by telephone about the prospect for a sale. Mr. Barnes informed him that the property had been sold to Mr. A. B. Walker and that the transaction would be closed on the following Monday. Mr. Walker purchased the property for $55,000, and the owners thereof paid the defendants a five per cent commission on the sale in the sum of $2,750.

The defendants contended the agreement between the plaintiff and Mr. Barnes to split the commission for the sale of the property applied only in the event the property was sold to Mr. Eastes, and denied that the plaintiff was entitled to any portion of the commission on the sale to Mr. Walker. Whereupon, the plaintiff instituted this action and attached one-half of the proceeds paid to the defendants. At the close of plaintiff's evidence, the defendants moved for judgment as of nonsuit. The motion was allowed and plaintiff appeals and assigns error.

W. R. Francis and M. G. Stamey for plaintiff, appellant.

Millar, Medford & Millar and Wynn & Wynn for defendants, appellees.

DENNY, J. The plaintiff insists that if his evidence is considered in the light most favorable to him, as it should be on a motion for judgment as of nonsuit, such evidence is sufficient to warrant its submission to a jury. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

We cannot concur in this view in light of the pleadings and the evidence disclosed by the record.

There is no allegation in the complaint to indicate, or from which it may be inferred, that the parties entered into a mutual agreement to pool their efforts to sell the property and to split the commission, regardless of which one procured the purchaser. The contract, as alleged, purports to bind the defendants only in this respect. Therefore, there is no mutuality of agreement or other consideration alleged, sufficient in law, to support the contract as set out in the complaint. Where there is no consideration for a contract, except the mutual promises of the parties, such promises must be binding on both parties. In such agreements, only a binding promise is sufficient consideration for a promise of the other party. 12 Am. Jur., Contracts, section 13, page 509, *et seq. Rankin v. Mitchem,* 141 N.C. 277, 53 S.E. 854; *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735; *Kirby v. Bd. of Education,* 230 N.C. 619, 55 S.E. 2d 322. See also *Wellington, Sears & Co. v. Dize Awning & Tent Co.,* 196 N.C. 748, 147 S.E. 13.

The plaintiff contends, however, that when he gave the defendants permission to sell the property, he surrendered a right sufficient to constitute a consideration for the agreement which they entered into. The contention is without merit. He had no exclusive right to sell the property at the time Mr. Barnes contacted him. In fact, it would seem at that particular time he had no agreement at all with the owners with respect to the sale of the property. His forty-eight hour agreement, whatever it was, had expired and the property was listed generally with the real estate brokers in Haywood County and with some in Asheville. Consequently, his right to recover must stand or fall upon the terms of his agreement with the defendants.

It is true that in the trial below the plaintiff undertook to prove the existence of a contract based upon the mutual promises of the respective parties, but proof without allegation is as unavailing as allegation without proof. *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285; *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613; *Ingold v. Assurance Co.,* 230 N.C. 142, 52 S.E. 2d 366, 8 A.L.R. 2d 1439.

No error has been made to appear in the ruling of the court below, and the judgment is

Affirmed.

C. S. LAMB v. ABNER N. STAPLES, JENNIE STAPLES, ALVIN N. STAPLES AND BETTY STAPLES.

(Filed 17 September, 1952.)

1. Vendor and Purchaser § 25a—

Where plaintiff purchaser alleges an agreement by defendant to convey to plaintiff at a stipulated price a certain tract of timber subject to a registered Federal tax lien, with further provision that plaintiff should procure the approval of the Collector of Internal Revenue to such sale within thirty days from the date of the execution of the contract, *held*, upon failure of plaintiff to offer evidence that he obtained approval of the Collector of Internal Revenue within the period stipulated, nonsuit was properly entered, nor would evidence of waiver of the thirty day limitation alter this result in the absence of allegation of waiver.

2. Waiver § 4—

As a general rule, when waiver is not pleaded evidence of waiver is inadmissible.

3. Pleadings § 24c—

Proof without allegation is as ineffective as allegation without proof.

4. Evidence § 24—

The exclusion of evidence not predicated upon allegation cannot constitute prejudicial error.

APPEAL by plaintiff from *Burgwyn, Special Judge*, May Term, 1952, PASQUOTANK.

Civil action to recover for alleged breach of contract. The pertinent facts are stated in the opinion.

From judgment as of nonsuit entered on motion of the defendants at the close of the plaintiff's evidence, the plaintiff appeals, assigning errors.

Howard W. Dobbins and J. W. Jennette for plaintiff, appellant.

J. Henry LeRoy for defendants, appellees.

JOHNSON, J. This appeal challenges the action of the lower court in (1) allowing the motion for nonsuit at the close of the plaintiff's evidence, and (2) excluding testimony proffered by the plaintiff.

1. *The Question of Nonsuit.*—The contract declared on binds the defendants to sell and the plaintiff to purchase certain timber on a 1200-acre tract of land in Camden County, North Carolina, for the sum of

$45,000, payable $10,000 cash on delivery of deed, with the balance of $35,000 to be evidenced by note secured by purchase money deed of trust, due 18 months after date, with further provision that the plaintiff, or his assigns, may begin cutting the timber immediately after delivery of deed and continue cutting upon condition that $20 per thousand feet, log measure, be paid on the note each month for the timber "milled or removed."

The land on which the timber was situate was subject to a registered Federal tax lien in amount of $102,301.76, levied and assessed against the defendants Abner N. Staples and wife Jennie Staples.

The parties understood that in order to consummate the sale it was necessary to obtain approval of and release from the Collector of Internal Revenue. As to this, the contract contains in substance these controlling stipulations: (1) That "permission and approval" of the sale by the Collector of Internal Revenue "is hereby made a condition precedent to the validity and effect of this agreement," and (2) that purchaser (the plaintiff) shall have thirty days from the date of the execution of the contract "in which to obtain the permission and approval of the said Collector of Internal Revenue."

Thus, by the express terms of the contract the burden of obtaining approval of the Collector of Internal Revenue was placed on the plaintiff, and he was given only thirty days in which to obtain such "permission and approval."

It is alleged in the complaint in substance that (1) the plaintiff, after so contracting to purchase the timber from the defendants, entered into another contract with one L. E. Collins to sell him the timber on a 295-acre portion of the 1200-act tract for $55,000; (2) that the defendants, after learning of the plaintiff's proposed sale of the 295-acre portion to L. E. Collins, contacted Collins and conspired with him to avoid the contract with plaintiff and proposed to sell the 295-acre portion to Collins direct for $50,000; and (3) that as a result of these dealings, and notwithstanding the Commissioner of Internal Revenue agreed to release and did release the lands and timber from the tax lien for the payment of $45,000, the defendants refused to deal further with the plaintiff, and refused "to convey to the plaintiff the lands (timber) described in the agreement under the terms thereof, thereby breaching the contract which they had with the plaintiff," to his damage in the sum of $100,000.

The record discloses fatal variances between the plaintiff's allegations and the proofs offered below. It nowhere appears in the evidence that the Collector of Internal Revenue ever approved the contract, and such approval was made a condition precedent to performance. This was a valid condition. *Federal Reserve Bank v. Neuse Mfg. Co.*, 213 N.C. 489, 196 S.E. 848; *Insurance Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606;

Jenkins v. Myers, 209 N.C. 312, 183 S.E. 529; 12 Am. Jur., Contracts, Sections 296 and 328; 17 C.J.S., Contracts, Sec. 338. See also *Goldston v. Newkirk,* 233 N.C. 428, 431, 64 S.E. 2d 424, 426 and 427.

On the contrary, it affirmatively appears in the evidence that the Collector of Internal Revenue expressly refused to approve the contract. He objected particularly to the stipulation which would permit the deferred balance of $35,000 to be paid as and when the timber was cut. He demanded full payment of the $45,000 before executing the release. This sum was not forthcoming. Besides, the release later executed by the Collector of Internal Revenue, relied on by the plaintiff, appears to have been executed after the expiration of the 30-day period allowed therefor by the terms of the contract. Here, the plaintiff urges that the evidence is sufficient to sustain the inference that the defendants waived the provisions of this 30-day limitation. As to this, it is enough to say there is no allegation of waiver, and the general rule is that when waiver is not pleaded, evidence is inadmissible to prove it. 56 Am. Jur., Waiver, Sec. 18. "Proof without allegation is as ineffective as allegation without proof." *McKee v. Lineberger,* 69 N.C. 217, 239. See also *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14; *Wilson v. Chandler,* 235 N.C. 373, 70 S.E. 2d 179.

It follows, then, that the judgment of nonsuit was properly entered.

2. *The Exclusion of Evidence.*—Here the exception relates to a line of proffered testimony given in the absence of the jury by one of the plaintiff's attorneys. The witness related in detail his various efforts to effect a release of the Federal tax lien. The excluded testimony contains a summary of various telephone conversations between the witness and defendants' attorney tending, as plaintiff contends, to show (1) that the defendants waived the provisions of the contract requiring that the approval of the Collector of Internal Revenue should be obtained within thirty days, and (2) that the defendants agreed to modify the contract in other particulars.

This line of proffered testimony is wholly unsupported by the pleadings. The complaint declares on the contract as written. There is no allegation of modification or waiver. Therefore the testimony proffered in respect thereto was not relevant in any aspect of the case. *Wilson v. Chandler, supra.* Accordingly, it is unnecessary for us to discuss the defendants' contention, urged with force, that no sufficient ground was laid for the reception in evidence of these alleged extra-judicial statements of the defendants' attorney. (*Commercial Solvents v. Johnson,* 235 N.C. 237, 241, 69 S.E. 2d 716, 719.)

The rest of the excluded testimony was without probative force as tending to show that the Collector of Internal Revenue approved the contract, as was required by its terms, and this was the crucial issue in the case.

Hence, prejudicial error may not be predicated upon the exclusion of the proffered testimony.

For the reasons given, the judgment below is

Affirmed.

L. A. MUSE AND GUS MUSE v. ELVA MUSE, GLADYS MUSE HALL, AND JOHN MUSE.

(Filed 17 September, 1952.)

1. Appeal and Error § 39c—

Where it appears from the entire record that plaintiffs failed to offer competent evidence sufficient to make out their cause of action, the court's instruction to the jury to answer the issue in favor of defendants may not be held for error and the rulings of the court in the progress of the trial cannot be held prejudicial on plaintiffs' appeal.

2. Limitation of Actions § 5b—

Where it is established that the person under whom plaintiffs claim was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to the property for fraud and undue influence, plaintiffs' claim is barred. G.S. 1-52 (9).

3. Limitation of Actions § 16—

The burden is upon plaintiffs to show that their action was brought within the time allowed by law.

4. Deeds § 6—

The time of the execution of a deed of gift and not its date is determinative of whether it was registered within two years. G.S. 47-26.

APPEAL by plaintiffs from *Bobbitt, J.*, February Term, 1952, of BUNCOMBE. No error.

This was a suit to set aside three deeds executed by K. M. Muse and his wife, M. A. Muse, to the defendants. The plaintiffs are two of the children and heirs of the grantors who are now deceased. The grounds of attack were want of sufficient mental capacity of the grantors to execute the deeds, and also on the ground that the deeds were procured by undue influence on the part of the defendants.

The case was first heard before Judge Rudisill and a jury at June Term, 1951, of Buncombe Superior Court. The jury at that trial for their verdict found on the first two issues that the grantors had mental capacity, and on the third issue found the deeds were procured by undue influence. Judge Rudisill in his discretion set aside the verdict on the third issue and granted a new trial on that issue.

At February Term, 1952, the case came on to be heard before Judge Bobbitt and a jury on the issue of fraud and undue influence, and also on an issue submitted as to whether plaintiffs' cause of action was barred by the three-years' statute of limitations.

After hearing the evidence the court was of opinion that there was no competent evidence to support the plaintiffs' allegations of fraud and undue influence on the part of defendants (who were children of the grantors) in procuring the deeds, and directed the jury to answer that issue "No." The court was also of opinion that since K. M. Muse died in 1941 and title passed by survivorship to his wife, M. A. Muse, if fraud and undue influence had been practiced, she had knowledge of all the facts, and that whatever cause of action she may have had at the time of her death in 1949 was barred by the three-years' statute of limitations, and the court instructed the jury to answer that issue in favor of defendants.

On the verdict returned at June Term, 1951, on the first two issues, and the verdict at February Term, 1952, judgment was rendered in favor of defendants. The plaintiffs excepted and appealed.

Cecil C. Jackson for plaintiffs, appellants.

Don C. Young for defendants, appellees.

DEVIN, C. J. The plaintiffs appealed at once from the order of Judge Rudisill setting aside the verdict on the third issue at June Term, 1951, allowing the verdict to stand as to the first two issues, and granting a partial new trial on the issue of undue influence. This was heard at Fall Term, 1951, and the appeal dismissed, this Court holding that these were matters within the discretion of the presiding judge. *Muse v. Muse,* 234 N.C. 205, 66 S.E. 2d 689.

The plaintiffs now bring forward their exceptions noted in the first trial to the charge of Judge Rudisill on the first two issues. However, upon examination of the portions of the charge excepted to we discover no substantial error, and hence the verdict of the jury must be taken to have established the fact that the grantors in the deeds had sufficient mental capacity to execute the deeds in question.

On the trial before Judge Bobbitt at February Term, 1952, the plaintiffs noted numerous exceptions to the rulings of the court in the admission of evidence, and to his action in giving the jury peremptory instructions to answer the third and fourth issues in favor of the defendants. While some of the rulings of the court standing alone would not be approved, an examination of the entire record leaves us with the conviction that Judge Bobbitt was right in holding that there was no competent evidence to support the allegations of fraud and undue influence on the part

of the defendants, and that his instruction to the jury to that effect may not be held for error. *In re Craven's Will,* 169 N.C. 561 (569), 86 S.E. 587; *In re Will of Turnage,* 208 N.C. 130, 179 S.E. 332; *Lee v. Ledbetter,* 229 N.C. 330, 49 S.E. 2d 634; *In re Will of Kemp,* 234 N.C. 495, 67 S.E. 2d 672. Likewise, on all the evidence we think the court correctly held, and so instructed the jury, that whatever cause of action M. A. Muse may have had was barred by the three-years' statute of limitations. Title, if any, vested in her in 1941. She was found to be mentally competent at that time, and she had knowledge of the facts now asserted by the plaintiffs. She died in 1949. G.S. 1-52 (9); *Peacock v. Barnes,* 142 N.C. 215, 55 S.E. 99; *Blankenship v. English,* 222 N.C. 91, 21 S.E. 2d 891; *Vail v. Vail,* 233 N.C. 109 (116), 63 S.E. 2d 202. The burden was on the plaintiffs to show this action was brought within the time allowed by law.

Plaintiffs contend that the deeds to the defendants being deeds of gift became void under G.S. 47-26 for failure to have them registered within two years from "the making thereof." But this position is untenable as the evidence shows the deeds were signed and acknowledged 22 April, 1940, and registered 4 April, 1941. Though apparently bearing date in 1937, the time of "making" the deed, as the word is used in the statute, means date of execution. "The execution of a deed is not complete until the instrument is signed, sealed and delivered." *Turlington v. Neighbors,* 222 N.C. 694, 24 S.E. 2d 648.

Without undertaking to discuss *seriatim* all the exceptions noted by plaintiffs, we reach the conclusion that upon the whole case as shown by the record no substantial error has been made to appear and that the result reached below should not be disturbed.

No error.

JACKSON L. LANGLEY AND WIFE, SARAH LANGLEY v. GEORGE W. LANGLEY AND WIFE, RUTH LANGLEY.

(Filed 17 September, 1952.)

1. Partition § 4g (2)—

While the clerk, upon hearing of exceptions to the report of the commissioners for actual partition, may recommit for correction or further consideration, or vacate the report and direct a reappraisal, or vacate the report, discharge the commissioners and appoint new commissioners to make partition, the clerk is without authority to alter the report either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners.

2. Partition § 4g (3)—

Upon appeal to the Superior Court from the disposition made by the clerk upon exceptions to the commissioners' report for actual partition, the judge

has jurisdiction to review the report in the light of the exceptions filed, hear evidence, and render such judgment, within the limits provided by law, as he deems proper under all the circumstances made to appear to him.

3. Courts § 4c—

When a civil action or special proceeding instituted before the clerk is for any ground sent to the Superior Court, the judge has authority to consider and determine the matter as if originally before him. G.S. 1-276.

4. Appeal and Error § 1—

The Supreme Court is limited to a review of alleged error of law upon appeal.

APPEAL by defendants from *Frizzelle, J.*, February Term, 1952, NASH. Affirmed.

Petition for partition.

Plaintiff Jackson L. Langley and defendant George W. Langley, as tenants in common, own a small tract of land on which are located two dwellings. On petition of plaintiffs, commissioners were appointed to make actual partition of the land. The commissioners filed their report in which they assessed an owelty charge of $50 against the share allotted to plaintiffs. Defendants excepted to the report. The sole basis of their exceptions is that there is an inequality in the partition made by the commissioners for the reason the share allotted to plaintiffs is somewhat larger in area and is located at the intersection of two roads while their share fronts on only one highway.

Upon hearing on the exceptions filed, the clerk found that the division as made by the commissioners "is just and fair but that the owelty charge made . . . should be increased from $50.00 to $100.00 in order to make equality of division." Defendants excepted and appealed.

When the cause came on for hearing in the court below, the trial judge affirmed the report of the commissioners as filed, expressly fixing the owelty charge at $50 as contained in said report. Defendants excepted and appealed.

S. L. Arrington for plaintiff appellee.

John M. King for defendant appellant.

BARNHILL, J. While, in a partition proceeding, upon exceptions filed to the report of the commissioners, the clerk may (1) recommit the report for correction or further consideration, or (2) vacate the report and direct a reappraisal by the same commissioners, or (3) vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make partition thereof, he is without authority to alter the

report filed either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners.

When the cause came before the judge on appeal, he was not limited to a review of the action of the clerk. He was vested with jurisdiction to review the report in the light of the exceptions filed, hear evidence as to the alleged inequality of division, and render such judgment, within the limits provided by law, as he deemed proper under all the circumstances made to appear to him. *Taylor v. Carrow,* 156 N.C. 6, 72 S.E. 76; *Skinner v. Carter,* 108 N.C. 106; *Hyman v. Edwards,* 217 N.C. 342, 7 S.E. 2d 700; *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602.

When a civil action or special proceeding instituted before the clerk is "for any ground whatever sent to the superior court before the judge," he has the authority to consider and determine the matter as if originally before him. G.S. 1-276; *Plemmons v. Cutshall,* 230 N.C. 595, 55 S.E. 2d 74; *Woody v. Barnett,* 235 N.C. 73.

On appeal this Court is limited to a review of alleged error of law in the judgment entered. *Hyman v. Edwards, supra.*

Whether the judge below reduced the owelty charge assessed by the clerk against the share allotted to the plaintiff for the reason the clerk was without authority to increase the same or because he concluded from the evidence offered that the partition made by the commissioners was fair and just is immaterial. In either event he was acting within the authority vested in him.

As no error in law is made to appear, the judgment confirming the report filed by the commissioners must be

Affirmed.

MAMIE DEAVER v. J. R. DEAVER.

(Filed 17 September, 1952.)

1. Negligence § 9—

Negligence does not create liability unless it is the proximate cause of the injury complained of, and foreseeability is an essential element of proximate cause.

2. Negligence § 19b (1)—

Evidence tending to show that defendant contractor was operating a small electric circular saw on a bench near his house, that there was sawdust and scrap lumber around the bench, that when plaintiff went out to deliver a business message to defendant, she stepped on something, lost her balance, and grabbed a piece of board on the saw bench which jerked her hand into the saw, causing serious injury, *is held* insufficient to overrule nonsuit, since under the evidence defendant could not have reasonably foreseen a mishap of such kind and nature.

APPEAL by plaintiff from *Bennett, Special Judge,* February Term, 1952, MADISON. Affirmed.

Civil action to recover damages for personal injuries.

Defendant is a contractor. In connection with his business he maintains and operates a small electric circular saw attached to a heavy-timbered, movable table or bench about four feet high. On 22 June, 1949, he placed the saw bench two or three feet from his back porch near the corner of his house, with the electric cord attached to a socket on the back porch. He was sawing boards and putting a new floor in his truck.

His wife, the plaintiff, would from time to time take messages for defendant over the telephone. On that day she went out to deliver a message just received. As she stepped down the one step to the back porch, her foot "reeled." "I stepped on something; I don't know, it might have been a piece of board." As she staggered and began to fall, she grabbed a piece of board on the saw bench and her hand was drawn into the saw and seriously injured. "Her hand was jerked into the saw." There was sawdust and scrap lumber around the bench. There was not as much scrap lumber on the opposite side of the bench. The turf around the bench was wet and soggy.

Defendant had operated his saw about his premises for several years and plaintiff was familiar with its operation and could see it that day before she left the porch and had seen it in its then location through her kitchen window. At the time of the mishap the saw was in operation but no one was in attendance. Defendant and his helper were then placing a newly sawn board in the flooring of the truck which was standing a few feet away.

Upon the conclusion of the plaintiff's evidence the court, on motion of defendant, entered judgment of nonsuit and plaintiff appealed.

J. M. Baley, Jr., and Charles E. Mashburn for plaintiff appellant.

A. E. Leake and J. W. Haynes for defendant appellee.

BARNHILL, J. Decision of the question presented on this appeal may rest upon the assumption that defendant was guilty of negligence in the manner in which he maintained and operated his saw and in permitting sawdust and scraps of lumber to accumulate around the saw bench, and that plaintiff occupied the position of an invitee or servant. Even so, the evidence offered, considered in the light most favorable to plaintiff, fails to make out a case for the jury.

Negligence does not create liability unless it is the proximate cause of the injury complained of. And foreseeability is an essential element of proximate cause. *Wood v. Telephone Co.,* 228 N.C. 605, 46 S.E. 2d 717; *Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688; *McIntyre v. Elevator*

Co., 230 N.C. 539, 54 S.E. 2d 45; *Gant v. Gant*, 197 N.C. 164, 148 S.E. 34.

For us to say that defendant was required to foresee a mishap of the kind and nature described by plaintiff and her witness would require of him a degree of foresight or prevision not exacted by the law of negligence. What is said in *Gant v. Gant, supra*, is appropriate here:

"No man, by the exercise of reasonable care, however high and rigid the standard of such care, upon the facts in any particular case, can foresee or forestall the inevitable accidents, and contingencies which happen and occur daily, some bringing sorrow and loss, and some bringing joy and profit, all however contributing, in part, to make up the sum total of human life. The law holds men liable only for the consequences of their acts, which they can and should foresee and by reasonable care and prudence, provide for."

We note that plaintiff alleges she slipped on the "wet and slippery" turf around the saw bench while she undertook to prove her case on the theory the debris which defendant had permitted to accumulate in the narrow space between the house and saw bench through which she had to pass was the cause of her fall. Even so, the variance is not material here for, in any event, the evidence fails to disclose actionable negligence on the part of the defendant.

The judgment entered in the court below is

Affirmed.

CORA C. FOGARTIE v. IRVING F. FOGARTIE.

(Filed 17 September, 1952.)

Divorce § 12—

In an action for alimony without divorce, the court, upon its finding that the facts alleged in the complaint are true, has jurisdiction, except upon allegation and proof satisfactory to the court of the wife's adultery, to award subsistence and counsel fees *pendente lite*, the amount thereof being in the sound discretion of the court upon consideration of the estate and earnings of the husband and the separate estate of the wife, which discretion is not reviewable on appeal in the absence of abuse. G.S. 50-16.

APPEAL by defendant from *Bobbitt, J.*, April 1952 Regular Civil Term, BUNCOMBE. Affirmed.

Action for alimony without divorce.

Defendant in his answer denies that he is an habitual drunkard and pleads the impotency of the plaintiff as a bar to the relief sought.

Plaintiff applied for subsistence and counsel fees *pendente lite* as provided in G.S. 50-16. From an order allowing plaintiff's motion, defendant appealed, assigning errors.

J. Y. Jordan, Jr., for plaintiff, appellee.
Irvin Monk and Don C. Young for defendant, appellant.

VALENTINE, J. The defendant contends that the court below committed error in allowing the plaintiff alimony *pendente lite* and counsel fees. With this we cannot agree.

The statute under which the plaintiff seeks relief (G.S. 50-16) provides two remedies—one, for alimony without divorce; and the other, for a reasonable subsistence and counsel fees *pendente lite*. *McFetters c. McFetters*, 219 N.C. 731, 14 S.E. 2d 833; *Taylor v. Taylor*, 197 N.C. 197, 148 S.E. 171.

The remedy thus established for the subsistence of the wife pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms. In arriving at the proper amount to be allotted, the court should take into consideration all the circumstances of the family, including the separate estate of the wife and the estate and earnings of the husband, and make only such allowances as are contemplated by the statute. The language of the order in the instant case, properly interpreted, discloses that the court complied with the purpose and meaning of the statute. Hence, the contention of the defendant that the court failed to take into consideration the separate estate and income of the plaintiff is untenable. The recitals in the judgment clearly disclose that the court gave due regard to the evidence in this respect and considered the same in arriving at its decision.

The court below for the purpose of the order found the facts relative to the cause of the separation to be as recited in plaintiff's complaint. This is in accord with the decisions of this Court. *Ragan v. Ragan*, 214 N.C. 36, 197 S.E. 554, and cases there cited; *Southard v. Southard*, 208 N.C. 392, 180 S.E. 665.

The amount of the allowances to plaintiff for her subsistence *pendente lite* and for her counsel fees is a matter for the trial judge. He has full power to act without the intervention of the jury (*Peele v. Peele*, 216 N.C. 298, 4 S.E. 2d 616), and his discretion in this respect is not reviewable, except in case of an abuse of discretion. *Phillips v. Phillips*, 223 N.C. 276, 25 S.E. 2d 848; *Tiedemann v. Tiedemann*, 204 N.C. 682, 169 S.E. 422. The only way by which the power of the court to make these allowances can be circumvented is by allegation and proof satisfactory to

the court of the wife's adultery. *Oldham v. Oldham,* 225 N.C. 476, 35 S.E. 2d 332. In this record, there is neither allegation nor proof of the infidelity of the wife. On the contrary, the defense interposed establishes beyond question the chastity of the plaintiff.

Allowances *pendente lite* constitute no part of the ultimate relief sought and do not affect the final rights of the parties. *Peele v. Peele, supra.*

Upon this record, we find no error, and the order below is

Affirmed.

ROMAINE CLARK WOODARD AND DAVID WOODARD v. WILLIAM THOMAS CLARK, JR., NANNIE SUE CLARK, GEORGE THOMAS DAVIS, MARY ELIZABETH CLARK DAVIS, GEORGE THOMAS DAVIS, JR., WILLIAM BLOUNT FLOWERS, NANNIE SUE CLARK FLOWERS, SUZANNE FLOWERS, WILLIAM THOMAS CLARK III, HENRY GROVES CONNOR, ALICE WHITEHEAD CONNOR, CHARLES E. HUSSEY, MARY CLARK HUSSEY, GEORGE HACKNEY III, BESSIE HANCOCK HACKNEY, AND THE UNBORN ISSUE OF WILLIAM THOMAS CLARK, JR., HENRY GROVES CONNOR AND MARY CLARK HUSSEY, AND WILEY L. LANE, JR., GUARDIAN AD LITEM FOR GEORGE THOMAS DAVIS, JR., SUZANNE FLOWERS, WILLIAM THOMAS CLARK III, AND THE UNBORN ISSUE OF WILLIAM THOMAS CLARK, JR., HENRY GROVES CONNOR AND MARY CLARK HUSSEY.

(Filed 24 September, 1952.)

1. **Wills § 33a: Estates § 15—**

In North Carolina the common law rule prevails that legal future interests in personal property may not be created by deed but may be created by will, either by vested or contingent limitation over after a life estate or defeasible fee.

2. **Common Law—**

The common law rule that future interests in personal property may be created by will but not by deed prevails in this State, since it has not been abrogated or repealed by statute or become obsolete, and is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State. G.S. 4-1.

3. **Constitutional Law § 10a—**

It is the prerogative of the Legislature and not the Court to modify a recognized common law rule.

4. **Appeal and Error § 51c—**

A decision of the Supreme Court must be considered in the light of the facts of the case in which it is rendered.

APPEAL by plaintiffs from *Frizzelle, J.,* May Term, 1952, WILSON. Affirmed.

Action under the Declaratory Judgment Act, here on former appeal. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888.

The plaintiff seeks to have the Court construe the last will and testament of W. T. Clark with special reference to the property devised and bequeathed to her and to declare and fix the exact quality of her estate therein and her rights, privileges, and responsibilities in respect thereto. All of the material facts appear in the former opinion of this Court *supra.* Repetition here would serve no useful purpose.

The *feme* plaintiff is the real party in interest. We will therefore, as a matter of convenience, hereafter refer to her as the plaintiff.

When the cause again came on for hearing in the court below, Frizzelle, J., adjudged and decreed that:

"1. The devise and bequest to Romaine Clark Woodard under the will of William T. Clark as set forth and contained in Item 15 of said will and Item 5 of the codicil thereto are subject to all of the limitations, restrictions, qualifications and conditions therein contained;

"2. The plaintiff Romaine Clark Woodard holds a defeasible fee in the real property devised to her under said will and a qualified property in the personalty bequeathed to her thereunder, subject to an executory limitation over as to both the real and personal property in favor of the contingent beneficiaries designated in said will and codicil to take effect upon the death of Romaine Clark Woodard without leaving issue surviving; to the defeasible fee held by Romaine Clark Woodard in said real property and the qualified property held by her in the personalty there is coupled a restricted power of sale for the limited purpose of such exchange, conversion, investment and reinvestment of the *corpus* of said property as may be required for the prudent management and conservation of said property;

"3. Romaine Clark Woodard is entitled to the possession, use and control of the real and personal property devised and bequeathed to her under said will during her lifetime without the necessity of posting bond, subject to the right of the contingent beneficiaries under said will to seek the intervention of the Court upon a proper showing that the principal of the estate is endangered.

"4. Romaine Clark Woodard is entitled to the rents, profits and other income derived from said property for her own use and benefit during the continuance of her estate, but she is not entitled nor does she have the authority to consume, give away, sell, exchange or otherwise dispose of any part of the principal of said property either real or personal for her own use or benefit;

"5. The said plaintiff shall forthwith file with the Clerk of this Court an inventory of the real and personal property received by her under the will of William T. Clark;

"6. Upon the death of Romaine Clark Woodard leaving issue surviving her title to the *corpus* of the realty and personalty devised and bequeathed to her under the terms of said will will ripen into a fee simple as to the realty and into an absolute property in the personalty in favor of her heirs and personal representatives;

"7. Upon the death of Romaine Clark Woodard without leaving issue surviving, the contingent beneficiaries designated under the will of William T. Clark shall be entitled to the *corpus* of said property, both real and personal, and the estate of Romaine Clark Woodard shall then be liable to them for an accounting therefor;"

Plaintiff excepted and appealed.

Brooks, McLendon, Brim & Holderness for plaintiff appellants.

Carr & Gibbons, Lucas & Rand, Wade A. Gardner, and Wiley L. Lane, Jr., for defendant appellees.

BARNHILL, J. The plaintiff on this appeal does not contend there is any error in the judgment entered in respect to the real property devised to her. The question she raises, as stated in her brief, is this: "Is the *feme* plaintiff's estate in the personal properties bequeathed to her by Item 5 of her father's Will absolute, or is it subject to a valid limitation over?"

We settled that question on the former appeal, *Woodard v. Clark*, 234 N.C. 215, 66 S.E. 2d 888. We then said:

"A consideration of the language contained in the Clark will in the light of this rule leads us to the conclusion that the devise to the plaintiff does not vest her with an absolute, unrestricted title to the property she received under the will.

". . . They (expressions used in the will) are imperative and dispositive in nature, effectively devising the property to others in the event plaintiff should die without issue surviving. (citing cases)"

The cause was remanded "to the end the court may spell out plaintiff's rights and define the limitations attached to her title to the property involved."

Even so, there is perhaps language in the opinion which would prompt the conclusion we held that the provisions of the will, and particularly the codicil, are sufficient, if effective, to create limitations upon the title of plaintiff to the personal property bequeathed to her but left open for future decision the question whether such limitations are valid and vest defendants with a contingent future interest in the property. The parties have proceeded upon the theory this was the intent and effect of the decision. For the purpose of more complete discussion of the question we will now so treat it.

In the early days of English history, holdings of choses in action and durable personal property were comparatively insignificant. Stocks, bonds, notes, and durable chattels not purely personal in nature, such as now compose the bulk of many estates, did not exist. So it was then considered that the ownership of personal property was absolute and incapable of division into succession interests and there could be no remainder or other future interest in a chattel. ". . . Future interests other than those arising out of the law of bailments were not permitted in the field of personal property." Gavit Black. Comment. 452; 24 A. & E. Enc. 436; 2 Black. Comment. (Lewis's Ed.) 856; 2 Kent Comm. 352; Gray Perpetuities (3rd Ed.) 598; Thompson Wills 435, sec. 353; *Baker v. R. R.*, 173 N.C. 365, 92 S.E. 170.

But the courts of England in the seventeenth century relaxed the rule by holding that a future interest in personal property could be created by will. Gray Perpetuities (3rd Ed.) 600. Property *quae ipso usu consumuntur* was excepted and, originally, there were restrictions and limitations as to how such property was to be held and managed for the protection of the contingent future interest or remainder which are not material here.

"The English authorities . . . hold generally that a disposition of a remainder in a chattel is good only in a will . . . or when given by the medium of a trust." 24 A. & E. Enc. 438.

The common law rule has been abandoned by the American courts.

"Today . . . (in the various courts of the United States) the generally accepted rule is that the same future interests that are permissible in the field of real property law are also permissible in the law of personal property, and the Rule against Perpetuities is a limitation on the creation of such interests in both fields." Gavit Black. Comment. 452; 1 Simes F.I. 369; Thompson Wills 435, sec. 353; Gray Perpetuities (3rd Ed.) 72; 3 Page Wills 421, sec. 1150. For cases see Gray Perpetuities (4th Ed.), sec. 848, n. 1, and 14 N.C.L.R. 197, n. 6.

"The rule is now well established that personal property, as well as real estate, is a proper subject of executory interests and limitations, provided the contingency operating to defeat the estate of the first taker is no more remote than the law allows." Thompson Wills 443, sec. 357.

"It is the common opinion in the United States that a future limitation of a chattel personal as a legal interest can be created by deed as well as by will . . . In North Carolina alone is the opposite doctrine held." Gray Perpetuities (3rd Ed.) 73-75; 19 A.J. 570, sec. 114.

"In America a future limitation by will of a chattel personal passes a legal interest . . . Even in North Carolina, where . . . a future limitation of a chattel personal by deed is bad, a future limitation by will of

such chattel is good." Gray Perpetuities (3rd Ed.) 71-72; 1 Simes F.I. 369; Gray Perpetuities (4th Ed.) 744.

So then, as stated in the textbooks cited, North Carolina still follows the common law rule which permits legal future interests in personal property to be created by will but not by deed.

"The principle of *Jones v. Spaight* (4 N.C. 157) is that since 1784, executory limitations of land and chattels are to be construed alike, upon the presumption that the intention of the testator is that in each case the estate should go over on the same event . . ." *Zollicoffer v. Zollicoffer,* 20 N.C. 574.

"At common law the ownership of personal property was absolute and incapable of division into successive interests, but this was modified by the English courts to permit the disposition of such property *by will,* but not by deed, upon the same terms and in the same manner as real property, and this State has followed and adopted the later doctrine." *Baker v. R. R., supra.*

Recognizing and applying the common law rule as the law in this jurisdiction, we have consistently held that the bequest of a remainder in personal property subject to a preceding life estate vests in the remainderman an enforceable legal estate in the property so bequeathed. *Dunwoodie's Executors v. Carrington,* 4 N.C. 355; *Ingram v. Terry,* 9 N.C. 122; *Burnett v. Roberts,* 15 N.C. 81; *Smith v. Barham,* 17 N.C. 420; *Knight v. Wall,* 19 N.C. 125; *Knight v. Leak,* 19 N.C. 133; *Creswell v. Emberson,* 41 N.C. 151; *Chambers v. Bumpass,* 72 N.C. 429; *Hodge v. Hodge,* 72 N.C. 616; *Ritch v. Morris,* 78 N.C. 377; *Britt v. Smith,* 86 N.C. 305; *In re Knowles,* 148 N.C. 461; *Williard v. Weavil,* 222 N.C. 492, 23 S.E. 2d 890.

The rule has been applied in like manner where there was a gift generally to the first taker of (1) specific personal property, or (2) the entire estate of testator, or (3) the residue of the estate, with a limitation over to others in the event the original donee should die without issue or upon some other contingency. *M'Kay v. Hendon,* 7 N.C. 21; *Zollicoffer v. Zollicoffer, supra; Threadgill v. Ingram,* 23 N.C. 577; *Skinner v. Lamb,* 25 N.C. 155; *Gregory v. Beasley,* 36 N.C. 25; *Spruill v. Moore,* 40 N.C. 284; *Jones v. Simmons,* 42 N.C. 178; *Braswell v. Morehead,* 45 N.C. 26; *Hall v. Robinson,* 56 N.C. 348; *Williams v. Cotten,* 56 N.C. 395; *Baker v. R. R., supra; Ernul v. Ernul,* 191 N.C. 347, 132 S.E. 2.

When such future interest is created by will it is valid and vests in the ulterior taker an enforceable title either vested or contingent, depending on the condition or event upon the happening of which the right of possession is made to rest.

There is a sound reason why this Court still adheres to the common law rule. So much of the common law "as is not destructive of, or repugnant

to, or inconsistent with, the freedom and independence of this state . . . and which has not been . . . abrogated, repealed, or become obsolete . . ." is declared by G.S. 4-1 to be in full force and effect in this jurisdiction. This statute was first enacted in 1715, re-enacted in 1778, and successively with each complete re-enactment of our statute law. *Speight v. Speight,* 208 N.C. 132, 179 S.E. 461.

With full knowledge of the decisions on the subject the General Assembly has not seen fit to alter the rule except as to slaves (1 Rev. Stat., ch. 37, sec. 22, Act of 1823; Revised Code, 1854, ch. 37, par. 21), and of course both of the Acts respecting slaves are now obsolete. It is the prerogative of the Legislature and not the Court to so modify the rule as to bring it in line with modern decisions in other jurisdictions. Until this is done, we must apply the law as we find it.

For cases holding that a future interest in personal property may not be created *inter vivos* see *Brown v. Pratt,* 56 N.C. 202; *Outlaw v. Taylor,* 168 N.C. 511, 84 S.E. 811; *Speight v. Speight,* 208 N.C. 132, 179 S.E. 461; and *Nixon v. Nixon,* 215 N.C. 377, 1 S.E. 2d 828.

But plaintiff cites and relies on *Hood v. McElvain,* 215 N.C. 568, 2 S.E. 2d 557. She stressfully contends that the Court in that decision abandoned the common law rule and placed deeds and wills on a parity by holding that there can be no valid future interest in personal property created either by will or deed.

That opinion, considered apart from the record in the case, is clearly susceptible of that interpretation. "But 'the law discussed in any opinion is set within the framework of the facts of that particular case (citing cases);' or as expressed by *Chief Justice Marshall* in *U. S. v. Burr,* 2 L. Ed. 684, at p. 690: 'Every opinion, to be clearly understood, ought to be considered with a view to the case in which it was delivered.'" *Poindexter v. Motor Lines,* 235 N.C. 286, and cases cited.

When the *Hood case* is so considered, it is made to appear that it does not sustain plaintiff's position. There the court below concluded that the bequest to the first taker was coupled with an unrestricted right of disposition and that therefore the limitation over to the ulterior beneficiaries was void. While the record does not seem to sustain this conclusion, the appellant did not assail the judgment on that ground or cite any authority in respect thereto. And when the gift is to the immediate legatee with unrestricted power of disposition, it vests the absolute estate, leaving nothing in the testator "capable of being given over to a third person." *Hall v. Robinson, supra,* Anno. 17 A.L.R. 2d 30. The attempted limitation over is void for repugnancy. *Hall v. Robinson, supra; Chewning v. Mason,* 158 N.C. 578, 74 S.E. 357; *Hambright v. Carroll,* 204 N.C. 496, 168 S.E. 817; 3 Page Wills 426, sec. 1153; Thompson Wills 438.

On the appeal from the judgment of the Superior Court, this Court was limited to a consideration of exceptions and assignments of error contained in the record and brought forward and discussed in the appellant's brief. Of necessity, therefore, the judgment entered was affirmed.

The court below sufficiently defined the nature of plaintiff's title to the personal property bequeathed to her and spelled out "the limitations, restrictions, qualifications and conditions" attached thereto by the language contained in the Clark will and codicil. There is no exception or assignment of error in the record directed to this particular part of the judgment and plaintiff does not challenge the same in her brief. We are of the opinion that the conclusions of the court below fully comply with the directions contained in our opinion on the original appeal and correctly interpret the terms of the will and codicil in this respect.

The judgment entered in the court below is

Affirmed.

STATE v. TOM WHITLEY THOMAS.

(Filed 24 September, 1952.)

1. Criminal Law §§ 14, 76a—

In a hearing upon a writ of *certiorari* to a recorder's court, the Superior Court is limited to questions of law or legal inference, and must act on the facts as they appear of record, and therefore on such hearing, challenging an order of the recorder's court executing a suspended judgment, defendant is not entitled to offer evidence either in regard to the facts and circumstances relating to the violation of the conditions of the suspended judgment or to whether the court should exercise its discretion and continue defendant on probation.

2. Criminal Law § 62f—

The right to appeal from order executing a suspended judgment does not apply to a person under the supervision of the Probation Commission. Chap. 1038, Session Laws of 1951.

3. Criminal Law § 17c—

A plea of *nolo contendere* may be entered only by leave of court, and such plea establishes the fact of guilt only for the purpose of punishment in the particular case in which it is entered, and cannot be used against the defendant as an admission in a subsequent civil action or a subsequent criminal proceeding. A finding by the court upon such plea that defendant is guilty is surplusage.

4. Criminal Law § 62f—

A suspended judgment cannot be put into execution solely on the basis of defendant's plea of *nolo contendere* in a subsequent legal action, even though the fact of guilt in such action would be a violation of the condi-

tions of suspension, but the solicitor must prove the fact of guilt by evidence *aliunde*.

5. Same—

A suspended sentence should not be invoked on the unverified report of the Probation Officer.

APPEAL by defendant from *Frizzelle, J.*, at July Term, 1952, of EDGECOMBE.

Criminal prosecution upon a warrant, No. 19246, issued out of the recorder's court of Edgecombe County, North Carolina, charging that defendant did unlawfully and willfully (1) transport, and (2) have in his possession six gallons of nontax-paid whiskey against the form of the statute, etc., heard in Superior Court of Edgecombe County upon defendant's petition for *certiorari* to bring up for review, and for reversal of judgment invoking a suspended sentence of imprisonment entered by said recorder's court.

In this connection, Tom Whitley Thomas applied to the judge holding the courts of the Second Judicial District, by verified petition, in which, after reciting the fact of a suspended judgment, on conditions stated, and the revocation thereof, set forth the following: "That no right of appeal is provided by statute in such cases, and that, as your petitioner is informed and verily believes, the said judgment revoking said probation, so in form rendered, was and is improper, irregular and erroneous for the following reasons, to wit: Your petitioner has not violated the terms or conditions of probation warranting or justifying revocation; and, further, the punishment invoked as a result of the revocation of probation is unduly harsh, cruel and unusual in violation of the Constitution." Thereupon petitioner prayed that a writ of *certiorari* issue.

And pursuant to an order of the judge aforesaid, the records of the recorder's court were certified 2 June, 1952, and as so certified, showed in the main the following: 1. At the 2 October, 1951, term of the recorder's court aforesaid the defendant entered a plea of guilty to the crimes of transporting, and possession of nontax-paid whiskey. Thereupon the court sentenced defendant to jail, to be assigned to work under the supervision of the State Highway and Public Works Commission of North Carolina for a period of two years. This sentence was suspended and defendant was placed on probation for a period of five years under the supervision of the North Carolina Probation Commission and its officers, subject to the provisions of the laws of this State and the rules and orders of said commission and its officers with leave that execution might be prayed at any time during the period of probation.

The conditions of probation, among others, are these: That defendant pay $2,000.00 fine and $174.95 costs; that his car be confiscated and

ordered sold according to law; that whiskey be confiscated and destroyed in such manner as directed by the Probation Commission; and that defendant "violate no penal law of any State or the Federal Government and be of general good behavior." The fine and costs were paid "10/9/51."

2. Thereafter on 11 March, 1952, the Probation Officer made "his official report on the conduct of the above named petitioner," as required by Section 4 of Chapter 132, Public Laws 1937, in which petition, after reciting the judgment, and terms of the judgment suspended as above recited, set forth: "Now, therefore, the above named probationer has violated conditions of his probation judgment in that he entered a plea of *nolo contendere* in recorder's court, Greenville, North Carolina, February 12, 1952, to a charge of operating a motor vehicle after his license had been suspended, and was found guilty by the court; and given a 90-day sentence, which sentence was suspended upon the condition that the defendant pay a fine of $200 and the costs; and upon the recommendation that his license be suspended for two additional years.

"Now, therefore, your probation officer prays the court to make suitable disposition in this case." (Note: This report and petition does not appear to have been verified.)

3. Thereupon, on 11 March, 1952, the judge of the recorder's court of Edgecombe County entered an order in which it is recited that "defendant appeared in open court to answer the charge of violating the conditions of a probation judgment imposed upon him at the October 2, 1951 term," etc., and that, "it now, therefore, appears to the court, and the court finds as a fact, from a written report submitted by the probation officer, and the defendant's own admission in open court that the above named defendant, Tom Whitley Thomas, has violated conditions of his probation judgment, in that he entered a plea of *nolo contendere* in recorder's court, Greenville, North Carolina, February 12, 1952, to a charge of operating a motor vehicle after his license had been suspended and was found guilty by the court and given a 90-day sentence, which sentence was suspended upon the condition that the defendant pay a fine of $200.00 and the costs; and upon the recommendation that his license be suspended for two additional years." And thereupon the judge of recorder's court adjudged "that probation be and the same is hereby revoked and the two-year sentence imposed in case No. 19246 and suspended, is hereby ordered put into effect . . ."

The case on appeal before this Court discloses that upon the call of the case for trial, apparently in Superior Court, defendant, the petitioner, announced to the court that he had some 15 or 20 witnesses which he desired to place upon the stand to testify in his behalf, which testimony would touch upon the circumstances and facts surrounding his having

operated his motor vehicle after his license was revoked as set out in the record, and touching upon the reasonableness of the punishment and as bearing upon the question of whether or not the court in its discretion should continue the defendant on probation. Whereupon the solicitor objected to any testimony whatever being offered. The objection was sustained and defendant excepted. Exception No. 1.

Whereupon the solicitor moved the court to dismiss the petition and deny the writ and remand the case for execution of sentence. The motion was granted, and defendant excepted. Exception No. 2.

The presiding judge, after reviewing the record as so certified, and reciting that "it further appearing that the defendant did not appeal either from the judgment sentencing him to the roads, suspended upon payment of the fine, or from the judgment revoking the probation judgment, and took no action with respect to the same, until the filing of application for writ of *certiorari* before the judge holding the courts of the Second Judicial District on the 20th day of March 1952, the court is of opinion that upon the admitted facts and these findings the defendant is not entitled to *certiorari*," ordered that defendant's motion for *certiorari* be denied, and that the cause be remanded to the recorder's court of Edgecombe County for the execution of the judgment theretofore entered in that court on 11th day of March, 1952.

Defendant excepted, Exception No. 3, and appeals therefrom to the Supreme Court, and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and C. G. Powell, Member of Staff, for the State.

Cameron S. Weeks and T. Chandler Muse for defendant, appellant.

WINBORNE, J. Defendant, appellant, here presents for consideration and decision three assignments of error based upon exceptions duly taken on the hearing before the judge of Superior Court.

The exceptions are: Number 1, to the refusal of the judge of Superior Court, upon hearing on the record certified from the recorder's court of Edgecombe County, to hear testimony touching upon (a) the circumstances and facts surrounding defendant's having operated his motor vehicle after his license had been revoked, as set out in the record, and (b) the reasonableness of the punishment as bearing upon the question whether or not the court in its discretion should continue defendant on probation;

Number 2, to the dismissal of defendant's petition for writ of *certiorari*, and remanding the case for execution of sentence; and

Number 3, to the signing of the judgment from which this appeal is taken.

Assignment of Error No. 1 is untenable for that when a criminal action has been brought from an inferior court to the Superior Court by means of a writ of *certiorari,* the Superior Court acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record and can only revise the proceedings as to regularity or on questions of law or legal inference. *S. v. Tripp,* 168 N.C. 150, 83 S.E. 630; *S. v. Rhodes,* 208 N.C. 241, 180 S.E. 84; *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Smith,* 233 N.C. 68, 62 S.E. 2d 495; *S. v. Stallings,* 234 N.C. 265, 66 S.E. 2d 822.

It is pertinent to note that the provisions of Chap. 1038 of 1951 Session Laws of North Carolina, providing that in all cases where a suspended sentence theretofore entered in a court inferior to the Superior Court is invoked by the court inferior to the Superior Court, the defendant shall have the right to appeal therefrom to the Superior Court, and, upon such appeal, the matter shall be heard *de novo,* but only upon the issue of whether or not there has been a violation of the terms of the suspended sentence, by express proviso, do not apply to a person under the supervision of the Probation Commission, as is the present defendant. Why the exception is made, is not before us.

However, the exceptions on which assignments of error Numbers 2 and 3 are based are well taken. These raise the question as to whether error in matters of law appear upon the face of the record. *Culbreth v. Britt Corp.,* 231 N.C. 76, 56 S.E. 2d 15.

The judge of Superior Court was authorized to consider the facts as they appear of record, and could only revise the proceedings as to regularity, or on questions of law or legal inference. *S. v. Tripp, supra.* But it appears here that the judge of Superior Court made findings of fact which were taken into consideration in his decision, and that his decision is predicated in part upon the fact that defendant did not appeal from the judgment revoking the probation judgment, and that he did not take any action with respect to the same until the filing of application for writ of *certiorari.* As above held, right of appeal was not open to defendant. His only redress was by petition for writ of *certiorari. S. v. King, supra.*

Moreover, it is apparent from the record that all through the proceeding there is confusion as to the effect of a plea of *nolo contendere* in the case in which it was entered, and its consequences outside the particular case. The text writers and annotators, interpreting decisions of the courts of the land, say (1) that "all the decisions are in agreement that the plea of *nolo contendere* cannot be entered by a defendant as a matter of right, but is pleadable only by leave of the court,"—that "its acceptance by the court is entirely a matter of grace." Ann. 152 A.L.R. 253, at p. 267, citing among other cases *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473; *S. v. Parker,* 220 N.C. 416, 17 S.E. 2d 475; (2) that in all decisions in point

the legal effect of the plea of *nolo contendere,* after it has been offered by the defendant and accepted by the court, in respect to the case in which it is interposed, is that it becomes an implied confession of guilt, and for the purposes of the case only, equivalent to a plea of guilty. Ann. 152 A.L.R. 253, at 273; and (3) that as to consequences of plea outside the case, "the fundamental rule, as unanimously accepted by all the courts as the rule expressing the effect of the plea in the case, is that while the plea of *nolo contendere* may be followed by a sentence, it does not establish the fact of guilt for any other purpose than that of the case to which it applies." That "the difference between it and a plea of guilty, therefore, simply is that while the latter is a confession that binds the defendant in other proceedings, the former has no effect beyond the particular case." That "consequently it cannot be used against the defendant as an admission in any civil suit for the same act." And, that "the rule seems to be the same in case of a later criminal proceeding." Ann. 152 A.L.R. 253, at 280. See also 14 Am. Jur. 954.

The plea of *nolo contendere* has been interposed and accepted in numerous cases in North Carolina, among which are these: *S. v. Burnett, supra; S. v. Parker, supra; S. v. Ayers,* 226 N.C. 579, 39 S.E. 2d 607; *S. v. Beasley,* 226 N.C. 580, 39 S.E. 2d 607; *S. v. Stansbury,* 230 N.C. 589, 55 S.E. 2d 185; *S. v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79; *S. v. Jamieson,* 232 N.C. 731, 62 S.E. 2d 52; *S. v. Horne,* 234 N.C. 115, 66 S.E. 2d 665.

In *S. v. Burnett, supra,* it is said: "A plea of *nolo contendere* . . . is equivalent to a plea of guilty in so far as it gives the court the power to punish . . . The only advantage in a plea of *nolo contendere* gained by the defendant is that it gives him the advantage of not being estopped to deny his guilt in civil action based upon the same facts. Upon a plea of guilty entered of record, the defendant would be estopped to deny his guilt if sued in a civil proceeding."

And in *In re Stiers,* 204 N.C. 48, 167 S.E. 382, this Court held "that a plea of *nolo contendere* does not amount to a conviction or confession in open court of a felony," . . . and "that as a disbarment proceeding is of a civil nature, the mere introduction of a certified copy of an indictment, and judgment thereon, based upon a plea of *nolo contendere,* is not sufficient to deprive an attorney of his license,—certainly when he is present in court, denying his guilt and strenuously contending that his fault, if any, rested upon a technical violation of a statute."

And in *S. v. Stansbury, supra,* in opinion by *Ervin, J.,* it is said: "The defendant's plea of *nolo contendere* . . . was tantamount to a plea of guilty for the purposes of this particular criminal action."

In the light of these principles, since this Court has recognized the ruling that a plea of *nolo contendere* cannot be used against a defendant

as an admission in a civil action and in an action of the nature of a civil action, *In re Stiers, supra,* it seems reasonable and logical that such plea ought not to be used against the defendant as an admission in any other criminal action. Hence we hold that a plea of *nolo contendere* entered by defendant in the recorder's court, at Greenville, N. C., to the charge of operating his automobile after his license had been suspended cannot be used against him as an admission on the question as to whether or not he has violated the condition of the judgment suspended by the recorder's court of Edgecombe County. Proof of such violation, if any, must be made independently of such plea, or of evidence or admission by defendant, that such plea was made.

Moreover, the law does not sanction a conditional plea of *nolo contendere. S. v. Horne, supra.* Hence if defendant entered a plea of *nolo contendere* in the recorder's court at Greenville, N. C., to the charge of operating a motor vehicle after his license had been suspended, the basis on which it is contended he violated the conditions of his probation judgment, and it was accepted by the court, the recorder may not find him guilty of the charge. Thus the super-added clause "and was found guilty by the court" would be a misapprehension of the effect of a plea of *nolo contendere* in a criminal action, and could not be upheld. See *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 324, and numerous other cases.

This is so, whether the misapprehension originated with the recorder of the Greenville court or with the probation officer. Further, it may be observed here that the suspended sentence should not be invoked on the unverified report of the probation officer.

"The matters involved—the enforcement of the criminal law and the liberty of the citizen—are worthy of exactitude and clear understanding," declared the late *Chief Justice Stacy* in *S. v. Horne, supra,* in opinion written in accordance with the Court's decision and filed by order of the Court after his death. So say we all now on this appeal.

For errors pointed out, the judgment of the Superior Court from which this appeal is taken, and the judgment of the recorder's court of Edgecombe County invoking the suspended sentence will be set aside, and the cause remanded to the Superior Court of Edgecombe County to be by it remanded to the recorder's court of said county for hearing in accordance with law and justice, on the question of fact as to whether defendant has violated the condition on which the sentence was suspended,—at which hearing defendant shall have an opportunity to be heard, and to offer evidence.

Error and remanded.

RUSSELL S. CHESSON v. NELLO L. TEER COMPANY, A CORPORATION.

(Filed 24 September, 1952.)

1. Highways § 4b—

A motorist driving upon a highway which is under construction or repair cannot assume that there are no obstructions or defects ahead, but is under duty to keep his vehicle under such control that he can stop it within the distance he can see a proper barrier.

2. Automobiles § 8a—

The duty to keep a proper lookout requires increased vigilance when the motorist's danger is increased by conditions obscuring his view.

3. Highways § 4b—Plaintiff's own negligence held proximate cause of accident at barricade of highway under construction.

Plaintiff's evidence tended to show that defendant construction company placed no signs or warnings along the highway under construction, that while the shoulders of the road had not been finished, plaintiff was unaware that the paving had not been completed, that defendant had erected a barrier across the highway at the end of the paving which plaintiff testified that he could have seen three hundred feet away, but that the barrier was obstructed on the occasion in question by a car which was turning around in the highway in front of the barrier, that plaintiff slackened his speed upon seeing the other car but that after it had cleared his lane of travel he accelerated his speed, at which time he first saw the barrier only forty feet ahead, that he immediately applied his brakes but was unable to stop, that he turned left into a detour, lost control of his car, ran off the road on the right-hand side of the detour, hit and broke a cement drain, causing his car to turn over and over. *Held:* The conduct of the innocent motorist in obscuring the barrier cannot result in liability on the part of defendant, it being apparent that plaintiff's own negligence in failing to keep a proper lookout and in traveling at a speed greater than was reasonable and prudent under the circumstances, was the real, efficient and sole proximate cause of the accident, and defendant's motion to nonsuit was properly allowed.

4. Automobiles § 18g (5)—

The physical facts at the scene of an accident may speak louder than words.

APPEAL by plaintiff from *Frizzelle, J.*, April Term, 1952, of WASHINGTON.

This is a civil action to recover for personal injuries and property damage sustained by the plaintiff as a result of the alleged negligence of the defendant. The pleadings raise the usual issues of negligence, contributory negligence and damages.

In March, 1950, the defendant, Nello L. Teer Company, a corporation, entered into a contract with the State Highway and Public Works Commission of North Carolina to hard surface with asphalt a certain public road leading from a point near the town of Plymouth in Washington

County and running eastwardly to Mackeys to intersect with U. S. Highway No. 64, and to construct dirt shoulders along said road. This road was built substantially along the route of an existing dirt road. It is intersected by a number of public roads, among them being one leading from Albemarle Beach.

On the date complained of, all the surfacing of the highway had been completed and the road opened to traffic, with the exception of 1,000 feet along which the contractor had provided a detour. The shoulders had not been constructed.

Shortly after noon, on Labor Day, 4 September, 1950, the plaintiff was driving his car en route from Albemarle Beach to Plymouth and entered this highway. He was accompanied by Michael Trueblood. The plaintiff testified that he knew the road was under construction and that the shoulders had not been built; that he did not know the paving had not been completed. After he had proceeded westwardly on the new highway for approximately two miles, at a speed of about 40 miles per hour, he noticed a car ahead of him apparently trying to turn around. The car turned and backed one time and came back around and proceeded eastwardly on the south side of the road. When he saw the car he slowed down to about 25 or 30 miles per hour, but accelerated his speed when the car completed its turn. Then for the first time he noticed a barrier across the highway just beyond the point where the car had turned. The barrier consisted of a pole about 5 or 6 inches in diameter at the big end; it was about 3 feet above the pavement and was resting on a mound of dirt on his right-hand side and in the groove of a couple of cross-poles on the left-hand side. "I was not traveling over 35 miles per hour when I saw the barricade. The brakes on my car were in good order. It was impossible to stop my car in the space between the barricade and me when I saw it . . . I first saw the pole and then looking for some alternative, I looked and saw this road (the detour) to the left. As soon as the other car cleared the lane, I pulled sharply to the left. The detour was on the left side, to the south of the highway. The detour was part of the old road which was being replaced by the newly constructed road. It turned pretty sharp to the left, and then back to the right. . . . The shoulder had not been built at the point where the detour led off the pavement. There was a drop from the paved part down to the dirt, a 8-inch drop. Beyond that was a grader mark where it had been cut, about 6 inches deep. . . . As I turned to enter the detour I dropped off the pavement and when I hit this other mark the car looked like it was going out of control, and I applied my brakes again to keep it from overturning. . . . Then I pulled back to the right and went to the side of the road on the right-hand side of the detour. That put me between the old road and the new road. There was a cement drain tile which ran under the detour. The end projected out

of the roadway. I struck it and it crumbled and fell in. The car was thrown over, and turned over and over." The car, a 1941 Chevrolet, was damaged beyond repair. He also testified there were no signs on or along the highway warning motorists of the detour or barricade. Plaintiff was seriously injured.

Michael Trueblood, a witness for the plaintiff, testified, "When we came to a point just east of White Marsh Church, there was a pole barrier in the road. I first saw a car turning around. When it got turned around it headed toward Mackeys. We were right on the pole, about 40 feet away, then. . . . When I first saw the car that turned around on the pavement we were about one-half mile away. It stopped on the same side we were on, and the next thing I knew it was backing out trying to turn around. . . . We were right on the barricade when he turned so we could see it—about 20 feet away. . . . We could not tell what this car was going to do, the way he was driving. . . . We were going about 35 or 40 miles per hour before we came to the barrier. The old road is close to the barrier, 20 or 25 feet. . . . Chesson applied his brakes and tried to stop when he saw the barricade. . . . He could not stop, and turned off into the old road."

Other witnesses for the plaintiff testified that they had traveled over this road, going in the same direction the plaintiff was traveling, a day or so before the plaintiff had his accident; that there were no signs warning of the approach to the end of the pavement or of a detour ahead, but that they saw the barrier before reaching it and had no difficulty turning off on the detour; that the drop of 6 or 8 inches in going from the paved highway to the detour was not an abrupt drop but an incline or ramp. One of these witnesses, a police officer of the Town of Roper, testified that he was driving 30 or 35 miles an hour as he approached the barrier; that he could see it and had no difficulty in stopping his car before he got to it; that, "At any reasonable or proper speed you could stop before you got to that barrier."

At the close of the plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was denied. Whereupon, the defendant offered numerous witnesses who testified contradicting the plaintiff's evidence with respect to the presence of warning signs and corroborated the plaintiff's witnesses with respect to the gradual incline of the shoulder leading from the highway to the detour. The defendant also offered evidence to the effect that the barricade could be seen for a distance of 800 to 1,500 feet.

At the conclusion of the defendant's evidence, the plaintiff took the stand in rebuttal and on cross-examination testified, "The barrier in my estimation would be hard to distinguish because of its color, and unless you were riding along and had knowledge of that barrier, and were look-

ing directly for it, I would not say that I could see it over 300 feet. I imagine I could see it 300 feet if it had not been obstructed."

In apt time the defendant renewed its motion for judgment as of nonsuit and the motion was allowed and plaintiff appeals, assigning error.

Bailey & Bailey for plaintiff, appellant.

Rodman & Rodman for defendant, appellee.

DENNY, J. The accident complained of occurred in broad daylight. And when the plaintiff's evidence is considered in the light most favorable to him, we do not think it is sufficient to establish actionable negligence on the part of the defendant.

The plaintiff's evidence points unerringly to the fact that he could have seen the barrier on the highway in ample time to have stopped his car before reaching it, if the barrier had not been obscured by another automobile.

What effect then did the conduct of an innocent motorist in obscuring the barrier from plaintiff's view have upon the rights of the litigants? The late *Chief Justice Stacy* pointed out what will and what will not constitute insulating negligence under such circumstances, in *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808, where he said: "The rule is, that if the original act be wrongful, and would naturally prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not in themselves wrongful, the injury is to be referred to the wrongful cause, passing by those which are innocent. *Scott v. Shepherd,* 2 Bl. 892 (*Squib case*). But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the last wrong as the proximate cause, and not to the first or more remote cause."

In applying the above rule to the facts in this case, we cannot concede that the placing of a barrier across a highway that is under construction, when such barrier is erected by the contractor for the protection of the traveling public, is within itself a wrongful act, or that such obstruction "would naturally prove injurious to some person or persons." The very presence of another automobile on the highway under the conditions and circumstances detailed by the plaintiff's evidence, called for caution on his part. In fact, he so testified in the trial below: "I had decreased my speed when I saw a car turning around ahead of me. . . . It was backing out from the road that lead around—the detour. . . . that . . . indicated to me that there was some necessity for care on my part. I slowed down. Then after the car got out of my way I accelerated my speed." Even so,

it is apparent that he did not exercise reasonable care, under the circumstances, for his own safety.

One who operates an automobile on a public highway, which is under construction or repair, cannot assume that there are no obstructions or defects ahead. 60 C.J.S., Section 201 (d), page 528, *et seq.; Humphrey v. Wayne County,* 257 Mich. 398, 241 N.W. 212; *Western Union Tel. Co. v. Stephenson* (C.C.A., 5th Cir.), 36 F. 2d 47; *Schwartz v. Jaffe,* 324 Pa. 324, 188 A. 295; *Duke v. Consolidated Gas Co. of N. Y.,* 244 App. Div. 337, 279 N.Y.S. 442. In such instances it is the duty of a motorist to keep his car under such control that it can be stopped within the distance within which a proper barrier ahead can be seen. *Western Union Tel. Co. v. Stephenson, supra;* Blashfield's Cyclopedia of Automobile Law and Practice, Volume 5, section 3311, page 439. The last cited authority also states in the same section that, "If he (a motorist) is able to stop after seeing a . . . contractor's barrier across a highway, but fails to do so, his contributory negligence will bar his recovery notwithstanding the failure of the contractor to provide statutory signals."

A motorist should exercise reasonable care in keeping a lookout commensurate with the increased danger occasioned by conditions obscuring his view. Blashfield's Cyclopedia of Automobile Law and Practice, Volume 5, section 3318, page 448; 60 C.J.S., section 201 (h), page 541; *Humphrey v. Wayne County, supra; Eller v. R. R.,* 200 N.C. 527, 157 S.E. 800; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326, and cases cited.

The case of *Eller v. R. R., supra,* involved a collision between the plaintiff's automobile and one of the defendant's passenger trains. To show negligence on the part of the defendant, the plaintiff, among other things, relied upon the excessive speed of the train and the failure to give any warning by bell or otherwise of its approach. Another element of negligence insisted upon by the plaintiff was that a car crossing the track at the time he arrived obscured his view. The Court said: "Such obstruction, however, was not due to any fault of the railroad company, and, indeed, was a circumstance wholly beyond its control." See *Lee v. R. R.,* 180 N.C. 413, 105 S.E. 15; and *Moore v. R. R.,* 203 N.C. 275, 165 S.E. 708.

Likewise, in the case of *Murray v. R. R., supra,* the plaintiff, an employee of the defendant railroad, and other of its employees, were engaged in repairing a grade crossing. To protect the workmen, the railroad had placed a dump car as a barricade on the concrete portion of the highway. As a Mrs. Elliott, a codefendant, approached the crossing, she overtook another car traveling in the same direction and on the same side of the highway. She speeded up to pass the car ahead and just at that moment it turned to the left to go around the barricade. Then Mrs. Elliott kept straight ahead, not seeing the barrier until too late to stop. She ran into

the barrier and seriously injured the plaintiff. It was contended there, as in the instant case, that the defendant railroad company failed to provide sufficient warning to travelers on the highway that there was a barrier at the crossing. It was also argued that Mrs. Elliott was prevented by the car ahead from seeing the obstruction which had been placed in the highway by the defendant railroad, and that she did not see it until the car ahead turned to the left, when it was too late for her to stop in time to have averted the accident. This Court held that plaintiff's injury was proximately caused by Mrs. Elliott's failure to exercise ordinary care and to observe the laws of the road in the operation of her automobile, independent of any act of omission of duty on the part of the defendant railroad.

In applying the foregoing principles of law to the facts in this case, it is our opinion, and we so hold, that the negligence of the plaintiff was the proximate cause of his injuries and damage. He was traveling on a highway that he knew was under construction. His guest passenger saw the automobile stop on the highway when they were one-half mile away. The plaintiff drove his car the one-half mile and was within 40 feet of the barrier across the highway as the other car cleared his side of the road. When the car completed its turn, he accelerated his speed although the barrier was in plain view only 40 feet ahead. When he did see the barrier, he applied his brakes but could not stop. As soon as the other car cleared the south lane of the highway, he turned left into the detour, lost control of his car, ran off the road on the right-hand side of the detour, broke a cement drain, and the car had such momentum that it not only turned over, but, in his language "turned over and over." It would seem to be another case where the physical facts speak louder than words. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88.

The judgment of the court below is

Affirmed.

R. P. DAVIS v. J. L. DAVIS, JOSIE DAVIS AND PENDER DAVIS, A MINOR.

(Filed 24 September, 1952.)

1. Frauds § 2—

Ordinarily, a promissory representation cannot be made the basis of fraud unless it is made with a present intent not to carry it out, and thus amounts to a misrepresentation of existing fact.

2. Cancellation of Instruments § 2—Evidence held insufficient to show that promise to support grantor was fraudulent misrepresentation.

A deed from a father to his son and daughter-in-law in consideration of the grantees' promise to support grantor for the remainder of his natural

life cannot be canceled on the ground that the promissory representation was fraudulent when it appears from grantor's own evidence that for some five years after the execution of the deed the grantor lived with grantees and that grantor sought cancellation at the expiration of that time because of the grantees' conveyance of the property to their minor son and the failure of the male grantee to send grantor the sum of fifty dollars for food and clothes, since the evidence does not show that grantees had no intention of supporting grantor at the time the agreement was entered into.

3. Fiduciaries § 1: Cancellation of Instruments § 2—

No presumption of fraud or undue influence arises from the conveyance of land by a father to his son, since the relationship is not a fiduciary one.

4. Deeds §§ 4, 16c—

Promise by grantees to support grantor for the balance of his natural life is alone sufficient consideration to support the deed, and where the evidence discloses that the deed was executed with the express agreement that the grantees would look after and support grantor, and also that the male grantee paid the sum of five hundred dollars to grantor and canceled a deed of trust on the property in the male grantee's favor, grantor's cause of action to cancel the deed for want of consideration is properly nonsuited.

APPEAL by plaintiff from *Sharp, Special Judge,* March-April Term, 1952, of MADISON.

This is an action to set aside a fee simple deed executed 17 September, 1945, by the plaintiff to the defendants, J. L. Davis and wife, Josie Davis, as tenants by the entirety, for alleged fraud and undue influence in its procurement and for lack of consideration; and to cancel a deed executed on 13 October, 1950, by these defendants, conveying the premises in question to their minor child, Pender Davis, subject to a life estate reserved in Josie Davis. The minor defendant is represented in this action by a duly appointed guardian *ad litem.* The additional facts pertinent to the appeal are hereinafter set out.

1. R. P. Davis, now 78 years of age, is the father of the defendant, J. L. Davis. His wife died in 1932. Thereafter, his daughter, Mrs. Clark, or his daughter, Mrs. Rice, lived with him until 1938. In 1938, his son, J. L. Davis and his wife and children moved into plaintiff's home and have resided there since that time.

2. It is alleged that soon after J. L. Davis and his wife moved into the home of plaintiff, they undertook to carry out a preconceived plan to defraud the plaintiff out of his farm and home; that they insisted they wanted to live with the plaintiff, to care for and maintain him for the remainder of his natural life; that they supplanted their will for his, and thus induced the plaintiff to convey his farm and home to them, which property it is alleged is reasonably worth $6,000 to $8,000. It is further alleged that said conveyance was made without consideration.

3. The deed from the plaintiff to the adult defendants, recites a consideration of $500.00 and other considerations. Immediately following the description of the property conveyed, the deed contains this stipulation: "With the express agreement and understanding that the said parties of the second part hereto are to live with, look after, care for, support and maintain the said R. P. Davis for and during his natural life."

4. Prior to the execution of the above deed, and most of the time since, the defendant, J. L. Davis, has been working in Detroit, Michigan. The deed was prepared by plaintiff's attorney, and neither his son, J. L. Davis, nor his wife was present at the time of its preparation. As a consideration for the execution of the deed, the defendant, J. L. Davis, was to pay the plaintiff $500.00 and cancel a deed of trust held by him on his father's property, which his father had executed to secure an indebtedness to him in the sum of $800.00; and the defendants, J. L. Davis and wife, were to support the plaintiff in accordance with the provisions contained in the deed.

5. In the trial below the plaintiff, among other things, testified, "When I made the deed to Johnny Davis in 1945 I went right in the Register of Deeds' office and Johnny cancelled the deed of trust that I made to him at that time as a consideration for my deed. . . . At that time he paid out to me $500.00 in one hundred dollar bills in the courthouse. When he paid me the $500.00 and cancelled the eight hundred dollar deed of trust I executed the deed. . . . I knew exactly what I was doing when I made the deed. . . . Nobody made me make that deed. . . . I went to my attorney myself and had the deed made myself and sent it to Johnny Davis in Detroit."

6. According to plaintiff's evidence, he has been dissatisfied with the support furnished him, particularly during the last two years. He testified that his son's wife told him in November, 1950, that if he got anything he would have to get it out of J. L. Davis. About a week after that, the plaintiff left the home of the defendants and has resided since that time with his daughter, Mrs. Clark. The plaintiff further testified, "I told J. L. Davis after he made that deed to the boy, I said, 'If you hadn't made that deed to your boy, I would not have brought this suit.' And if he had sent me the $50.00 to buy me some food and clothes. . . . I will say that when I made this deed in 1945 I was perfectly willing for him to have the land if he would support me, but he failed to do it. The only objection I have up to the present time is that he is not supporting me."

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit and the motion was allowed and the plaintiff appeals, assigning error.

Clyde M. Roberts and Calvin R. Edney for plaintiff, appellant.
J. M. Baley, Jr., and Charles E. Mashburn for defendants, appellees.

DENNY, J. It is the general rule that an unfulfilled promise cannot be made the basis for an action for fraud. *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364; *Shoffner v. Thompson,* 197 N.C. 664, 150 S.E. 195; *Trust Co. v. Yelverton,* 185 N.C. 314, 117 S.E. 299; *Pritchard v. Dailey,* 168 N.C. 330, 84 S.E. 392; 23 Am. Jur., Fraud and Deceit, section 38, page 799, *et seq.* The rule, of course, is otherwise, where the promise is made fraudulently with no intention to carry it out, and such promise constitutes a misrepresentation of a material fact which induces the promisee to act upon it to his injury. *Williams v. Williams, supra.*

The evidence of the plaintiff, however, is not sufficient to show that J. L. Davis and wife, Josie Davis, had no intention of supporting the plaintiff at the time the agreement for support was entered into. The defendants had lived in the plaintiff's home approximately 7 years before the deed was executed, and plaintiff had lived with the defendants for more than five years thereafter before any serious controversy arose with respect to the plaintiff's support. Moreover, the plaintiff made it clear that he would not have instituted this action if his son had sent him the $50.00 (apparently an amount he had requested) for food and clothes, and he and his wife had not conveyed the premises in question to their minor son.

The plaintiff insists that a confidential relationship existed between the adult defendants and the plaintiff which raised the presumption of fraud and entitled him to go to the jury, irrespective of any other evidence. The contention is untenable. This action does not involve a fiduciary relationship as was the case in *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615. Here, we are dealing with a parent and his son and daughter-in-law. It is a family relationship, not a fiduciary one, and such relationship does not raise a presumption of fraud or undue influence. *Gerringer v. Gerringer,* 223 N.C. 818, 28 S.E. 2d 501; *In re Craven,* 169 N.C. 561, 86 S.E. 587.

Likewise, the allegation in the complaint to the effect that the deed was executed and delivered without consideration is negatived by the plaintiff's own testimony. At the time of its execution, the plaintiff received the equivalent of $1,300 and the promise of support. The latter promise alone was sufficient consideration for the transfer of the property. *Minor v. Minor,* 232 N.C. 669, 62 S.E. 2d 60; *Lee v. Ledbetter,* 229 N.C. 330, 49 S.E. 2d 634; *Ayers v. Banks,* 201 N.C. 811, 161 S.E. 550; *Salms v. Martin,* 63 N.C. 608.

The plaintiff excepts to the exclusion of certain evidence purporting to be statements made by the plaintiff prior to the execution of the deed involved herein. The exception will not be upheld.

A careful consideration of all the evidence disclosed by the record, when considered in the light most favorable to the plaintiff, at most, shows only a breach of contract for support. *Gerringer v. Gerringer, supra.* The evidence is clearly insufficient to warrant the submission of an issue to the jury on the question of fraud, undue influence, or lack of consideration.

The judgment of the court below is

Affirmed.

ROBERT O. ALEXANDER v. LAWRENCE E. BROWN AND CARL W. SMITH.

(Filed 24 September, 1952.)

1. Malicious Prosecution § 7—

In an action for malicious prosecution, plaintiff is entitled to allege the fact of his arrest and all circumstances of aggravation attending it as bearing upon the issue of damages.

2. Pleadings § 22b—

Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. G.S. 1-163, G.S. 1-152.

3. Judgments § 17a—

Where a judicial ruling is susceptible of two interpretations, the court will adopt the one which makes it harmonize with the law properly applicable to the case.

4. Courts § 5—Order allowing amendment, made after order allowing motion to strike, held not repugnant when properly construed.

Where a motion to strike a paragraph of the complaint relating to the second cause of action is made on the ground that the facts alleged therein by reference to paragraphs of the first cause of action were irrelevant, and such motion is granted without statement of reasons, another Superior Court judge has the discretionary power to allow an amendment setting out the same facts in full instead of by reference to other parts of the complaint, when such allegations are relevant and material, since the order granting the motion to strike will be interpreted as based upon error in incorporating allegations by reference contrary to Supreme Court Rule No. 20 (2) and not on the ground that the allegations were immaterial, and thus the two orders harmonized, with the second implementing rather than repudiating the first.

APPEAL by defendants from *Bobbitt, J.*, at June Term, 1952, of BUNCOMBE.

Civil action for false arrest and imprisonment and for malicious prosecution heard upon a motion to strike parts of an amendment to the complaint.

These are the salient facts:

1. This cause was heard by us at the Fall Term, 1949. *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470.

2. Thereafter, to wit, on 7 June, 1951, the plaintiff Robert O. Alexander recast his complaint so as to allege a first cause of action against the defendants Lawrence E. Brown and Carl W. Smith as joint tortfeasors for false arrest and imprisonment, and a second cause of action against the defendant Lawrence E. Brown alone for malicious prosecution.

3. Both causes of action allegedly arose out of a series of related events, which are depicted from the plaintiff's point of view in the opinion on the former appeal.

4. When he remodeled his complaint, the plaintiff recounted the circumstances attending his arrest and imprisonment with particularity in the eight paragraphs of his first cause of action.

5. The plaintiff invoked the deprivation of his liberty as an element of damage in his second cause of action. But he did not set out in his statement of his second cause of action the circumstances accompanying his arrest and imprisonment. He undertook, however, to incorporate such circumstances in his second cause of action by inserting this reference to the allegations of his first cause of action in the first paragraph of his second cause of action: "That the plaintiff reiterates the allegations contained in paragraphs 1 through 8 of his first cause of action."

6. The defendants thereupon moved to strike the first paragraph of the plaintiff's second cause of action on the ground that the allegations thereby "made a part of said cause of action by reiteration . . . are immaterial, irrelevant, and prejudicial to the defendant Lawrence E. Brown."

7. The motion to strike was heard by His Honor, J. C. Rudisill, the presiding judge at the June Term, 1951, of the Superior Court of Buncombe County, who entered an order striking out "all of paragraph one of the second cause of action" and allowing the plaintiff until 6 July, 1951, as time in which to amend his complaint.

8. Three days after the expiration of the time specified by Judge Rudisill, to wit, on 9 July, 1951, the plaintiff filed an amendment to the complaint in which he restated his second cause of action in its entirety. The first eight paragraphs of the amendment set out in specific detail the plaintiff's version of the facts surrounding his arrest and imprisonment.

9. The defendants thereupon made a twofold motion to strike. They moved to strike the amendment as a whole on the ground that it "was filed . . . three days after the time for filing had expired," and they moved to

strike the first eight paragraphs of the amendment on the theory that their allegations "are immaterial, irrelevant, and prejudicial," and constitute "a repetition of the paragraph . . . heretofore stricken out . . . by His Honor, J. C. Rudisill."

10. This motion to strike was heard by His Honor, William H. Bobbitt, the presiding judge at the June Term, 1952, of the Superior Court of Buncombe County, who entered an order extending the time for filing the amendment to the date of the hearing, *i.e.*, 10 June, 1952; adjudging the amendment duly filed as of that day; denying the motion to strike in its entirety; and allowing the defendants thirty days to answer, demur, or otherwise plead to the amendment. The order recites in express terms that this action was taken by Judge Bobbitt in the exercise of his discretion.

11. The defendants appealed, assigning Judge Bobbitt's order as error.

Guy Weaver for plaintiff, appellee.

J. W. Haynes for defendants, appellants.

ERVIN, J. Since the deprivation of personal liberty suffered by a plaintiff and all circumstances of aggravation attending it constitute elements of damage in an action for malicious prosecution, the present plaintiff's version of the facts accompanying his arrest and imprisonment is clearly germane to his second cause of action. 54 C.J.S., Malicious Prosecution, section 112.

G.S. 1-163 provides that "the judge may . . . amend any pleading . . . by inserting . . . allegations material to the case," and G.S. 1-152 specifies that "the judge may likewise, in his discretion, . . . allow an . . . act to be done after the time limited, or . . . may enlarge the time." These statutory provisions conferred upon Judge Bobbitt the discretionary power to extend the time for filing the amendment to the complaint to the date specified in his order. *Smith v. Insurance Company,* 208 N.C. 99, 179 S.E. 457.

The defendants insist with much earnestness and eloquence that Judge Bobbitt erred in permitting the plaintiff to file a pleading containing the first eight paragraphs of the amendment and in denying their motion to strike such paragraphs from the amendment even if he did possess discretionary power to permit the plaintiff to file an amendment to the complaint after the time limited in Judge Rudisill's order. They advance these arguments to support their position: That when he recast his complaint, the plaintiff incorporated his version of the facts attending his arrest and imprisonment in his second cause of action by appropriate reference to the allegations of his first cause of action; that Judge Rudisill adjudged as a matter of law that the plaintiff's version of these facts was

immaterial and irrelevant to his second cause of action and prejudicial to the defendant Lawrence E. Brown, and struck out the first paragraph of the plaintiff's second cause of action for that reason; that this ruling of Judge Rudisill, whether sound or unsound, became binding on the parties as "the law of the case" by the plaintiff's failure to have it reviewed on appeal; that Judge Bobbitt's action in permitting the plaintiff to file a pleading containing the first eight paragraphs of the amendment and in refusing to strike such paragraphs from the amendment was tantamount to a reversal of Judge Rudisill's ruling because the first eight paragraphs of the amendment set out in specific detail the plaintiff's version of the facts accompanying his arrest and imprisonment; and that consequently Judge Bobbitt's action is invalidated by the rule applied in *Power Company v. Peacock,* 197 N.C. 735, 150 S.E. 510, that one Superior Court judge cannot review the decision of another Superior Court judge upon a matter of law or legal inference.

The position of the defendants is rendered untenable by the salutary principle that where a judicial ruling is susceptible of two interpretations, the court will adopt the one which makes it harmonize with the law properly applicable to the case. *In re Summers,* 79 Ind. App. 108, 137 N.E. 291; 49 C.J.S., Judgments, section 436.

While the record reveals that the defendants moved to strike the first paragraph of the plaintiff's second cause of action on the ground that the allegations thereby "made a part of said cause of action by reiteration . . . are immaterial, irrelevant, and prejudicial to the defendant Lawrence E. Brown," it does not compel the conclusion that Judge Rudisill made the erroneous adjudication that the ground assigned by the defendants for their motion was valid in law when he struck out "all of paragraph one of the second cause of action" without stating any reason whatever for his ruling. In entering his order, Judge Rudisill heeded the sage advice which the Earl of Mansfield is reputed to have given those who wear the ermine: "Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong."

When all is said, the order is susceptible of the construction that Judge Rudisill struck out paragraph one of the second cause of action merely because the plaintiff's attempt to incorporate his version of the facts attending his arrest and imprisonment in his second cause of action by reference to the allegations of his first cause of action contravened the rule of court which provides that "every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto." Su-

preme Court Rule No. 20 (2), General Statutes, Vol. 4, Appendix 1; *Cherry v. Walker,* 232 N.C. 725, 62 S.E. 2d 329; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648; McIntosh on North Carolina Practice and Procedure in Civil Cases, section 433. This interpretation harmonizes the order with the legal principle that the deprivation of personal liberty suffered by the plaintiff and all circumstances of aggravation attending it constitute elements of damage in the action for malicious prosecution. It is likewise consistent with the inclusion in the order of the provision granting the plaintiff leave to amend his complaint. This provision indicates that Judge Rudisill contemplated that the plaintiff would revamp his second cause of action so as to conform the same to the rule of court.

Under this view, Judge Bobbitt's order implements rather than repudiates Judge Rudisill's ruling. This being true, Judge Bobbitt's order is

Affirmed.

GATES SCHOOL DISTRICT COMMITTEE, COMPOSED OF M. R. TAYLOR, JOHN H. WIGGINS AND R. G. OWENS, AND THE FOLLOWING INDIVIDUALLY, J. R. FREEMAN, J. N. EURE, L. J. HAYES, HARRY EURE, D. G. FREEMAN, L. T. HARRELL AND HOWARD EURE, CITIZENS, RESIDENTS AND TAXPAYERS AND PATRONS OF THE ABOVE NAMED SCHOOL DISTRICT, HAVING CHILDREN ASSIGNED TO AND ATTENDING THE SCHOOL OF SAID DISTRICT AS PUPILS, v. THE BOARD OF EDUCATION OF GATES COUNTY, COMPOSED OF S. P. CROSS, CHAIRMAN, AND MRS. MARION NIXON AND LAMAR BENTON AND W. C. HARRELL, GATES COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION.

(Filed 24 September, 1952.)

Schools § 3a—Complaint held insufficient to state cause to restrain consolidation of schools either for want of authority or abuse of discretion.

This action was instituted to enjoin school authorities from consolidating a non-special tax district for administrative and attendance purposes with a special tax district having no special tax under G.S. 115-189, G.S. 115-361, plaintiffs alleging that the consolidation was not authorized by law and that such consolidation, under the circumstances, amounted to abuse of discretion. *Held:* It having been determined on a former appeal that the County Board of Education had authority to order the consolidation under the provisions of G.S. 115-99, and it appearing from the facts alleged that there were cogent reasons for consolidating the schools negating abuse of discretion in the decision to consolidate, defendants' demurrer *ore tenus* to the complaint was properly sustained.

APPEAL by plaintiffs from *Williams, J.,* at March Term, 1952, of GATES.

Suit to enjoin or set aside the action of school authorities in consolidating schools.

Prior to the order of discontinuance and consolidation hereafter mentioned, the Board of Education of Gates County maintained an elementary school in the Gates School District, a non-special tax district of Gates County, and a union school in the Gatesville School District, a special tax district of Gates County. The Gatesville School District does not have a supplemental tax under G.S. 115-189 or G.S. 115-361. On 28 August, 1951, the Board of Education of Gates County, acting with the approval of the State Board of Education, entered an order discontinuing the elementary school in the Gates School District and consolidating such elementary school for administrative and attendance purposes with the union school in the Gatesville School District.

The plaintiffs M. R. Taylor, John H. Wiggins, and R. G. Owens, as school committeemen of the Gates School District, and the plaintiffs J. R. Freeman, J. N. Eure, L. J. Hayes, Harry Eure, D. G. Freeman, L. T. Harrell, and Howard Eure, as citizens, parents, and taxpayers residing in the Gates School District, thereupon brought this action against the defendants, the Board of Education of Gates County, and W. C. Harrell, the Superintendent of Public Instruction of Gates County, to set aside the order of 28 August, 1951, and to enjoin the defendants from carrying such order into effect.

The complaint undertakes to attack the legality of the action of the school authorities on the theory that their action was either without authority of law, or so clearly unreasonable as to amount to an oppressive and manifest abuse of any authority conferred upon them by law. The defendants answered, denying the validity of the plaintiffs' case.

The plaintiffs applied to Judge J. Paul Frizzelle for an interlocutory or preliminary injunction to restrain the defendants from carrying the order of discontinuance and consolidation into effect pending the final hearing, and Judge Frizzelle granted such injunction upon the specific hypothesis that the order in question was not sanctioned by law. This court reviewed this ruling upon the appeal of the defendants, held that the issuance of the injunction constituted error, and remanded the cause to the Superior Court for further proceedings. *School District Committee v. Board of Education,* 235 N.C. 212, 69 S.E. 2d 529.

When the cause came on for hearing at the March Term, 1952, of the Superior Court of Gates County, the defendants demurred *ore tenus* to the complaint and moved to dismiss the action on the ground that the complaint did not state facts sufficient to constitute a cause of action. Judge Williams, the presiding judge, rendered a judgment sustaining the oral demurrer and dismissing the action. The plaintiffs appealed, assigning the judgment as error.

John A. Wilkinson and H. S. Ward for plaintiffs, appellants.
Godwin & Godwin for defendants, appellees.

ERVIN, J. These propositions are well settled:

1. The Superior Court may enjoin or set aside the action of school authorities in creating or consolidating school districts when their action is without authority of law. *Kreeger v. Drummond,* 235 N.C. 8, 68 S.E. 2d 800; *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403; *Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714; *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *School Committee v. Board of Education,* 186 N.C. 643, 120 S.E. 202; *Davenport v. Board of Education,* 183 N.C. 570, 112 S.E. 246; *Pemberton v. Board of Education,* 172 N.C. 552, 90 S.E. 578; *Pickler v. Board of Education,* 149 N.C. 221, 62 S.E. 902; *Venable v. School Committee,* 149 N.C. 120, 62 S.E. 902.

2. Although the law may confer upon school authorities the discretionary authority to create or consolidate school districts, the Superior Court may enjoin or set aside the creation or consolidation of school districts by such authorities when their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion. *Kreeger v. Drummond, supra; Kistler v. Board of Education, supra; Gore v. Columbus County,* 232 N.C. 636, 61 S.E. 2d 890; *Feezor v. Siceloff, supra; Atkins v. McAden, supra; Messer v. Smathers,* 213 N.C. 183, 195 S.E. 376; *Moore v. Board of Education,* 212 N.C. 499, 193 S.E. 732; *Crabtree v. Board of Education,* 199 N.C. 645, 155 S.E. 550; *Clark v. McQueen,* 195 N.C. 714, 143 S.E. 528; *Board of Education v. Forrest,* 190 N.C. 753, 130 S.E. 621; *McInnish v. Board of Education,* 187 N.C. 494, 122 S.E. 182; *School Committee v. Board of Education, supra; Pemberton v. Board of Education, supra; Newton v. School Committee,* 158 N.C. 186, 73 S.E. 886; *Pickler v. Board of Education, supra; Venable v. School Committee, supra.*

When this cause was before us on the former appeal, we held that the statute embodied in G.S. 115-99 confers upon a county board of education, which acts in such respect with the approval of the State Board of Education, discretionary legal authority to consolidate a non-special tax district, either in whole or in part, for administrative and attendance purposes only with a special tax district having no supplemental tax under G.S. 115-189 or G.S. 115-361 without the consent of the voters in the portion of the non-special tax district being added to the special tax district. *School District Committee v. Board of Education, supra.* This holding is tantamount to an adjudication that the Board of Education of Gates County was authorized by law to adopt the order of discontinuance and consolidation under attack, and that the complaint is fatally defective in so far as it attempts to allege the contrary.

It would unduly prolong this opinion without effecting a compensating good to set forth a minute analysis of the other allegations of the complaint. When all is said, they merely disclose that at the time of their adoption of the order of discontinuance and consolidation, the school authorities were confronted by appealing reasons, chiefly sentimental in character, for continuing the elementary school in the Gates School District, and cogent reasons, largely practical in nature, for consolidating it with the union school in the Gatesville School District. The circumstance that the school authorities chose the latter course rather than the former does not suffice to show that they abused their discretion.

What has been said compels the conclusion that the complaint does not state facts sufficient to constitute a cause of action, and necessitates an affirmance of the judgment. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 448.

Affirmed.

STATE v. EARL GRIFFIN.

(Filed 24 September, 1952.)

1. Homicide § 25—

Evidence tending to show that after an altercation during which defendant knocked deceased to the floor, defendant brutally kicked deceased time after time over a period of fifteen minutes while deceased was lying helpless on the floor, inflicting injuries, including a fractured skull and broken ribs, causing death, *is held* sufficient to overrule nonsuit in a prosecution for murder in the second degree, G.S. 15-173, notwithstanding that the assault was provoked.

2. Homicide § 27f—

Instructions of the court on defendant's plea of self-defense *held* without error.

3. Homicide § 27a—

Where the State does not contend that the murder was committed with a deadly weapon and is not given the benefit of any presumption created by proof of an intentional killing with such weapon, the court is not required to define the term.

4. Same—

The charge of the court upon the count of murder in the second degree and the count of manslaughter and in applying the law to the evidence in the case *held* without error.

APPEAL by defendant from *Gwyn, J.*, March Term, 1952, HENDERSON. No error.

Criminal prosecution under a bill of indictment which charges that defendant committed the crime of murder in the slaying of one Lola Lyda.

On 26 November 1951 there was a drinking party at the home of the deceased. Defendant twice went off to buy whiskey with money furnished by deceased. The second time he came back with a half-gallon fruit jar of liquor. Some time later deceased accused defendant of stealing his liquor. He threatened to cut defendant, got a knife, backed defendant up against the wall, and made "a rake" at him. Defendant took the knife from deceased and threw it in his truck on the outside. In this scuffle defendant received a deep gash "all the way across the fat part of his hand" and "jaggered" places on his hand and jaw. He bled profusely.

Deceased then got a shotgun and threatened to kill defendant. Defendant took the gun away from him. Deceased said he had another gun. "Then he started to dive for the door to get the other gun (in another room) and Mr. Griffin knocked him down to the floor. Mr. Griffin then began kicking him all over his shoulders and all . . . He kicked him all around his body and on his head . . . He knocked him down on the floor, and would take his foot and kick him, and directly he just hauled off and stamped down one time like that, I would say struck him here on the head, maybe kind of on the back . . ." This continued for about fifteen minutes, but he was not kicking him all the time. Blood was all over the room—the kitchen. The sheriff testified: "I don't believe there was anything in the kitchen that did not have some blood on it . . . the whole place." Defendant was persuaded to desist. It was then discovered that deceased had no pulse. Defendant tried to revive him. Failing in that, he left. Defendant was visibly under the influence of liquor but sobered up some when he saw the blood on his hand.

The deceased died almost immediately. An autopsy disclosed that his skull was fractured "as much as the shell of an egg would be fractured if pushed in." His heart was bruised, several ribs on each side were broken, and there were other injuries.

Deceased was about sixty-five years of age, in bad health, and "couldn't hardly get up when he sat down."

At the beginning of the trial the solicitor announced he would not seek a conviction of murder in the first degree. The jury returned a verdict of "guilty of manslaughter." The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

Arthur J. Redden and Geo. Green for defendant appellant.

BARNHILL, J. The record before us discloses an aggravated, vicious assault. The defendant, it is true, had been provoked. Yet it is apparent he was inspired by unreasoning passion, aroused by liquor, and that his assault upon the deceased went far beyond the requirements of legitimate self-defense. Certainly the testimony is amply sufficient to repel a demurrer and motion to dismiss under G.S. 15-173.

Notwithstanding the nature of the assault and the evidence tending to show that the defendant continued to kick and stomp the deceased after he was down helpless on the floor, the court below cautiously and prudently gave him the full benefit of his plea of self-defense. Exceptions to the charge directed to this phase of the case are without merit.

The cause was not tried on the theory defendant was killed by the use of a deadly weapon. Therefore, it was not necessary for the court to instruct the jury as to what constitutes a deadly weapon or to charge it as to whether, under the circumstances disclosed by the testimony, defendant's "feet and hands" could or could not be deemed to be such a weapon within the meaning of the law.

The State was not given the benefit of the presumption created by proof of an intentional homicide with a deadly weapon. Instead the court instructed the jury that before it could return a verdict of murder in the second degree, it must find, beyond a reasonable doubt "that the defendant unlawfully, willfully and feloniously killed Lola Lyda, and that with malice . . ."

The court further instructed the jury that if it failed to find the defendant guilty of murder in the second degree, then it should weigh the evidence to determine whether he was guilty of manslaughter, and that before it could render a verdict of manslaughter it must find beyond a reasonable doubt that defendant "unlawfully, willfully and feloniously killed" the deceased. In this connection the court fully and correctly explained the law in respect to sudden passion, excessive force, apprehension of danger, and other matters to be considered on the charge of murder in the second degree and manslaughter.

The charge of the court, both on the count of murder in the second degree and manslaughter, is so clearly in substantial accord with our former decisions the citation of authorities would serve no useful purpose. The other exceptions are formal in nature. They require no discussion.

In the trial below we find

No error.

STATE v. JUNIOR TERRY.

(Filed 24 September, 1952.)

1. Criminal Law § 76a—

Where petition for writ of *certiorari* filed by defendant in apt time to bring up the record and case on appeal on his original appeal is denied, and upon a later appeal from denial of defendant's motion in the trial court to strike out the original judgment, it appears that the Court, in denying the petition for *certiorari*, had inadvertently overlooked matters showing probable error in the trial, the Supreme Court will reconsider the petition for *certiorari* and grant the petition in order to prevent injustice.

2. Criminal Law § 60b—

Where defendant enters a plea of guilty to a warrant charging an assault upon a female and nothing more, the trial court is without authority, upon a later amendment of the warrant to charge that defendant was a male person over eighteen years of age, to enter judgment on the amended warrant in the absence of a verdict of a jury or a plea of guilty by defendant to the warrant as amended, and sentence in excess of that permitted by law for the offense originally charged in the warrant will be set aside and cause remanded for trial upon the warrant as amended.

APPEAL by defendant from *Rudisill, J.*, May Term, 1952, ROCKINGHAM.

This appeal arises from an adverse judgment upon defendant's motion to strike the original judgment from the record.

The defendant was tried at the August 1951 Term of the Superior Court of Rockingham County upon a warrant charging that he "did commit an assault on a female, to wit: Mrs. Gold Lawson, by knocking her down and putting her in great fear and causing injury to her body contrary to the form of the statute and against the peace and dignity of the State." Defendant entered a plea of "guilty" as charged and was remanded to jail for judgment at a later date during the term. Two days after the plea of guilty was entered, the solicitor moved to amend the warrant to include an allegation that the defendant was a male person over 18 years of age. This motion was allowed over defendant's objection. The defendant never pled guilty to the warrant as amended nor was the case submitted to a jury. The court, however, found as a fact from the testimony of the defendant's mother and from the physical appearance of the defendant, who was then in court, "that the defendant was 23 years of age at the time of the assault." Thereafter, during the term, judgment was entered sentencing the defendant to be "confined in the common jail of Rockingham County for a period of two years to be assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission." From this judgment, defendant in open court gave notice of appeal.

On 30 August, 1951, the solicitor accepted service of defendant's statement of case on appeal, which was filed in the office of the Clerk of Superior Court of Rockingham County on the following day. On 10 September, 1951, the solicitor served a countercase upon D. Floyd Osborne, who was a member of defendant's legal staff during the trial and who had since attempted unsuccessfully to withdraw from the case. The countercase was never served upon the defendant nor upon Robert S. Cahoon, who still represents defendant. On 21 September, 1951, Judge Rousseau made an order settling the countercase as the statement of the case on appeal.

On 25 September, 1951, defendant filed in this Court his petition for writ of *certiorari,* to which was attached an uncertified copy of his statement of case on appeal. On 29 September, 1951, a copy of defendant's statement of case, accompanied by two certificates of the Clerk of Superior Court of Rockingham County, was filed in this Court. The first certificate, dated 31 August, 1951, was not under seal and certified that defendant's statement of case on appeal constituted the case on appeal and that no countercase had been filed; and the second, dated 28 September, 1951, with Clerk's seal affixed, certified that said papers constituted a true and correct copy of defendant's statement of case on appeal. The latter certificate also recited that the first certificate was returned to the clerk at his request. The statement of the case on appeal as settled by the presiding judge was certified to this Court and filed here on 26 September, 1951.

On 28 September, 1951, defendant filed in this Court a motion to strike the purported case on appeal as settled by the trial judge and to substitute in its place the defendant's statement of case on appeal. Defendant asked that his motion be included in and as a part of his petition for writ of *certiorari.* The effect of defendant's motion and his petition for writ of *certiorari* was a request that this Court state and settle the statement of case on appeal.

The Attorney-General in apt time moved that defendant's appeal be dismissed and the judgment of the lower court affirmed under Rule 17, for failure to perfect the appeal. This motion was allowed on 30 October, 1951.

On 19 May, 1952, defendant moved in the Superior Court of Rockingham County to strike the original judgment on the ground that his constitutional rights had been violated. This motion was denied and defendant excepted and appealed, assigning error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Robert S. Cahoon for defendant, appellant.

VALENTINE, J. Matters in the record on this appeal direct our attention to the petition for a writ of *certiorari,* filed by the defendant in apt time to bring up the record and case on appeal on his original appeal, which was denied for the reason defendant had failed to show merit or probable error in the trial. A re-examination of that petition and the exhibit attached thereto disclose that the petition does show probable error which we then inadvertently overlooked. We, therefore, upon a reconsideration of the petition for writ of *certiorari,* now grant the same and consider the record on this appeal as due return to the writ.

When defendant's plea of guilty was tendered and accepted by the State, the warrant charged an assault upon a female and nothing more. It contained no allegation that a deadly weapon was used or that serious damage was done or that defendant was a male person over 18 years of age. G.S. 14-33. This is the warrant to which defendant's plea of guilty speaks.

The finding by the court that the defendant was 23 years of age at the time of the assault could not suffice to bring the defendant within the warrant as amended. Only a plea of guilty to or a jury verdict upon the warrant as amended could subject the defendant to the punishment prescribed for an assault upon a female person by a man or boy over 18 years of age. The punishment for the crime to which the defendant pled guilty is restricted to a fine of not more than $50.00, or imprisonment not in excess of 30 days, or both.

To justify a sentence of imprisonment for two years for a simple assault upon a female person by a man or boy, where no serious damage was done, the defendant must have been over 18 years of age, and this fact must have been asserted in the warrant and found by the jury with the other necessary elements of the crime, or established by defendant's plea of guilty. However, an exception to this rule arises when a defendant is charged with an assault on a female resulting in serious and permanent injury. In which case, the defendant could plead guilty to or be convicted of "a less degree of the same crime charged," which could include an assault on a female by a male person over 18 years of age. This is not the situation here. The opinion of and the cases cited by the late *Chief Justice Stacy,* in *S. v. Grimes,* 226 N.C. 523, 39 S.E. 2d 394, constitute complete authority for the position here taken with respect to this aspect of the case. Upon what was there so ably said, we must conclude that the learned and painstaking judge below exceeded his authority in sentencing the defendant to two years in prison upon defendant's plea of guilty to the charge contained in the warrant as originally drawn.

It would be a manifest injustice to allow an unlawful sentence upon defendant's plea of guilty to stand. It would also be an injustice to send this case back for a corrected sentence. It appears under all the circum-

stances that the case should be remanded for trial upon the warrant as amended. Indeed, that is the end sought by the defendant.

For the error pointed out, the case is remanded for a

New trial.

J. P. HUFFMAN AND WIFE FLORENCE HUFFMAN, J. E. DIVELBISS, JR., W. BRYAN CARTER, LEO FINKELSTEIN, R. M. BURAN, ROBERT E. HIPPS, C. T. JOHNSON, MRS. DICK BRIGGS, LEILA R. OGDEN, C. L. KELLOGG, MABEL C. WILSON AND EMANUEL T. LINN, FOR THEMSELVES AND ALL OTHER LANDOWNERS WITHIN LAKE VIEW PARK DEVELOPMENT WHO MAY COME IN AND MAKE THEMSELVES PARTIES PLAINTIFF, v. SARAH TAYLOR JOHNSON AND HUSBAND, ROBERT H. JOHNSON.

(Filed 24 September, 1952.)

Deeds § 16b—

Evidence tending to show that defendants rented out two rooms in their house after certain improvements or alterations had been made, but that the roomers had no kitchen facilities and took all of their meals at restaurants and other places outside the residence, *is held* insufficient to be submitted to the jury upon the issue as to whether defendants had converted their residence into an "apartment house" in violation of covenants restricting use of the property in the area to one family dwellings.

APPEAL by plaintiffs from *Bobbitt, J.*, April 1952 Mixed Term, BUNCOMBE. Affirmed.

This is a civil action commenced for the purpose of restraining the defendants from violating the restrictions set forth in the general plan of development of Lake View Park, and for a mandatory injunction directing said defendants to reconvert their residence into a one-family dwelling house.

The plaintiffs are owners of lots and homes in Block O of Lake View Park, a restricted residential subdivision located in the city of Asheville, a plat of which subdivision is of record in the office of the Register of Deeds for Buncombe County in Plat Book 4, at page 140. The defendants took title to Lot 531, in Block O, of said subdivision, by deed dated 24 November, 1944.

The complaint sets forth in detail the general plan of development of Lake View Park, including the restrictive covenants affecting said development, which restrictions are in part as follows: "That they will not erect . . . on the land above described any . . . apartment house, . . . two-family dwelling house, . . . or at any time use or suffer to be used any building or buildings erected thereon for any such purpose." The only allegation of a violation of the restrictive covenants is paragraph 12 of the complaint, which reads as follows: "That on or about the month of

December, 1945, the defendants violated the restrictions set forth in the general plan of development of Lake View Park and breached their contract to comply with the same, by beginning the conversion of said one-family dwelling house into an apartment house, and completed said conversion on or about the month of January, 1946, making of said one-family dwelling house an apartment house or building, and have maintained and now maintain said building as such, in plain and clear violation of said restrictions and in breach of said contract." The case was tried below with that allegation as the only basis for the relief sought.

At the close of plaintiffs' evidence, the defendants' motion for judgment as of nonsuit was sustained. Plaintiffs excepted and appealed, assigning errors.

Bernard & Parker and J. Y. Jordan, Jr., for plaintiffs, appellants.

Sam M. Cathey, James S. Howell, and Oscar Stanton for defendants, appellees.

VALENTINE, J. The taproot of plaintiffs' case is nestled in the allegation that defendants have violated the restrictive covenants of Lake View Park by converting their residence into and maintaining it as an apartment house. Conceding without deciding that the restrictive covenants of Lake View Park are subsisting and binding upon the defendants, this single question is presented for decision here: Is the evidence in the record, taken as true and liberally construed in favor of the plaintiffs, sufficient to take the case to the jury upon the issues properly raised?

In order for plaintiffs to make good their allegation, they must offer evidence tending to show that the defendants have so altered their residence as to convert it into an apartment house within the meaning of that term.

The definition of an "apartment house" varies somewhat depending upon the surrounding circumstances, but that term invariably connotes a house constructed with separate apartments for more than one family or at least a house that is constructed larger than necessary for one family and suitable for occupancy and independent housekeeping by more than one family. 3 C.J.S. 1422, and cases there cited. It has been uniformly held that an apartment house is a building used as a dwelling for several families, each living separate and apart. *DeLaney v. VanNess*, 193 N.C. 721, 138 S.E. 28; *Satterthwait v. Gibbs*, 135 Atl. 862. For general annotations, see 14 A.L.R. 2d 1380 *et seq.*

The plaintiffs' evidence tends to show that the defendants purchased Lot 531, in Block O, of Lake View Park, upon which was situate a story and a half residence with a reasonably full size basement. The basement contained a coal-burning heating plant and a garage. The first floor or

main part of the residence consisted of a large living room, dining room or alcove, kitchen, bedroom, bath and patio porch on the back. The second floor or attic consisted of bedroom and bath.

Mrs. Johnson, one of the defendants, who was called as a witness for the plaintiffs, testified that when they purchased the property, the door from the basement opened into the living room above the position of the furnace in the basement, so that when the furnace was serviced, disagreeable fumes and smoke would rise up in the living room and when it rained the basement would overflow and become muddy and mud would be tracked up the steps into the main part of the house. The defendants, realizing these conditions and after examining the basement of a newer house built by one of the plaintiffs in the same block, decided to partition off the furnace in their basement, to damp-proof the walls, to cover the floor with asphalt tile, and otherwise improve the basement so that it could be used by their twelve year old son as a play room and as a place to entertain his young friends. These improvements included the installation of a shower and toilet for the convenience of their son and his friends. The defendants' son has grown to manhood and is now in the army, and soon after he went into the armed forces, someone broke in and stole a lot of things. Mrs. Johnson's husband and codefendant is a traveling man and is away from home a good part of the time. This fact and the fright of burglars caused Mrs. Johnson to feel the need of having some protection in the house. She requested a gentleman friend of the family to come and occupy the basement as a bedroom and be there for protection at night. To obviate the necessity of having a man as the only other person in the house and feeling the need of the companionship of another lady, Mrs. Johnson requested a lady friend of the family to occupy the bedroom in the garret. The gentleman who has a bedroom in the basement pays rent some of the time and the other time as compensation for his room acts as handy-man around the house, firing the furnace, keeping the plumbing and other appliances in order, mowing the lawn and keeping the grounds. The lady who occupies the bedroom in the attic pays rent *ten months in the year and the other two months occupies the room rent* free and cares for the house while the owners are away. There is no kitchen or other housekeeping equipment in the basement or in the attic. Both roomers take all their meals at restaurants and other places outside the residence of the defendants.

There was no evidence of sufficient housekeeping space or facilities to accommodate a family in either the basement or the attic. Indeed, all of the evidence on this subject, most of which was elicited from one of the defendants and the roomer who occupies the basement, tended to show that the house was not used by more than one family nor as an apartment house.

Accepting all of plaintiffs' evidence as true and measuring it by the yardstick of liberality required upon motions for judgment as of nonsuit, we must conclude that there is not sufficient evidence to take the case to the jury and that the judgment of nonsuit was properly entered.

The ruling of the court below is

Affirmed.

IN THE MATTER OF LEE SAMS, ADMINISTRATOR OF THE ESTATE OF ZORA RICE SAMS, DECEASED.

(Filed 24 September, 1952.)

1. Appeal and Error § 6c (3)—

An exception to the "findings of fact as set forth in the judgment" is a broadside exception and is insufficient to challenge the sufficiency of the evidence to support the findings or any one of them.

2. Appeal and Error § 40d—

In the absence of an effective assignment of error to the findings of fact it will be presumed that there was sufficient evidence to support the findings.

3. Appeal and Error § 6c (2)—

A general exception to the judgment or the signing of the judgment presents for review the sole question of whether the facts found support the judgment.

4. Executors and Administrators § 3—

Findings that an administrator had moved from the jurisdiction of this State and had interests antagonistic to the estate is sufficient to support the clerk's order revoking letters of administration. G.S. 28-32, G.S. 28-8 (2).

5. Same—

On appeal from the clerk's order revoking letters of administration, the Superior Court should not hear the matter *de novo* but has authority only to review the record. In this case there being no exception to the hearing *de novo* and no prejudicial error having resulted from such hearing, the judgment approving the order of the clerk is affirmed.

APPEAL by Lee Sams from *McLean, Special Judge,* at June Term, 1952, of MADISON.

This is a proceeding under G.S. 28-32 for revocation of letters of administration issued by the Clerk of the Superior Court of Madison County to Lee Sams as administrator of the estate of Zora Rice Sams, deceased, heard below on verified complaint of Mrs. Iola Rice Franklin, Minnie Rice and Mrs. Vernon Buckner, sisters of the deceased, and response to

the charges filed by the administrator. The administrator is the surviving husband of the deceased.

The record discloses that the Clerk, after hearing the evidence, found these facts: "that the administrator, Lee Sams, removed from the jurisdiction of North Carolina and became a resident of the State of Florida; . . . that the administrator has interests antagonistic to the estate; and the court finding in its discretion that the administrator, Lee Sams, is legally incompetent to administer upon said estate and ought not to administer upon said estate." Thereupon an order was entered by the Clerk revoking the letters previously issued. To this order the administrator excepted and appealed therefrom to the Superior Court. There the Presiding Judge, after a *de novo* hearing, found facts and entered judgment "approving and affirming" the order of the Clerk revoking the letters of administration, and remanding the cause to the Clerk.

To the judgment entered Lee Sams excepted and appealed to this Court. The bill of "Exceptions and Assignments of Error" set out in the case on appeal recites that Lee Sams, Administrator (1) "excepts to the findings of fact, as set forth in the judgment. . . ." and (2) ". . . excepts and assigns as error the signing of the judgment. . . ."

Clyde Roberts and Guy Weaver for Lee Sams, Administrator, appellant.

J. M. Baley, Jr., for appellees.

JOHNSON, J. The exceptive assignment to the findings of fact is broadside. *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916; *Thompson v. Thompson,* 235 N.C. 416, 70 S.E. 2d 495. It is insufficient to challenge the sufficiency of the evidence to support the findings or any one of them. *Town of Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601; McIntosh, N. C. P. & P., Sec. 517. In this state of the record, the presumption is there was sufficient evidence to support the findings. *Vestal v. Vending Machine Exchange,* 219 N.C. 468, 14 S.E. 2d 427.

The general exception to the order of the Clerk carried up for review before the Judge of the Superior Court only the question whether the facts found by the Clerk support the order. And in turn the general exception to the judgment signed by the Judge brings here for review the single question whether the facts found support the judgment. *Wilson v. Robinson, supra; Thompson v. Thompson, supra.* It is manifest that both the order of the Clerk and the judgment of the Judge are supported by the facts found. G.S. 28-32; G.S. 28-8 (2); 21 Am. Jur., Executors and Administrators, Sec. 158; *In re Battle,* 158 N.C. 388, 74 S.E. 23.

It is noted that the appeal from the Clerk was heard *de novo* by the Presiding Judge, rather than in his appellate capacity by review of the record as approved by numerous decisions of this Court: *In re Estate of Johnson,* 232 N.C. 59, 64, 59 S.E. 2d 223; *In re Will of Hine,* 228 N.C. 405, 411, 45 S.E. 2d 526; *In re Estate of Styers,* 202 N.C. 715, 164 S.E. 123; *In re Estate of Wright,* 200 N.C. 620, 158 S.E. 192; *In re Will of Gulley,* 186 N.C. 78, 118 S.E. 839; *Edwards v. Cobb,* 95 N.C. 4. See also: McIntosh, N. C. P. & P., Sections 65, 72, 696 and 701; *Rowland v. Thompson,* 64 N.C. 714; *In re Estate of Edwards,* 234 N.C. 202, 66 S.E. 2d 675; *Mills v. McDaniel,* 161 N.C. 112, 76 S.E. 551. However, there was no objection or exception to the *de novo* hearing in the Superior Court, and upon the record as presented no prejudicial error has been made to appear. Therefore the judgment below affirming and approving the former order of the Clerk is

Affirmed.

WILLIAM A. H. HOWLAND v. AMBER JUSTIZ STITZER, NOW REMARRIED AND KNOWN AS MRS. SHERMAN HAWES, JR., AND FIRST NATIONAL BANK & TRUST COMPANY IN ASHEVILLE, NORTH CAROLINA, A CORPORATION.

(Filed 8 October, 1952.)

1. Divorce and Alimony § 16: Husband and Wife § 12d—

Where the provisions in a divorce decree for the support of a wife, in accordance with a prior valid deed of separation executed by the parties, is stricken out by the court originally rendering such decree without prejudice to the rights of the parties under the agreement, the provisions for the support of the wife may no longer be enforced by contempt proceedings, but the separation agreement stands without power in the courts to modify it in the absence of fraud or duress.

2. Husband and Wife § 12d—

A contract between husband and wife to separate in the future is void, but an agreement executed after separation which does not release the husband from his obligation to support his wife is valid in this State and under the laws of the State of New York, and binds the husband to contribute the sums therein provided for the future support of his wife.

3. Same—

A separation agreement executed by husband and wife after separation and pending her divorce action is not subject to attack under the laws of the State of New York for fraud and collusion on the ground that its real consideration was that the wife would proceed with the divorce action without delay and that the husband would not defend it, there being no attack of the ground on which the divorce was granted or contention that the decree was not justified by the real facts, since in such instance no

fraud is perpetrated on the court in obtaining the decree, nor is the agreement contrary to public policy.

4. Same—

While decree of absolute divorce terminates the right to alimony under a prior decree, it does not affect the valid provisions of a separation agreement voluntarily executed by the parties prior to the decree of divorce, and the obligation of the husband to pay certain sums monthly to the wife for the balance of her life regardless of her marital status remains binding even after her subsequent remarriage, nor is such provision contrary to public policy.

5. Same—

Where, after decree of absolute divorce, the husband recognized the validity of a separation agreement executed by them prior to the divorce decree by continuing to pay her for more than two and one-half years the amounts stipulated therein even after her remarriage, *held* the husband by ratifying and confirming the agreement is estopped from attacking it.

6. Pleadings § 31—

The wife's motion to strike allegations in her husband's reply attacking the validity of a separation agreement entered into by the parties should have been allowed under the facts of this case, it appearing that the agreement was not subject to attack on the grounds alleged and that the husband was estopped from attacking it by his ratification and confirmation of the agreement, leaving for adjudication the respective rights of the parties under the terms of the agreement.

APPEAL by defendant Hawes from *Gwyn, J.*, July Term, 1952, of BUNCOMBE.

Civil action to determine whether the plaintiff is entitled to receive certain funds now held by the corporate defendant, as trustee, pursuant to an agreement entered into by and between the plaintiff herein and the corporate defendant on 30 October, 1940, which funds were assigned to the defendant Hawes in a separation agreement entered into by and between the plaintiff and the individual defendant, his former wife, now Mrs. Hawes, on 2 April, 1947.

The plaintiff and the individual defendant herein were married on 6 January, 1941. They lived together as husband and wife until sometime in 1946 when they separated. At the time of their separation, they were citizens and residents of the State of New York; and on 18 September, 1946, Amber Howland, as the party of the first part, and her husband, the plaintiff herein, as party of the second part, entered into a separation agreement in said State. This agreement contained these pertinent facts: (1) That the parties had separated and were living apart from each other; (2) that they were desirous of avoiding the unpleasantness of litigation, and were desirous of entering into an agreement pursuant to which they might continue to live separate and apart permanently; (3) that the

parties had agreed upon a reasonable provision for the support and maintenance of the party of the first part for her natural life, and in consideration of the foregoing recitals and the mutual covenants, contracts, and agreements therein contained, it was mutually agreed by and between the parties thereafter to live separate and apart from each other for the rest of their natural lives; (4) that the party of the second part agreed that during the lifetime of the party of the first part or until her remarriage, and during his lifetime, he would pay to the party of the first part $4,200.00 annually, in equal monthly installments of $350.00, payable in advance on the first day of every month; (5) that the principal and proceeds of the trust referred to above would be collateral security for the faithful performance of the provisions of the agreement; (6) that the party of the first part would contract no debts in the name of her husband or in any way bind him for any debt or debts; (7) that the party of the second part would cause a policy of life insurance to be issued on his life in the amount of $25,000.00, making the party of the first part the irrevocable beneficiary thereunder, and he would pay the annual premiums thereon during his life or until such time, prior to his death, when the policy should become paid up; (8) that a certain house and lot in Nassau County, State of New York, should continue to be the property of the party of the first part; (9) that the apartment, and furnishings contained therein, located at 1060 Park Avenue, New York City, was and should continue to be the property of the party of the first part; (10) that the provisions contained in the agreement should remain in full force and effect notwithstanding any action of any nature whatsoever taken by either party in the courts of that State, any other State, or any other Country, and should only be terminated by the happening of any one of the following events: "(a) the death of the party of the first part; (b) the death of the party of the second part; (c) the remarriage of the party of the first part"; (11) that each party would execute, and deliver, any and all such further assurances, things and documents as the other said party should reasonably require, for the purpose of giving full force and effect to the agreement.

Thereafter, on 10 February, 1947, Mrs. Amber Howland, now Mrs. Hawes, instituted an action for absolute divorce against her husband, the plaintiff herein, in the State of New York, on the ground of adultery, and obtained service on him on 13 February, 1947. While this action was pending, to wit: on 2 April, 1947, the parties entered into another separation agreement, reciting the purposes therefor to be the same as those recited in the original agreement, and in consideration of the cancellation, abrogation and abandonment of the former agreement, and in further consideration of the mutual covenants, contracts and agreements therein contained, it was mutually agreed that in lieu of the payment of $4,200.00

per year to Mrs. Howland, and the transfer to her of the apartment and its furnishings, located at 1060 Park Avenue, New York City, and other provisions for her benefit for life or until her remarriage, she was to receive the income for life from four shares of the common stock of the Providence Journal Company, of Providence, Rhode Island, which stock constituted a part of the principal of the trust held by the corporate defendant; ". . . provided, however, that if the gross annual income of the party of the second part shall be less than the sum of $7,500.00, then for such time and periods as the gross annual income of the party of the second part shall be less than $7,500.00, the party of the first part shall receive no more than 20% (1/5) of the gross annual income of the party of the second part for such time and periods, and the party of the first part shall repay to the party of the second part the excess between the amount she shall receive in income from the four (4) shares of stock hereinabove referred to and the amount of 20% (1/5) of the gross annual income of the party of the second part, whatever that sum shall be." This agreement provides that the income from this stock shall be paid to the individual defendant herein during her lifetime irrespective of her marital status, and the plaintiff herein so notified the corporate defendant and instructed it to transmit these dividends to his wife, Amber Howland, in accordance with the terms of the agreement.

On 11 July, 1947, the New York Court entered an interlocutory decree to become the final judgment after the expiration of three months, unless for sufficient cause the Court in the meantime should direct otherwise. This decree became final and the plaintiff was given the right to remarry, but the defendant was denied that right without the express permission of the Court. The decree further provided, "that the defendant shall provide for the support and maintenance of the plaintiff during the entire period of her lifetime in accordance with the terms of an agreement between the parties dated the 2nd day of April 1947, which said agreement is incorporated in this judgment."

The plaintiff in this action remarried immediately after 16 October, 1947, the effective date of the above decree. Mrs. Amber Howland later married Charles Stitzer, Jr. This latter marriage resulted in divorce and the former Mrs. Amber Howland is now the wife of Sherman Hawes, Jr.

After the entry of the above decree, the proceeds from the stock referred to above were paid to the former Mrs. Amber Howland from 1 May, 1947, until 5 December, 1949, at which time an action was instituted against these defendants by the plaintiff in the Superior Court of Buncombe County, North Carolina, to restrain the corporate defendant from making any further payments of said dividends to the former Mrs. Amber Howland, who was then Mrs. Charles Stitzer, Jr.; and for the purpose of having the court modify the New York judgment to the extent of relieving the

plaintiff from being required to provide for the support of his former wife as provided in the New York decree. It was alleged in the complaint that he was entitled to such relief since his former wife, Amber Howland, had remarried. On appeal to this Court from a judgment overruling a demurrer interposed by the defendant, Mrs. Amber Justiz Stitzer, it was held that the Superior Court of Buncombe County had no power to modify the New York decree, and reversed the judgment of the lower court. See *Howland v. Stitzer,* 231 N.C. 528, 58 S.E. 2d 104.

After the decision in the above case was rendered, the plaintiff herein made a motion in the cause in the original divorce proceeding in the State of New York, on 23 June, 1950, requesting that the provision for alimony contained in the decree be eliminated on the ground that the plaintiff therein had remarried. The motion was allowed pursuant to the provisions of Section 1172c of the Civil Practice Act of the State of New York. The New York Court in its decree, entered 1 May, 1951, modifying the original judgment, expressly provided, however, that such modification should be without prejudice to such rights as the plaintiff may have pursuant to the terms of the agreement entered into between the parties dated 2 April, 1947.

The plaintiff herein, who was the defendant in the New York proceeding, instituted this action on 24 January, 1952, alleging that by reason of the modification of the New York divorce decree, with respect to alimony, he is relieved of any obligation to support his former wife, the present Mrs. Hawes, and is, therefore, entitled to have the First National Bank & Trust Company, as trustee, the corporate defendant herein, enjoined from making any further payments to the defendant Mrs. Hawes; that he is further entitled to a decree adjudging that he is the beneficial owner of the four shares of stock referred to herein, free from any claim of the defendant Mrs. Hawes; and to a decree directing said trustee to pay to him the accumulated dividends from said stock which the trustee has held since 5 December, 1949, as well as the future income therefrom.

The defendant Hawes, in her answer, admits that the New York Court has modified the original decree in the respects alleged, but she sets up in her further answer and defense the provisions of the separation agreement entered into by and between her and her former husband, the plaintiff herein, dated 2 April, 1947, and alleges she is entitled to the benefits provided thereunder irrespective of the modification of the New York decree.

The plaintiff in his reply to the further answer and defense of Mrs. Hawes, alleges that the paper writing dated 2 April, 1947, was entered into between the plaintiff and the defendant on the promise of the defendant to proceed promptly to obtain an absolute divorce from the plaintiff, and the promise of the plaintiff to the defendant Hawes not to defend said

divorce action; that the agreement was executed in furtherance of a scheme entered into by the parties to obtain a divorce and to promote the dissolution of the marriage relationship between the parties; that it did not state the real considerations moving between the parties and is void and of no force and effect, being in violation of the statutes of the State of New York, to wit: Domestic Relations Law, Section 51, as follows: ". . . a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife." It is further alleged, that said agreement being invalid and unenforceable did not constitute an assignment of the income from the stock to the defendant herein, as set forth in the agreement, and that the agreement is violative of the public policy of the State of New York and of the State of North Carolina.

The defendant Hawes in apt time moved to strike from the plaintiff's reply all allegations which attack the validity of the contract on the ground of collusion, for the reason that if said allegations were true, which is denied, the plaintiff has ratified the provisions of the separation agreement by his conduct subsequent to the execution of the same. The motion was denied and the defendant Hawes appeals to the Supreme Court, assigning error.

William J. Cocke and C. N. Malone for plaintiff, appellee.
David H. Armstrong for defendant, appellant, Hawes.

DENNY, J. In the State of New York, where an action for divorce is brought by a husband or wife, and the final judgment of divorce has been rendered in favor of the wife, the Court upon application of the husband on notice, and proof of the remarriage of the wife, must modify such judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the wife. Thompson's Laws of New York, Civil Practice Act, Section 1172c; *Dumproff v. Dumproff,* 138 Misc. 298, 244 N.Y.S. 597; *Kirkbride v. Van Note,* 275 N.Y. 244, 9 N.E. 2d 852.

The New York divorce decree, dissolving the marriage between the plaintiff and the defendant, Mrs. Hawes, which decree directed the defendant therein to support his wife, Mrs. Amber Howland, the plaintiff therein, during the entire period of her lifetime in accordance with the terms of the agreement between the parties dated 2 April, 1947, having been modified as authorized and provided in the above statute, the parties involved are relegated to their contractual rights under the agreement. *Goldman v. Goldman,* 282 N.Y. 296, 26 N.E. 2d 265; *Severance v. Severance,* 260 N.Y. 432, 183 N.E. 909; *Goldfish v. Goldfish,* 193 App. Div.

686, 184 N.Y.S. 512. This simply means that although the agreement may constitute a valid and enforceable contract, the provisions therein can no longer be enforced by a contempt order. *Goldman v. Goldman, supra; Levy v. Levy,* 149 App. Div. 561, 133 N.Y.S. 1084; *Kunker v. Kunker,* 230 App. Div. 641, 246 N.Y.S. 118; *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118.

A contract between husband and wife to separate in the future is void, but it is too well settled, in this country, to admit of discussion, that after a separation has taken place a valid contract may be made, which will bind the husband to contribute the sums therein provided for the future support of his wife. *Galusha v. Galusha,* 116 N.Y. 635, 22 N.E. 1114; *Kunker v. Kunker, supra; Schnitzer v. Buerger,* 237 App. Div. 622, 262 N.Y.S. 385; *Winter v. Winter,* 191 N.Y. 462, 84 N.E. 382, 16 L.R.A. (N.S.) 710; *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327, Ann. Cas. 1913D.

Where parties to a separation agreement have the legal capacity to contract and the subject matter involved is lawful, and the provisions contained therein are just and equitable, and it has been properly and voluntarily executed, in the absence of fraud or duress, the courts are without power to modify it. *Galusha v. Galusha, supra; Goldman v. Goldman, supra; Kunker v. Kunker, supra.*

In the last cited case it was pointed out that the wife had the choice of two methods for obtaining support—by agreement or by judgment. The Court said: "Both had their advantages and disadvantages. The contract method had permanence. No matter what hardships it might later impose upon her husband, there was no power in the court to modify it . . . The agreement could not be enforced by contempt proceedings nor by sequestration of property. On the other hand, if she submitted her claims for support to the court, inquiry would be made into the means and earning capacity of her husband and a sum fixed as a just and adequate substitute for her support. . . . Payments might be secured or enforced by contempt proceedings or sequestration. . . . If she remarried, the judgment must be modified in respect to alimony." Civil Practice Act, Section 1159 (now Section 1172c).

The New York courts recognize the validity of separation agreements made during marriage, so long as they are not agreements to separate or to release the husband from his obligation to support his wife. *In re Rhinelander's Estate,* 290 N.Y. 31, 47 N.E. 2d 681; *Winter v. Winter, supra; Clark v. Fosdick,* 118 N.Y. 7, 22 N.E. 1111; *Galusha v. Galusha, supra.*

The sole remaining question for determination on this appeal is whether the plaintiff, in view of the facts and circumstances disclosed by the record, is entitled to allege collusion as a defense to the individual

defendant's rights under the separation agreement entered into 2 April, 1947.

The plaintiff in this action insists that the above agreement was entered into by and between the parties as a scheme to obtain a divorce in violation of Section 51 of the Domestic Relations Law of the State of New York. In his brief, however, he states "that he had previously entered into an agreement on September 18, 1946 which prescribed that he should pay $350.00 per month which was very onerous, and which was terminable on her remarriage; that thereafter she had threatened never to remarry; that the agreement had been entered into without knowing his rights and without impartial counsel; and that the agreement of April 2, 1947 was entered into pursuant to an agreement that she should give him a divorce, institute an action and that he would not defend the same."

It is well to note, in this connection, that the action against the plaintiff for divorce had been pending for nearly two months before the second separation agreement was entered into. The plaintiff is very careful not to deny the truth of the allegations or the evidence in support of his adulterous conduct, the ground on which the divorce was granted. He insists that the divorce was properly and legally granted; that the collusion affected only the separation agreement. Or to put it another way, he contends there was no imposition of fraud on the court that could possibly affect the validity of the divorce granted, but that the separation agreement was collusive and should be so held, thus releasing him of all obligations under it. It appears that the moving consideration on his part in making the provision for the support of his wife for life, regardless of her marital status, rather than for life or until her remarriage, was (1) to get out from under the onerous payment to her of $350.00 per month, and (2) to assure him that she would proceed with the pending divorce action without undue delay. He was anxious to be divorced so that he could remarry. He now insists upon the validity of everything that was done in so far as it inures to his benefit or has any bearing on the validity of the divorce decree, but demands the right to repudiate every provision that imposes any burden or obligation on him.

In discussing separation agreements in 17 Am. Jur., Divorce and Separation, Section 499, page 408, *et seq.*, it is said: "The validity of such agreements depends on whether there is an attempt to obtain a divorce not justified by the real facts and thus to practice a fraud on the court. An agreement between the parties, not involving an imposition on the court or a suppression of facts, but intended merely to facilitate the proofs and smooth the asperities of the litigation, is valid . . . Under this rule, where a separation has been induced by the vicious conduct or disability of one of the parties, without inducement or fault of the other, a contract looking to a settlement of property rights and the proper maintenance of

the one not in fault is in no sense repugnant to public policy. The amount which the husband is to pay the wife, the terms of the payment, and the length of time during which such payment is to continue may all be arranged between them by consent. In other words, agreements made upon the separation of husband and wife whereby a division of the property or a provision for the support of the wife is made and the husband is released from obligation to support, otherwise than as provided for in such contracts, are, as a rule, considered to be valid, provided they are properly executed. Such agreements violate no rule of public policy, . . ."

The above statement of the law is consonant with the decisions on the subject in the State of New York. *In re Rhinelander's Estate, supra; Graham v. Hunter,* 266 App. Div. 576, 42 N.Y.S. 2d 717; *Goldman v. Goldman, supra; Butler v. Marcus,* 264 N.Y. 519, 191 N.E. 544; *West v. Burke,* 165 App. Div. 667, 151 N.Y.S. 329, affirmed 219 N.Y. 7, 113 N.E. 561; *Hamlin v. Hamlin,* 224 App. Div. 168, 230 N.Y.S. 51.

In the case of *Butler v. Marcus, supra,* the husband and wife, while living apart, made an agreement whereby the wife was to be paid a monthly sum for one year, the payments to stop at the end of the year if the parties were still married; but if before the end of that year either party should obtain a divorce, then the payments should continue. The wife obtained a divorce before the end of the critical year. In a suit brought by the wife to enforce the agreement against her former husband, the defense was interposed that the agreement was void as against public policy and in violation of Section 51 of the Domestic Relations Law. The Court granted a motion to strike the defense as insufficient in law and entered a summary judgment in favor of the plaintiff. The ruling was affirmed on appeal, and later cited with approval in *In re Rhinelander's Estate, supra. Cf. Hoyt v. Hoyt,* 265 App. Div. 223, 38 N.Y.S. 2d 312.

In *Graham v. Hunter, supra,* the defendant attacked the validity of the separation agreement, asserting it to be illegal and unenforceable in the courts of New York in that it was a contract to dissolve the marriage. This claim was based upon a provision of the agreement, dated 7 December, 1932, which conditioned the payments to the wife for her maintenance and support upon her personal submission to the jurisdiction of any court of competent jurisdiction in any action for a divorce which might thereafter be commenced by the defendant. It also provided that the plaintiff would not be entitled to any payments thereunder if she did anything "which might have any material tendency to delay or hinder the filing and entry of a decree or judgment of divorce," by any such court of competent jurisdiction. The parties involved were divorced in the State of Nevada, and while the New York Court held that it could not modify the decree; it did say, in discussing agreements which have a

direct tendency toward dissolving marriages: "We do not believe that the provision in the agreement of December 7th necessarily comes within such condemnation."

Certainly the separation agreement entered into by the plaintiff and the individual defendant on 2 April, 1947, contains nothing violative of Section 51 of the Domestic Relations Act of the State of New York. And it is clear from the record and the plaintiff's statements in his brief, that he was the movant in bringing about the abrogation and cancellation of the former separation agreement which was not satisfactory to him, and the procurement of the execution of the agreement he now seeks to attack. The income from the four shares of stock assigned to his former wife ordinarily amounts to about $1,600.00 annually. He stood by and never attacked the agreement in the divorce proceedings (*Hoyt v. Hoyt, supra*), nor until after the income therefrom had been paid to his former wife for more than 2½ years. He recognized the validity of the contract until his former wife remarried. Under the terms of the agreement she is to receive the income from the above stock for life, regardless of her marital status. Her remarriage had nothing whatever to do with the validity or invalidity of the agreement. *Graham v. Hunter, supra.* Having by his conduct ratified and confirmed the agreement, we hold that he is now estopped from attacking it. He that seeks relief in a court of equity should enter the chancery with clean hands.

The parties are entitled to have the court consider the instruments involved as they are written and to adjudicate their respective rights thereunder. But the motion to strike from the plaintiff's reply all the allegations which attack the validity of the separation agreement entered 2 April, 1947, should have been granted, and the ruling to the contrary is

Reversed.

OLIVE O'NEAL SPENCER v. McDOWELL MOTOR COMPANY, INC., AND CHARLIE IVES.

(Filed 8 October, 1952.)

1. Automobiles § 16—Instruction held for error in not applying law to evidence in regard to duties of pedestrian on highway.

Where the evidence is conflicting as to whether plaintiff pedestrian was walking on her left-hand side of the highway facing traffic or on her right-hand side of the highway, *held* the court should charge the jury on the various aspects of the evidence to the effect that if she were walking on her left-hand side of the highway it was her duty to yield the right of way to vehicles upon the roadway, and that if she were walking on her right-hand side it was in violation of the statute, G.S. 20-174 (a) (d), and an instruction that the duty of a pedestrian to yield the right of way applies

only to traffic approaching from the front when he is walking on his left side of the highway, must be held for error.

2. Negligence § 20—

An instruction which in effect charges that if defendant failed to avail himself of the last clear chance to avoid the injury to answer the issue of contributory negligence in the negative, must be held for error as making the conduct of the defendant determinative of the question of whether plaintiff was contributorily negligent.

3. Automobiles § 24½c—

Chap. 494, Session Laws of 1951, providing that the registration of a car should be *prima facie* evidence of ownership and that ownership should be *prima facie* evidence that the vehicle was being operated and used with the authority, consent and knowledge of the owner, applies to an accident occurring prior to the effective date of the statute unless action was pending at the time of its effective date. G.S. 20-71.1.

4. Actions § 9—

An action is pending from the time it is commenced, and an action is commenced by issuance of summons.

5. Statutes § 10—

Where a statute expressly provides that it should not apply to pending litigation, such limitation will not be enlarged to exclude from its operation causes of action arising prior to its effective date when action thereon is not brought until subsequent to its effective date. The maxim *expressio unius est exclusio alterius* applies.

6. Same: Constitutional Law § 24—

A statute creating a presumption of evidence may be given retroactive effect, since there is no vested right in procedure.

7. Automobiles § 24½f: Trial § 31b—

Where a defendant sought to be held under the doctrine of *respondeat superior* introduces in evidence bill of sale, recorded conditional sales contract, etc., tending to show that at the time of the accident in suit defendant had sold the automobile involved in the accident, it is error for the trial court to fail to declare and explain the law arising upon such evidence even in the absence of request for instructions.

APPEAL by defendants, McDowell Motor Company and Charlie L. Ives, separately, from *Williams, J.*, at February Term, 1952, of PASQUOTANK.

Civil action instituted 13 August, 1951, to recover damages for personal injuries allegedly resulting from actionable negligence when hit by automobile operated by defendant Charlie Ives.

For purposes of this appeal the following statement of the case is deemed sufficient for proper consideration of points on which decision here turns.

The time of the accident, the subject of this action, was about 11:00 o'clock on morning of 30 April, 1951, on the highway between Elizabeth

City and Weeksville. This highway runs in general north-south direction. It has a paved surface 20 feet in width with shoulders 4 feet in width. Plaintiff lived on the west side of the highway about a mile and a half below Elizabeth City. South of her house there was a curve in the highway. Her mailbox was north of the curve but south of her house, and on the east side of highway. A 35-mile speed limit sign was on the east side of the highway just north of her mailbox. Mrs. Johnson lived just north of plaintiff's home. She too had a mailbox on east side of highway.

Defendant Ives was operating a red convertible automobile coming from direction of Weeksville toward Elizabeth City.

As to the position of plaintiff at time of accident: Plaintiff alleges in her complaint that she "was walking southwardly on the east shoulder of" highway.

On the other hand, defendant Motor Company denies in its answer the allegations of complaint in which the above was alleged. And the defendant Ives, in his answer, admits that "plaintiff was walking, not southwardly but northwardly, on the east shoulder of said highway."

Upon the trial in Superior Court plaintiff offered evidence tending to show: That about 11 o'clock of said date she was going to her mailbox; that no traffic was coming, and quoting her: "I crossed the highway to the east shoulder; I turned and was walking left facing traffic, going south, and I saw a red convertible coming. After seeing the convertible I don't remember anything else until I regained consciousness . . . As to the direction in which the red convertible was coming, I just can't place it. I just saw it coming facing me from the direction of Weeksville, towards Elizabeth City. I was walking just to the north of the sign when I first saw the automobile. I was on the east shoulder in the dirt. I just saw the car coming around the curve, and that is all I can remember."

Then on cross-examination plaintiff continued her testimony by saying: "I was about 10 feet north of the State Highway sign when I saw the car coming . . ."

Then on re-direct examination plaintiff testified: "After I got on the east shoulder of the road I did not go back upon the paved portion of the road. I was on the grass when I was hit right on the edge of the ditch."

W. T. Hawkins, State Highway Patrolman, witness for plaintiff, testified: "I had a conversation with him (Ives) at that time. He said he was coming north to Elizabeth City, and this woman stepped out in the road in front of him, and he lost control, and hit the ditch."

And defendant Ives testified: ". . . Mrs. Spencer was on the shoulder of the road . . . when I first saw Mrs. Spencer on the highway. She was standing still, she was in front of her house and kind of an angle to me, facing the west." And, again, "As I came up to the scene of the accident

Mrs. Spencer was standing on the shoulder on the far side of the highway from her home, and she was facing more towards Elizabeth City than she was in the direction from which I was coming."

Plaintiff further alleges in her complaint, and defendant Ives admits in his answer, but defendant Motor Company denies in its answer, that at the time and place of the accident the automobile, being driven by Ives, was owned by defendant Motor Company, and carried thereon dealer's license plate issued to the Motor Company by the North Carolina Department of Motor Vehicles; and that Ives was in the employment of defendant Motor Company, acting as its servant, agent and employee in the furtherance of its business.

And upon the trial plaintiff offered evidence tending to show that the records of the North Carolina Motor Vehicle Department failed to show registration of a 1951 Ford convertible to Charlie Ives of Pasquotank County, but that 1951 Dealer's Tag D-11113, the tag on the red convertible operated by defendant Ives at the time of the collision with plaintiff, was issued to defendant Motor Company prior to 30 April, 1951, and remained in its name through and after 30 April, 1951.

On the other hand, defendant Motor Company avers that defendant Ives was the owner and operator of the automobile in question; that he was temporarily using dealer's license plate issued to it; and that he, Ives, was on his own private business or pleasure, and was in no way on any business of it or any business connected with it.

And upon the trial defendant offered in evidence, among other things, a duplicate of original bill of sale, identified as Exhibit 1, date 31 March, 1951, from defendant Motor Company to defendant Ives, together with public record of Pasquotank County of a conditional sales contract dated 3 April, 1951, and filed for registration 13 April, 1951, from defendant Ives, as purchaser, and defendant Motor Company, as seller, identified as Exhibit 2, all in respect to the automobile operated by defendant Ives at the time of the accident.

And in this connection defendant Motor Company offered evidence tending to show that after 3 April, 1951, defendant Ives kept the automobile in question in his possession; that defendant Motor Company assigned purchase money note and contract to Commercial Credit Corporation; and that when the sale of this car was made sales tax of $15.00 was paid by the Motor Company to the State of North Carolina.

These issues were submitted to and answered by the jury as shown, to wit:

"1. Was the plaintiff injured by the negligence of the defendant, Charlie Ives, as alleged in the complaint? A. Yes.

"2. Was the plaintiff injured by the negligence of the defendant, McDowell Motor Company, as alleged in the complaint? A. Yes.

"3. Did the plaintiff by her own negligence contribute to her injuries, as set up in the answer? A. No.

"4. What damages, if any, is the plaintiff entitled to recover? A. $3,500.00."

From judgment signed in accordance with the verdict each defendant appeals to Supreme Court, and assigns error.

Wilson & Wilson for plaintiff, appellee.
John H. Hall for defendant Motor Company, appellant.
W. C. Morse, Jr., for defendant Ives, appellant.

WINBORNE, J. I. The appellant Motor Company assigns as error, among others, portions of the charge as given by the court in respect to the third issue, that is, the issue as to contributory negligence of plaintiff (assignments of error numbers 9 and 10 based on its exceptions 24 and 26), and to the failure of the court to declare, explain and apply the law arising on the evidence on the third issue, particularly as it concerns or is addressed to the statute requiring pedestrians to walk on the extreme left-hand side of the highway and yield the right of way to approaching traffic, as provided for in G.S. 20-174 (a). (Assignment of error number 13 based on exception 29.) And the appellant Ives also assigns as error the same portions of the charge as so given. (Assignments 3 and 4 based on his exceptions 12 and 13.) These exceptions are well taken.

In this connection it is appropriate to turn to an act passed by the General Assembly, Public Laws 1937, Chap. 407, Article XI, now Part 11 of Chap. 20 of General Statutes, pertaining to rights and duties of pedestrians in respect to streets and highways in this State.

In Sec. 133 of the above Act, now G.S. 20-172, it is declared that "pedestrians shall be subject to traffic control signals at intersections as theretofore declared in this Act, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in this article." Then, after defining in Sec. 134, now G.S. 20-173, pedestrians' right of way at cross-walks, it is further declared in Sec. 135, now G.S. 20-174, that "(a) Every pedestrian crossing a roadway at any other point than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right of way to all vehicles upon the roadway," and that "(d) it shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand thereof, and such pedestrian shall yield the right of way to approaching traffic."

The trial court, after reading to the jury only the provisions of subsection (a) of Sec. 135, now G.S. 20-174 (a) above quoted, charged as follows: "I instruct you in that respect, gentlemen, that the provisions of

that statute do not require a pedestrian on the highway to yield the right of way; the duty is imposed upon him under the terms of that statute to yield the right of way to traffic approaching from the front as they are going down the left side of the highway." This is the portion to which exception 24 relates.

In this connection there is evidence in the record from which it may be inferred that plaintiff was walking north along the highway on her right-hand side. Defendant Ives testified that when he first saw plaintiff she was facing more towards Elizabeth City than she was in the direction from which he was coming. And plaintiff herself testified: "I crossed the highway to the east shoulder; I turned and was walking left facing traffic, going south."

True, plaintiff also testified, "I just saw it (the convertible) coming facing me from the direction of Weeksville, towards Elizabeth City." This testimony is susceptible of the inference, as plaintiff contends, that she was walking south on her left-hand side of the highway.

Thus it was incumbent upon the trial court to give appropriate instruction in the light of both inferences—that is, (1) the inference that plaintiff was walking on her left-hand side of the highway, and (2) the inference that she was walking on her right-hand side of the highway, as the jury may find the facts to be.

If she were walking on her left-hand side the statute says she "shall yield the right of way to approaching traffic." Hence we are constrained to hold that the portion of the charge to which exception is here taken reads into the statute more than it contains, and is calculated to mislead and confuse the jury.

On the other hand, if plaintiff were walking north on her right-hand side of the highway, this was in violation of the statute, G.S. 20-174 (d), and would be evidence of negligence to be considered in connection with surrounding circumstances as to whether she used reasonable care and caution commensurate with visible conditions. See *Miller v. Motor Freight Lines,* 218 N.C. 464, 11 S.E. 2d 300; *Tysinger v. Dairy Products Co.,* 225 N.C. 717, 36 S.E. 2d 246; also *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696; *S. c.,* 216 N.C. 487, 5 S.E. 2d 555.

As to Motor Company's Assignment of Error No. 10: The court, after charging on the burden of proof as to the third issue, stated the contentions of the plaintiff, and of the defendants as to how the issue should be answered in keeping with their respective contentions. Then the court instructed the jury: "If . . . you find by the greater weight of the evidence that at the time and place in question Mrs. Spencer, the plaintiff in this action, failed to exercise that degree of care a person of ordinary prudence would exercise in the position she occupied on the shoulder of the road as the car was approaching her and passed her and that by reason

of the position in which she assumed or placed herself she caused the car to collide with and inflicting the injuries sustained about which she complains, or that was the proximate cause, it would be your duty to answer that issue YES; or if you find by the greater weight and when I say 'proximate cause' I mean contributing as a proximate cause or one of the proximate causes of the collision and injury, or (U) if you find by the greater weight of the evidence that at the time and place in question the plaintiff Mrs. Spencer was walking on the right side of the highway in the direction in which she was going, and that in so doing she was acting in violation of the statute which I read to you, and that she was in plain view of the defendant Ives operating the automobile, or where, with the exercise of reasonable care, she could have been seen or should have been seen; and that Ives negligently and carelessly failed to exercise that degree of care a person of ordinary prudence would exercise or due care to prevent the automobile from colliding with her, and that such negligence on his part resulted in and approximately caused the collision and injury, it would be your duty to answer that issue No, unless you so find you would answer it YES. (V)."

The portion between letters U-V is subject of Exception 26.

In respect to this charge, the conduct of the defendant Ives is not the determinative factor as to whether plaintiff violated her duty, and whether such violation was a proximate or contributing cause of her injury. Hence the instruction, as so given, is erroneous.

II. Appellant Motor Company also excepts to portions of the charge in respect to the second issue, as to whether plaintiff was injured by its negligence, as alleged in the complaint, to which portions Assignments of Error 3 to 7, both inclusive, based upon exceptions 18 to 22, both inclusive, relate. These exceptions are untenable. They challenge the ruling of the court that the provisions of Chapter 494 of 1951 Session Laws of North Carolina are applicable to case in hand. This chapter is entitled "An Act to provide New Rules of Evidence in Regard to the Agency of the Operator of a Motor Vehicle Involved in Any Accident." It is made a new section of Chapter 20 of General Statutes and is designated G.S. 20-71.1. It provides in Sec. 1 that "(a) In all action 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 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 under the control of a person, for whose conduct the owner was legally responsible, 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."

In Sec. 2 it is declared that "the provisions of this Act shall not apply to pending litigation." And in Sec. 4 it specifies that "this Act shall become effective from and after July 1, 1951."

While appellant Motor Company does not contend that the Legislature is without authority to change the rules of evidence in the manner revealed in the language of the 1951 Act, as above stated, it contends that under rules of interpretation the Act should not be given retroactive effect, that is, as to existing causes of action, as the trial court did in the case in hand. It seems clear, however, from the language of the Act that the Legislature intended that on and after 1 July, 1951, the only limitation upon the applicability of the Act is that it shall not apply to pending litigation, that is, litigation then pending. It is so expressly provided.

An action is pending from the time it is commenced until its final determination. And a civil action is commenced by the issuance of a summons. See among others the case *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833.

Moreover, the maxim *expressio unius est exclusio alterius,* that is, that the expression of one thing is the exclusion of another, applies. From the fact that the Legislature expressly provided that the provisions of the Act shall not apply to pending litigation, it may be implied that it should apply in all other cases.

In *Tabor v. Ward,* 83 N.C. 291, the Court declares that laws which change the rules of evidence relate to the remedy only, and are at all times subject to modification and control by the Legislature, and that changes thus made may be made applicable to existing causes of action. And it is pertinently stated: "Retrospective laws would certainly be in violation of the spirit of the Constitution if they destroyed or impaired vested right," but that "one can have no vested right in a rule of evidence when he could have no such right in the remedy," and that "there is no such thing as a vested right in any particular remedy." See also *Byrd v. Johnson,* 220 N.C. 184, 16 S.E. 2d 843; *B-C Remedy Co. v. Unemployment Compensation Commission,* 226 N.C. 52, 36 S.E. 2d 733; Stansbury's N. C. Evidence, Sec. 6; *Wallace v. R. R.,* 104 N.C. 442, 10 S.E. 552.

Indeed, the case of *Lowe v. Harris,* 112 N.C. 472, 17 S.E. 539, on which this appellant relies, is distinguishable from case in hand.

III. Appellant Motor Company also assigns as error the failure of the trial court to declare and explain the law arising on the evidence, on the

second issue, particularly as it concerns or is addressed to the defendant's documentary evidence, especially the invoice or conditional sales contract, defendant's Exhibits 1, 2 and 3. This is Motor Company's Assignment of Error 14 based on its exception 30.

In the recent case of *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, this Court in opinion by *Ervin, J.,* reviewed decisions of this Court on the application of provisions of the statute G.S. 1-180. Headnote 1 epitomizes the case as follows: "G.S. 1-180 requires the trial court to instruct the jury as to the law upon all substantial features of the case without request for special instructions, and a general statement of the law is not sufficient, but the court must explain the law as it relates to various aspects of the evidence adduced and to the particular issues involved." In the light of this interpretation of the statute applied to case in hand, we are of opinion and hold that the point here made by the appellant is well taken.

IV. It may be noted that exceptions to the denial of motions of defendants for judgments of nonsuit are not assigned as error, nor are they brought up for review. Moreover, since there must be a new trial, and the matters to which other assignments of error are directed may not then recur, we deem it unnecessary to give to them express consideration.

For reasons stated, let there be a

New trial.

ATLANTIC COAST LINE RAILROAD COMPANY v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 8 October, 1952.)

1. Contracts § 8—

A paragraph or excerpt from a contract must be interpreted in context with the rest of the agreement.

2. Indemnity § 2c—Indemnity agreement in this case held not to impose liability for loss not due to indemnitor's neglect or omissions.

By written contract, defendant railroad company, in consideration of being allowed to cross plaintiff railroad company's tracks at grade, obligated itself to keep the crossing in repair and to indemnify defendant against loss "arising from or growing out of the omissions or neglect" of the defendant in the construction and maintenance of the crossing. Construing the agreement contextually it is *held* defendant is not liable for damage to plaintiff's train caused by a broken rail which was entirely unexplained and not discovered until immediately after plaintiff's engine had traversed the crossing when such damage was not the result of any neglect or omission of defendant company in the performance of its duty to inspect and maintain the crossing, since under the agreement defendant was not an insurer and may not be held liable for inevitable accident,

latent defect, or act of God. This result obtains even though the word "omissions" be construed as synonymous with "failure" and therefore broader in its scope than the term "negligence."

APPEAL by plaintiff from *Frizzelle, J.*, at February Civil Term, 1952, of WILSON.

Civil action by plaintiff railroad company against defendant railway company to recover for damage to one of plaintiff's trains caused by a broken rail at a crossing where the tracks of the two companies cross, alleged to be due to the failure of the defendant company to maintain the crossing in good condition in accordance with the terms of a special contract between the two companies.

The parties waived trial by jury and submitted the case to the Presiding Judge upon the following agreed statement of facts:

"1. Plaintiff and defendant are both Railroad Companies, engaged in interstate commerce, and both lawfully operate through North Carolina, and their tracks cross each other in Wilson County, North Carolina.

"2. On 27 June, 1906 the plaintiff and Raleigh and Pamlico Sound Railroad Company entered into a contract, in terms and provisions as follows:

" 'ARTICLES OF AGREEMENT made and entered into this 27th day of June 1906 by and between the ATLANTIC COAST LINE RAILROAD COMPANY, a corporation created and existing under and by virtue of the laws of the State of Virginia, party of the first part, hereinafter called the COAST LINE COMPANY, and the RALEIGH AND PAMLICO SOUND RAILROAD COMPANY, a corporation created and existing under and by virtue of the laws of the State of North Carolina, party of the second part, hereinafter called the RALEIGH COMPANY:

" 'WHEREAS, the Raleigh Company desires to construct its main line track so that the same will cross the line of the Coast Line Company at grade at a point South of and near to the Town of Wilson, N. C., and the Coast Line Company is willing to permit such crossing to be constructed, upon the terms and conditions hereinafter set forth;

" 'NOW THEREFORE THIS AGREEMENT WITNESSETH: That for, and in consideration of the sum of one dollar to the Coast Line Company in hand paid by the Raleigh Company, receipt of which is hereby acknowledged, and in consideration of the several covenants and agreements by the Raleigh Company, hereinafter made, and to be kept and performed, it is mutually agreed by and between the parties hereto, to-wit:

" 'FIRST: That the Coast Line Company will grant and does hereby grant to the Raleigh Company the right to construct a single or double track grade crossing, over and across its right of way, land, and its two main line tracks, at a point twenty-six hundred and Seventy (2670) feet

South of the 108 Mile Post of the Coast Line Company, in the County of Wilson, N. C., as indicated in the blueprint hereto attached, as part of this agreement;

" 'SECOND: That the plans for such crossing, and the materials employed for its construction and the construction of the culverts which may be necessary to provide for the proper drainage of the said Coast Line Company's roadway and track, shall be submitted to, and in all respects be acceptable to the Engineer of Roadway of the said Coast Line Company.

" 'THIRD: That the said Raleigh Company shall, at its own cost and expense, construct the said grade crossing, in accordance with said plans and specifications, providing therefor all rails, frogs, ties, and any and all other materials necessary; the actual work of constructing said crossing to be subject to the supervision of, and satisfactory to the Engineer of Roadway of the said Coast Line Company, or his duly authorized representative.

" 'FOURTH: That the said Raleigh Company will, at its own cost and expense, at all times maintain said crossing in good condition, and will from time to time make all necessary repairs and renewals thereto. It is further agreed in this respect that if at any time the said crossing should, in the opinion of the Coast Line Company's representative, require renewals or repairs, that the said Raleigh Company will, upon request in writing from the Engineer of Roadway of said Coast Line Company, proceed to make such repairs and renewals, and if such repairs and renewals shall not have been made or begun within ten (10) days after such notice from the said Coast Line Company, then, and in that event, the Coast Line Company may itself cause the necessary work to be done and renewals to be made, and may thereafter charge the said Raleigh Company with the full cost of the work of repair and renewals, which said charge the Raleigh Company hereby agrees and binds itself to pay.

" 'In cases of emergency, the Coast Line Company may make repairs to said crossing, and charge cost of same to the Raleigh Company as aforesaid.

" 'It is further agreed by the Raleigh Company that no work of repair shall be done by it on said crossing without first giving written notice to the Engineer of Roadway, or Roadmaster, of the said Coast Line Company, at least twenty-four (24) hours before entering upon said work; that in making any such repairs or doing any work on said crossing, the Raleigh Company will, in all respects, conform to the requirements of the Coast Line Company as to the time and manner of doing said work so as not to impede the trains of the said Coast Line Company.'

(Paragraphs FIFTH, SIXTH, SEVENTH, and EIGHTH are omitted as not being pertinent to decision.)

"'NINTH: That it shall be the duty of the said Raleigh Company, and it does hereby fully agree and undertake, upon the demand of the said Coast Line Company to pay, make good and fully indemnify the Coast Line Company against all proper claims for loss, injury, or damage, which it, or any of its employees or passengers or any other person or persons may sustain by accident, collision, delay, or hindrance, or from any other cause arising from or growing out of the omissions or neglect of the said Raleigh Company or its agents or employees, in the construction, repair, maintenance, or operation of said crossing or crossings, or in the exercise of any of the rights and privileges granted it hereunder.'

(Paragraph TENTH is omitted as not being pertinent to decision.)

"'ELEVENTH: That this agreement and all of the terms, stipulations and conditions thereof, shall inure to and be binding upon the respective successors and assigns of the parties hereto.

"'IN WITNESS WHEREOF (here follows the rest of the attestation clause and other formal parts of the contract showing due execution by the two companies. These parts are omitted as not being pertinent to decision.) . . .'

"3. Prior to September 10, 1949 the defendant succeeded to all of the rights and liabilities of Raleigh and Pamlico Sound Railroad Company under such contract, and the contract was, on September 10, 1949 and still is in full force and effect between the plaintiff and the defendant.

"4. The defendant at its own cost and expense, at all times, exercised reasonable care in maintaining said crossing in good condition, and otherwise exercised reasonable care in discharging fully its obligations under said contract.

"5. At about 6 a.m. on 10 September 1949 plaintiff's northbound passenger train No. 92 passed over said crossing and immediately upon so doing, the Engineer of said train stopped the train, went back to the crossing, where it was discovered that a piece of the west running rail on the northbound track about four (4) inches in length from the end of the west running rail within the crossing was broken off; that the breaking of the piece of rail was through no fault or neglect on the part of the defendant.

"6. In passing over said crossing, the wheels of the plaintiff's Diesel engines and the following cars on the left side of the train struck the broken rail, causing the damage to the wheels of the plaintiff's Diesel units and cars to the extent of $8,809.76.

"7. The defendant, during all the time the said contract was in force, diligently and carefully inspected said crossing, it having made the last such inspection in the afternoon of 9 September 1949, at which time the crossing appeared to be in good condition; if there was any defect in the crossing or in the rail, such defect was not the fault of the defendant, nor

did it occur by reason of any negligence on the part of the defendant, and such defect, if any there was, could not have been discovered by the defendant in its inspection of the crossing on the afternoon of 9 September 1949, by the exercise of ordinary diligence and care.

"8. It is specifically agreed between the parties that the above mentioned rail did not break because of any negligence on the part of the defendant.

"If the Court is of the opinion that the defendant is liable to the plaintiff under the foregoing agreed statement of facts, it will enter judgment against the defendant in the sum of $8,809.76.

"If the Court is of the opinion that the defendant is not liable, it will dismiss the action."

The court, after hearing arguments of counsel, concluded on the facts agreed that the plaintiff was not entitled to recover, and entered judgment so decreeing. From the judgment entered, the plaintiff appealed.

F. S. Spruill for plaintiff, appellant.

Gardner, Connor & Lee for defendant, appellee.

JOHNSON, J. The single question presented by this appeal is: Does the contract between the plaintiff and the defendant make the defendant liable for damage sustained by plaintiff because of a broken rail, notwithstanding the rail broke through no fault of the defendant?

The plaintiff contends that the contract makes the defendant an insurer and imposes absolute liability. The plaintiff lays stress on the part of paragraph FOURTH of the contract wherein the defendant agrees that it "will at its own cost and expense, at all times maintain said crossing in good condition, and will from time to time make all necessary repairs and renewals thereto." The plaintiff insists that this language creates an absolute covenant, an unconditional promise, that the defendant at all times will maintain the crossing in good condition, irrespective of inevitable accident, latent defect, or act of God.

The plaintiff also points to paragraph NINTH and urges that by its terms the defendant specifically covenants to indemnify the plaintiff against all claims for damage which plaintiff may suffer because of the "omissions or neglect" of the defendant in maintaining the crossing in good repair as required by paragraph FOURTH; that is to say, as plaintiff contends, for omitting to keep the crossing in good repair at all times, at all hazards.

However, when the excerpts from paragraph FOURTH and the provisions of paragraph NINTH, relied on by the plaintiff to support its contention, are considered in context and interpreted with the rest of the contract, as is the rule in cases like this one (12 Am. Jur., Contracts, Sec. 241; *Gilbert*

v. Shingle Co., 167 N.C. 286, 83 S.E. 337), it is apparent that these sections take on different meaning than as urged by the plaintiff.

Here it is to be noted that there is more to paragraph FOURTH than the excerpt which the plaintiff cites and relies on as creating an absolute covenant to maintain the crossing in good condition. This paragraph further provides that if in the opinion of the plaintiff the crossing should require renewals or repairs, the defendant, on written request of the plaintiff, will proceed to make them, but if not so made within ten days after notice, then the plaintiff itself may make the renewals or repairs. Moreover, it is provided in this paragraph that the defendant shall make no repairs whatsoever without first giving written notice to the plaintiff at least twenty-four hours before entering upon such work, and that in making any such repairs, the defendant shall comply with the requirements of the plaintiff as to the time and manner of doing the work. Also, paragraph FOURTH recognizes that the parties contemplated that emergencies might arise making it impossible for the defendant to give the required notices and make the repairs under the contract. As to this, it is observed that paragraph FOURTH provides that in case of emergency, the plaintiff may proceed to make the repairs and charge the costs to the defendant.

It thus appears that since the defendant's covenant to maintain the crossing is conditioned upon notice to and approval of the plaintiff as to methods of repair, and so forth, it may not be construed as making the defendant an insurer that the crossing will be maintained in good condition at all times, at all hazards.

And it is evident that the indemnity covenant contained in paragraph NINTH, by which the defendant agrees to indemnify the plaintiff against damage caused by "omissions or neglect" to repair and maintain the crossing, is referable to and must be interpreted in connection with the provisions of paragraph FOURTH. When this is done, it is manifest that the provisions of the contract do not impose absolute liability upon the defendant.

In this view of the case it seems unnecessary to discuss the distinctions and refinements of meaning placed by lexicographer's on the words "omissions" and "neglect," emphasized by the plaintiff. It may be conceded on this record (1) that the expression "omissions or neglect" is not synonymous with negligence; (2) that "neglect" is synonymous with "negligence," and (3) that "omission" is synonymous with "failure."

Conceding all this, the record here shows no damage to the plaintiff arising out of any omission of the defendant respecting maintenance or repair of the crossing within the meaning of the contract sued on.

And certainly there is nothing on the record tending to show that the rail broke as a result of an omission of the defendant. Here we have an

entirely unexplained broken rail. It was on the plaintiff's northbound track. This means that none of the defendant's trains ever passed over the particular rail. From all that appears in the facts agreed, it is just as logical that the rail broke because it was struck by the plaintiff's train as it is to say it broke because of an omission on the part of the defendant.

The facts in this case, under a contextual interpretation of the controlling provisions of the contract, do not come within the doctrine that one who makes a positive agreement to do a lawful act is not ordinarily absolved from liability for failure to do it by a subsequent impossibility of performance caused by an unavoidable accident (12 Am. Jur., Contracts, Sec. 363). Therefore, we deem it unnecessary to discuss the authorities cited and discussed in the briefs on this principle of law.

It follows from what we have said that Judge Frizzelle correctly held that the plaintiff is not entitled to recover. The judgment below is

Affirmed.

TOWN OF FREMONT v. MACK D. BAKER AND WIFE, ELSIE MAE W. BAKER, T. R. UZZELL, TRUSTEE, AND ATLAS WEBB AND WIFE, EFFIE WEBB.

(Filed 8 October, 1952.)

1. Appeal and Error § 40c—

On appeal from an order granting or denying injunctive relief, the findings of fact made by the court are not conclusive, but nevertheless they will not be disturbed when they are clearly supported by the evidence offered.

2. Easements § 3—

An easement by prescription must have boundaries sufficiently definite to be located and identified with reasonable certainty, and allegations that plaintiff municipality had obtained an easement by prescription across the back part of defendant's lot for the purpose of maintaining and repairing its water and sewer mains, without any allegation as to the width of the easement or its boundaries, is insufficient to state a cause of action for an easement by prescription.

3. Pleadings § 24c—

Proof without allegation is as unavailing as allegation without proof.

4. Injunctions § 8—

A temporary restraining order issued in a suit for permanent injunction will ordinarily be continued to the hearing to preserve the *status quo* when serious issues of fact are raised and plaintiff makes it appear *prima facie* that he will be able to maintain his primary equity, and there is reasonable apprehension of irreparable loss or the destruction of the subject matter of the action or wrongful injury thereto.

5. Injunctions § 1a—

Injunction will not lie to settle a dispute as to the possession of realty or to dispossess one person for the benefit of another.

6. Injunctions § 8—Temporary restraining order should be dismissed when continuance is not necessary to preserve property rights or prevent irreparable injury.

Plaintiff municipality instituted suit to restrain the obstruction of its asserted easement by dedication for the maintenance and repair of its water and sewer mains across the vacant part of defendant's lot. At the time the action was instituted defendant had already begun construction on the land, and walls of the structure had been built. *Held:* Temporary restraining order issued in the cause was properly dismissed on the hearing to show cause, since the original *status quo* could not be preserved without requiring defendant to remove the walls already erected, to which remedy plaintiff was not entitled at that time, and since plaintiff has not shown that its rights would be lost or materially impaired unless the restraining order were continued to the hearing.

7. Same—Where injunctive relief is not sole objective of action, and serious issues of fact are raised, court may not dismiss the action on hearing of order to show cause.

Even though an order to show cause why a temporary restraining order should not be continued to the hearing on the merits is heard at term time, the court, in the absence of waiver of trial by jury, has no authority to determine, without the aid of a jury, serious issues of fact raised therein upon which the property rights of the parties depend, and even though the court properly dismisses the temporary restraining order, it is error for the court to dismiss the action, since the action is not before the court on its merits, and injunctive relief is not the sole objective of the action. The agreement of the parties in this case that the judge might enter judgment out of term, construed in the light of the record, *held* not to amount to a waiver of jury trial.

8. Same—

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, findings by the court in regard to the respective property rights of the parties in the subject matter are not binding on the court or the parties upon the hearing of the cause on the merits.

APPEAL by plaintiff from *Grady, Emergency Judge,* June Term, 1952, WAYNE. Modified and affirmed.

Civil action to restrain the obstruction of a right of way easement for the maintenance and repair of plaintiff's water and sewer mains and for a decree adjudging plaintiff's right to the possession and use of said easement.

Plaintiff is a municipal corporation. The area within its boundary lying on the north side of Main Street between Railroad Street and Sycamore Street is divided into twelve lots facing Main Street and extending

northerly. The lots vary in depth from 88 to 140 feet. Buildings have been constructed on these lots. Due to the depth of the respective lots and the buildings thereon, the open space to the rear of the buildings extending from Railroad to Sycamore Street is very irregular in width.

In 1922 plaintiff was installing water and sewer mains. On petition of the owners of the twelve lots, it agreed to locate the mains, intended and designed to serve the buildings on said lots, in the open space to the rear of the buildings rather than in Main Street. It alleges that the property owners then and there dedicated to the public an easement or right of way in said space for the location and maintenance of said mains, including the right of ingress and egress for those purposes.

Defendants own one of the lots on Main Street, twenty-one feet wide and extending back 120 feet. The building thereon was 88 feet in depth with a play pen to the rear. Defendant Mack D. Baker, the owner of the lot and the real party in interest, has now begun the construction of an addition to his building. The addition will extend to the northern end of his lot and be located over and across plaintiff's water and sewer mains. The walls of this building are constructed of concrete blocks and said defendant intends to construct the flooring of concrete. The walls are set ten inches in the ground and have been completed, but the roof has not been constructed and the floor of concrete has not been laid.

Upon the institution of this action plaintiff obtained a temporary restraining order. The rule to show cause why the restraining order should not be continued to the hearing was returnable before Hatch, Special J. He continued the same to the June Term to be heard by the judge presiding. At the June Term, Grady, Emergency J., presiding, it was agreed in open court "that the presiding Judge might take all of the papers to his home, hear the case upon affidavits, exhibits, and stipulations of the parties, and enter judgment out of term and out of the county, as should appear just and proper upon the facts as found."

In due time Grady, Emergency J., found the facts, including the findings that (1) plaintiff has acquired an easement across the land of defendants which "carries with it the ordinary privileges incident to the maintenance and repair of Water & Sewage Systems, and the defendants have no right to interfere in any way with the exercise of such rights;" (2) the walls of the building had been constructed and the right of way blocked or obstructed when this action was instituted and the obstruction is a *fait accompli;* (3) plaintiff has an adequate remedy at law; (4) no damages have been shown; and (5) plaintiff will not suffer irreparable damage by reason of the construction of said building. He thereupon entered judgment dissolving the temporary restraining order and dismissing the action. Plaintiff excepted and appealed.

B. F. Aycock and Dees & Dees for plaintiff appellant.

J. Faison Thomson and J. Faison Thomson, Jr., for defendant appellees.

BARNHILL, J. While in appeals of this character from an order granting or denying injunctive relief, the findings of fact made by the court below are not conclusive and binding on this Court, a careful examination of the record discloses no reason why we should at this stage of the proceeding undertake to revise the facts found by the court below. *Smith v. Bank,* 223 N.C. 249, 25 S.E. 2d 859; *Gaines v. Manufacturing Co.,* 234 N.C. 340, 67 S.E. 2d 350. The essential facts on the rule to show cause sufficiently appear in the findings made by the court below.

The plaintiff stressfully contends that it has acquired by prescription a general alleyway across the land of defendants, which alley, it contends, extends from Railroad Street to Sycamore Street over and along the vacant property to the rear of the buildings fronting on Main Street. We may concede, without deciding, that it offered some evidence to this effect. Even so, on this record plaintiff's contention is without merit. The complaint does not sufficiently allege the existence of a public alleyway. *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153; *Cahoon v. Roughton,* 215 N.C. 116, 1 S.E. 2d 362; *Thompson v. Umberger,* 221 N.C. 178, 19 S.E. 2d 484; *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906; *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371; Anno. 143 A.L.R. 1403. And proof without allegation is as unavailing as allegation without proof. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14; *Flying Service v. Martin,* 233 N.C. 17, 62 S.E. 2d 528; *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285.

Before defendants began the erection of the addition to their building, the rear of their lot was vacant for a distance of thirty-two feet. Does plaintiff claim an alley thirty-two feet in width? If not, where does the alley cross the same? How wide is the easement and what are its boundaries? As to these essentials of a public way the complaint contains no averment.

In the complaint the plaintiff's right to require a passageway from Railroad Street to Sycamore Street to be kept open to the end it may have free and unobstructed access to its water and sewer mains for the purpose of maintenance and repair is predicated on an alleged agreement made between the plaintiff and the property owners at the time the mains were installed. Thus the plaintiff asserts an easement by dedication. Should the temporary restraining order be continued to the final hearing so as to maintain the *status quo* until the issues raised by the pleadings in this respect are finally determined? This is the real question posed for decision.

Ordinarily a temporary restraining order should be continued until the final hearing when it is made to appear, *prima facie,* that the plaintiff will be able to maintain his primary equity and there is reasonable apprehension of irreparable loss unless it remains in force, or it appears to be reasonably necessary to protect plaintiff's rights until the controversy between the parties can be determined. *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *Smith v. Bank,* 223 N.C. 249, 25 S.E. 2d 859.

When the main purpose of an action is to obtain a permanent injunction and the evidence presents a serious issue as to the existence of facts which, if established, would entitle the plaintiff to the relief demanded, *Springs v. Refining Co.,* 205 N.C. 444, 171 S.E. 635; *Bailey v. Bryson,* 214 N.C. 212, 198 S.E. 622, or when it is necessary to protect the subject of the action against destruction or wrongful injury until the legal controversy has been settled, *Lawhon v. McArthur,* 213 N.C. 260, 195 S.E. 786; *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143, the usual practice is to continue the temporary restraining order to the hearing.

Conversely, the order will not be continued when no issues of fact are raised, *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252, or when a permanent injunction is the only relief sought and no probable equity is made to appear, *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359; *Mosteller v. R. R.,* 220 N.C. 275, 17 S.E. 2d 133; *Cahoon v. Comrs. of Hyde,* 207 N.C. 48, 175 S.E. 846, or when plaintiff seeks to restrain a consummated wrong, *Jackson v. Jernigan, supra; Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455; *Groves v. McDonald,* 223 N.C. 150, 25 S.E. 2d 387.

Nor may a restraining order be used as an instrument to settle a dispute as to the possession of realty or to dispossess one for the benefit of another. *Armstrong v. Armstrong,* 230 N.C. 201, 52 S.E. 2d 362; *Young v. Pittman,* 224 N.C. 175, 29 S.E. 2d 551.

The plaintiff did not institute this action until after defendants had entered upon and, by the erection of the walls to their annex, substantially obstructed the alleged easement, thereby effectively preventing ingress and egress over and across their land along the course of the water and sewer mains. Therefore a continuance of the restraining order would not serve to maintain the original *status quo* without a further order summarily ousting defendants and requiring them to remove the walls they have erected—a remedy to which plaintiff is not entitled at this stage of the proceeding.

Plaintiff may be entitled to the free and unobstructed access to its mains as an essential part of an easement granted or dedicated by the property owners. This we may concede. Even so, it has failed to show that there is any immediate danger of irreparable damage or that its rights will be lost or materially impaired pending the trial unless the

restraining order is continued to the hearing. *Branch v. Board of Education, supra.*

It follows that plaintiff has failed to show harmful error in the order of the court below dissolving the temporary restraining order.

But the court below likewise dismissed the action at the cost of the plaintiff. In this there was error.

The action came on for hearing at term. Even so, it was before the court on the rule to show cause. There is nothing in the record to indicate that it was calendared for hearing on the merits. The record fails to disclose a waiver of trial by jury. And plaintiff asserts that it did not agree to submit the case to the judge for any purpose other than to decide whether the temporary restraining order should be continued to the hearing.

The stipulations of counsel as recited in the judgment are somewhat ambiguous and might be held sufficient to constitute a submission of the whole controversy to the judge to find the facts and render judgment on the merits in accord with the facts found. When, however, the agreement is construed in the light of the record and the position plaintiff now assumes, it can mean nothing more than a stipulation that the court should consider the affidavits, find the facts "and enter judgment out of term . . . as should appear just and proper" on the interlocutory motion.

Injunctive relief is not the sole objective of plaintiff's action. It is ancillary to its main cause of action. Its ownership of an easement over and across the lands of defendants and other property owners along the line of its water and sewer mains and its rights incident thereto have not been adjudicated so as to become a matter of public record. It seeks a judgment in this action decreeing that it is the owner, by dedication, of a right of way over and across the land of defendants for the purpose of maintaining and repairing its said mains with the right to keep said way free of any obstruction which would interfere with or impede its free access thereto. Defendants deny the existence of the right of way asserted by plaintiff. Thus there are issues of fact to be determined in a trial by jury. This being true, the court was without jurisdiction to dismiss the action. *Groves v. McDonald, supra; Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349; *Bond v. Bond,* 235 N.C. 754.

It is true the court found as a fact that plaintiff has acquired an easement across the land of defendants which "carries with it the ordinary privileges incident to the maintenance and repair of Water & Sewage Systems, and the defendants have no right to interfere in any way with the exercise of such rights," and there is no exception to such findings. But this finding does not serve to protect plaintiff or judicially establish its easement, for the findings of the judge made at a preliminary hearing such as the one here involved are not binding on the court or the parties

at the hearing on the merits. *Sineath v. Katzis,* 219 N.C. 434, 14 S.E. 2d 418; *Branch v. Board of Education, supra.*

At the time of the hearing a demurrer to the complaint for that it fails to state a cause of action was pending. There is nothing in the record to indicate that the court below considered the same. Nor does it appear that the action was dismissed on the grounds stated in the demurrer. Yet the demurrer appears in the record and counsel referred to it in the oral argument. We take note thereof merely to forestall any suggestion that we have overlooked this phase of the case.

That we sustain the judgment dismissing the temporary restraining order does not constitute a license for defendants to complete the construction of the annex to their building. They are now fully advised of the rights plaintiff is asserting and will proceed at their own risk.

So much of the judgment as undertakes to dismiss the action is vacated and the cause is remanded with direction that it be reinstated upon the civil issue docket for trial of the issues raised by the pleadings. As so modified, the judgment entered in the court below is affirmed.

Modified and affirmed.

JAMES H. JACKSON, ADMINISTRATOR OF THE ESTATE OF JUDITH LANE JACKSON, DEC'D., v. DR. T. H. JOYNER.

(Filed 8 October, 1952.)

1. Physicians and Surgeons § 16½—

Where the evidence tends to show that the physician performing the operation selected and arranged for the help of an anaesthetist employed by the hospital and had full power and control over him in the performance of his duties during the operation, *held* the anaesthetist was, during the period of the operation, the agent of the physician, and the physician is liable for the negligence of the anaesthetist in the administration of the anaesthetic. *Byrd v. Hospital,* 202 N.C. 337, cited and distinguished.

2. Master and Servant § 22d—

Where an employee is in the general employment of one person, but in the performance of a particular duty is under the immediate direction and control of another, the latter is liable for the servant's negligence under the doctrine of *respondeat superior.*

3. Physicians and Surgeons § 16½—

Where in an action to recover for the death of a child following an operation, the complaint alleges that the defendant physician permitted an overdose of anaesthetic to be administered to the patient, and upon the trial there is substantial evidence to the effect that the anaesthetist who performed his duties under the direction and control of the physician was

negligent, error in the charge to the effect that the physician would not be liable for the negligence of the anaesthetist must be held prejudicial.

4. Evidence § 48½—

Where the details of the treatment and care given the patient by defendant physician are presented to an expert witness in the form of a hypothetical question, the witness should be asked whether in his opinion the treatment and care as outlined was in conformity with approved medical practices and treatment in the locality rather than whether such treatment would constitute a reasonable degree of care to be exercised by a diligent physician under the circumstances.

APPEAL by plaintiff from *Bobbitt, J.*, and a jury, at Regular March Term, 1952, of BUNCOMBE.

Civil action by plaintiff to recover damages for the alleged wrongful death of his intestate, an eight-year-old girl, who died before regaining consciousness after a tonsillectomy performed by the defendant, Dr. T. H. Joyner, at the Mountain Sanitarium in Henderson County.

The Sanitarium and also Edgar A. Hanson, who administered the anaesthetic, were originally joined as defendants along with Dr. Joyner. However, by decision on former appeal, heard at the Spring Term, 1951, this Court affirmed a previous judgment of nonsuit as to all defendants except Dr. Joyner. As to him, the case was sent back for retrial for errors committed in the course of the trial. The decision on former appeal is reported in 234 N.C. 222, 67 S.E. 2d 57.

On retrial the jury found for their verdict that the death of plaintiff's intestate was not caused by negligence of Dr. Joyner. From judgment on the verdict the plaintiff appealed, assigning errors.

W. W. Candler, Don C. Young, and Cecil C. Jackson for plaintiff, appellant.

Harkins, Van Winkle, Walton & Buck for defendant, appellee.

JOHNSON, J. The plaintiff challenges the correctness of these instructions: ". . . The Court instructs you that there is no evidence tending to show that Edgar A. Hanson or any of the nurses who attended Judith Lane Jackson was an employee of the defendant, Dr. T. H. Joyner. The Court instructs you further that the negligence on the part of Hanson, if any, and the negligence on the part of any of the nurses, if any, would not be deemed in law, the negligence of the defendant, Dr. Joyner.

"If there were negligence on the part of Hanson or on the part of any one or more of the nurses, which is denied by the defendant, Dr. T. H. Joyner, in such case the defendant, Dr. T. H. Joyner, would not be responsible for their negligence. The issue for decision is whether the defendant, Dr. T. H. Joyner, was negligent and whether such negligence

on his part was the proximate cause or one of the proximate causes of the death of Judith Lane Jackson."

These instructions in effect withdrew from the jury the question of negligence of Dr. Joyner based on the conduct of nurse Hanson.

The record discloses that the child's mother in arranging for the operation contacted and engaged only Dr. Joyner. He in turn, after demurring to the mother's suggestion that her family physician be engaged to give the anaesthetic, arranged for the help and assistance of the nurses, including nurse Hanson, who administered the anaesthetic.

On this record the evidence is sufficient to justify the inference that during the time the child was being prepared for the operation and while the operation was in progress, Dr. Joyner, as surgeon in charge, had full power of control over the nurses, including nurse Hanson, so as to make him responsible for the way and manner in which the anaesthetic was administered by Hanson.

And when a surgeon occupies such position, his duties and liabilities respecting supervision and control over the administration of the anaesthetic are substantially the same as those respecting the other phases of the operation and his treatment of the patient generally; that is, he is bound to exercise such reasonable care and skill respecting the administration of the anaesthetic as is usually exercised by average physicians and surgeons of good standing in the same community. 41 Am. Jur., Physicians and Surgeons, Sec. 95. See also *Jackson v. Sanitarium,* 234 N.C. 222, 67 S.E. 2d 57; *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356.

It is true Hanson was in the general employ of the hospital; nevertheless, on this record it is inferable that he stood in the position of a lent servant who for the purpose and duration of the operation occupied the position of servant of Dr. Joyner. 35 Am. Jur., Master and Servant, Sec. 18. And the rule is that where a servant has two masters, a general and special one, the latter, if having the power of immediate direction and control, is the one responsible for the servant's negligence. 35 Am. Jur., Master and Servant, Sec. 541. See also *Hodge v. McGuire,* 235 N.C. 132, 69 S.E. 2d 229; *Hayes v. Elon College,* 224 N.C. 11, 15, 29 S.E. 2d 137. The power of control is the test of liability under the doctrine of *respondeat superior.* 35 Am. Jur., Master and Servant, Sec. 539.

It would seem from what we have said that the challenged instructions must be held for error in eliminating from the case the doctrine of *respondeat superior.*

The defendant seeks to sustain the instructions as given on the theory that the nonsuit as to Hanson, affirmed on former appeal on authority of *Byrd v. Hospital,* 202 N.C. 337, 162 S.E. 738, relieves Dr. Joyner from liability for any act or omission connected with the conduct of nurse

Hanson in administering the anaesthetic, and such is urged to be the law of the case.

The contention would seem to be without merit, but it calls for an analysis of the decision in *Byrd v. Hospital, supra.* There, the action was against the lessee of a hospital and a staff nurse. The attending physician was not sued. The evidence disclosed that the alleged acts of negligence of the nurse were committed in administering a heat treatment to a patient while the physician in charge was standing by directing the mode of treatment and impliedly approving the treatment as given by the nurse. The treatment was not obviously or inherently dangerous. It was there held that the nurse was justified in assuming that the treatment, administered in the presence of the physician, was proper under the circumstances, and it was further held that the treatment so administered was deemed the treatment of the physician and not of the nurse, and that nonsuit should have been allowed.

In short, *Byrd v. Hospital, supra,* holds that as between patient and nurse, the nurse who follows the orders of the physician or surgeon in charge is not ordinarily liable if injury results from the treatment as prescribed. But nothing is said in the *Byrd case* to justify the contention that exoneration of the nurse, *ipso facto,* immunizes the physician in charge.

On the contrary, the rationale of the decision in the *Byrd case* is, not that nonsuit as to the nurse immunizes the physician, but rather, if the acts and omissions complained of be negligent, they then are referable and imputable to the true author thereof, the physician who directed or suffered the negligent conduct through the instrumentality of an agent under his control, and that therefore the physician alone is responsible and liable therefor.

Further, it is to be observed that the principle announced in the *Byrd case* stands as an exception to the general rule that an agent who does a tortuous act is not relieved from liability by the fact that he acted at the command or under the direction of his principal. 2 Am. Jur., Agency, Sections 324 and 326.

But be that as it may, the decision on former appeal, based on the Byrd decision, may not be invoked for the purpose of limiting the liability, if any, of Dr. Joyner or restricting the scope of the issue of negligence as to him. The principle upon which the decision in the *Byrd case* was made to turn has no bearing on the issue of negligence as to Dr. Joyner and furnishes no criterion by which to determine the question of his liability. It follows, then, that the evidence which was adduced below, including that which was substantially the same as on first trial and also the new evidence offered on the retrial, should have been evaluated in the light of the general rules governing the doctrine of *respondeat superior.*

We have also considered the defendant's further contention that if there be errors in the instructions they were harmless. Here the defendant urges that there is neither allegation nor proof to support any finding of negligence against Dr. Joyner based on negligent acts or omissions of Hanson. The record impels the other view. The gravamen of the complaint is that this was an anaesthetic death. There is specific allegation that Dr. Joyner permitted an overdose of ether or anaesthesia to be administered by Hanson. The evidence offered at the first trial, which we held to be sufficient to make out a *prima facie* case of actionable negligence, was substantially re-offered at the second hearing. (See statement of facts in connection with the decision on former appeal—234 N.C. 222.) Also, on retrial, substantial new evidence was offered tending to show actionable negligence of the defendant based on the conduct of nurse Hanson. However, with the case going back for retrial, we refrain from recapitulating or discussing this evidence in detail. It suffices to say a considerable portion of such evidence was elicited from defense witnesses.

Since errors in the charge necessitate a new trial, we deem it proper to direct attention to another group of exceptions which seem to be worthy of consideration. These relate to the testimony of a number of medical experts placed on the stand by the defendant. The exceptions challenge both the form of hypothetical questions propounded to the witnesses and the answers given by them. The question propounded to Dr. Louis Griffith will suffice to illustrate this group of exceptions:

"Q. If the jury should find from the evidence in this case and by its greater weight that Dr. Joyner performed a tonsillectomy operation on Judith Jackson, . . . (then follows a three-page gist of the defendant's evidence, relating numerous visits of Dr. Joyner to the bedside of the child beginning about fifteen minutes after she was taken to the hospital room following the operation and running through the rest of the day and night until she died, and giving the details of the treatment and care of the child by Dr. Joyner and the nurses during this period) . . . have you an opinion satisfactory to yourself as to whether or not the actions of Dr. Joyner in his treatment and care of this patient after post-operation and the conditions under which she was kept and observed during that time would constitute a reasonable degree of care to be exercised by a diligent physician on a patient following a tonsillectomy?

"Objection by plaintiff. Overruled. Exception.

"A. Yes, I have an opinion.

"Q. What is that opinion, Doctor?

"A. My opinion is that the child had meticulous care.

"Motion by plaintiff's counsel to strike out the answer and instruct the jury not to consider the answer. Motion denied. Exception.

"Q. Doctor, will you please define to the jury what you mean by 'meticulous' care?

"A. Well, in my estimation . . .

"Q. In your opinion, doctor?

"A. Yes, in my opinion. That was just a mistake on my part, my opinion—in my opinion no patient could have had better care than that patient had.

"Motion to strike. Denied. Exception.

"Q. That is assuming the facts to be as recited in the question?

"Objection.

"A. Yes, that is it exactly.

"Motion to strike. Denied. Exception."

Instead of asking the witness whether in his opinion the treatment outlined in the hypothetical question constitutes "a reasonable degree of care to be exercised by a diligent physician," it would seem to be the better practice, more nearly in accord with approved precedents, to let the witness say whether in his opinion the treatment and care given, as outlined in the hypothetical question, was in conformity with approved medical practices and treatment in the same locality, thus leaving it for the jury to draw from the evidence its own inference as to whether the physician exercised reasonable care in applying his professional knowledge and skill to the patient's case. See Stansbury, North Carolina Law of Evidence, Sec. 137; 32 C.J.S., Evidence, Sec. 534 (4); 20 Am. Jur., Evidence, Sec. 787 *et seq.*; 58 Am. Jur., Witnesses, Sec. 851 *et seq.* *Cf.* Wigmore on Evidence, Third Ed., Vol. 11, Sections 672 to 686.

It is also noted that this witness' answer, in addition to being unresponsive to the question, was highly argumentative.

New trial.

STATE OF NORTH CAROLINA UPON THE RELATION OF BILL ATKINS v. LLOYD FORTNER, ADRIAN BUCHANAN, RUSH T. WRAY, AND EVERTON POWELL.

(Filed 8 October, 1952.)

1. Appeal and Error § 10a—

A "case on appeal" is not necessary where the record proper contains case agreed which is equivalent to a special verdict.

2. Public Officers § 2: Schools § 4b—Procedure to fill vacancy in membership of county board of education.

Construing G.S. 115-42 in conjunction with G.S. 115-37 and G.S. 115-38, *it is held* that a vacancy in the membership of a county board of education may be filled by the county executive committee of the political party to

which the former incumbent belonged for that portion of the unexpired term between the occurrence of the vacancy and the next regular session of the General Assembly, provided such committee acts within thirty days of the vacancy, but when it does not act within that period of time the State Board of Education has power to fill the vacancy, and its appointee is entitled to the office notwithstanding that the executive committee has attempted to act after the expiration of the thirty day period. The General Assembly alone has power to fill the vacancy for that portion of the unexpired term subsequent to its next regular session, and the provision of the statute that such vacancy be filled from candidates nominated by the party primary or convention of such county in instances where vacancy occurs before the primary or convention, applies only to the filling of the vacancy by the General Assembly and does not limit the action of the county executive committee or the State Board of Education.

3. Appeal and Error § 6c (2)—

An exception to the judgment is sufficient to raise the question of whether the facts embodied in the case agreed support the judgment.

4. Public Officers § 6c—

A public office is vacant when it is without an incumbent who has the legal right to exercise its functions, and a vacancy occurs as of the time of the happening of the event which is the cause of the vacancy.

5. Same—

Where a vacancy in a public office occurs by virtue of the constitutional provision against double office holding, Constitution of North Carolina, Art. XIV, Sec. 7, such vacancy occurs as of the date of the acceptance of the second office unaffected by the fact that the person accepting the second office continues to discharge the duties of the office in good faith, since ignorance of the law excuses no man.

APPEAL by defendants Rush T. Wray and Everton Powell from *McLean, Special Judge,* at the August Term, 1952, of the Superior Court of Yancey County.

Civil action in the nature of *quo warranto* to determine conflicting claims to public offices.

After this cause was regularly in court upon pleadings filed, the parties agreed on the facts and submitted the cause to the judge upon a case agreed. The controlling facts appear in chronological order in the numbered paragraphs set forth below.

1. The Board of Education of Yancey County is a governmental agency, having the duties, powers, and responsibilities specified by Chapter 115 of the General Statutes. It acts through three members.

2. Clyde A. Ayers, Mark W. Bennett, and John Thomas qualified as members of the Board of Education of Yancey County for a period of two years beginning on the first Monday in April, 1951, under a legislative appointment made by Chapter 256 of the 1951 Session Laws of North Carolina. Ayers and Bennett adhere to the Democratic Party.

3. On 5 July, 1951, Bennett accepted the office of Mayor of Burnsville without relinquishing his office as a member of the Board of Education of Yancey County, and undertook to discharge the duties of both offices from that time until 9 April, 1952, when the decision in *Edwards v. Board of Education,* 235 N.C. 345, 70 S.E. 2d 170, was handed down.

4. On 31 August, 1951, Ayers resigned as a member of the Board of Education of Yancey County, and the Democratic Executive Committee of Yancey County, acting under G.S. 115-42, elected another Democrat, namely, R. A. Radford, who was then holding the office of United States Postmaster at Cane River, North Carolina, to fill the vacancy in the membership of the Board of Education of Yancey County caused by the resignation of Ayers until the meeting of the next regular session of the General Assembly. Radford forthwith accepted the office of member of the Board of Education of Yancey County without relinquishing the postmastership at Cane River, and undertook to discharge the duties of both offices from that time until 9 April, 1952, when the decision in *Edwards v. Board of Education, supra,* was handed down.

5. No proceedings of any kind were ever brought against Bennett and Radford to try their claims to the posts on the Board of Education of Yancey County. They ceased to discharge the duties of these posts on 9 April, 1952, when the decision in *Edwards v. Board of Education, supra,* was handed down.

6. On 19 April, 1952, the Democratic Party held a convention in Yancey County to name candidates for county offices, and nominated two of its members, namely, Lloyd Fortner and Adrian Buchanan, as candidates for membership on the county board of education without specifying whether such nominees were candidates for vacancies or regular terms.

7. On 29 April, 1952, the Democratic Executive Committee of Yancey County, which purported to act under G.S. 115-42, took action sufficient in form to appoint Fortner and Buchanan to serve as members of the Board of Education of Yancey County until the regular meeting of the General Assembly in 1953 in the places actually occupied by Bennett and Radford down to 9 April, 1952. Fortner and Buchanan subsequently took the oaths prescribed by law for members of county boards of education, and claim to be presently entitled to the two offices mentioned in this paragraph.

8. On 1 May, 1952, the State Board of Education, which also purported to act under G.S. 115-42, took action sufficient in form to appoint two other Democrats, namely, Rush T. Wray and Everton Powell, to serve as members of the Board of Education of Yancey County until the regular meeting of the General Assembly in 1953 in the places actually filled by Bennett and Radford down to 9 April, 1952. Wray and Powell forthwith took the oaths prescribed by law for members of county boards of educa-

tion, and entered into the actual possession of the two posts on the Board of Education of Yancey County, which they still occupy under the claim that they hold the legal title to them.

9. On 6 June, 1952, the relator Bill Atkins, a taxpaying citizen and resident of Yancey County, brought this civil action in the nature of *quo warranto* against Lloyd Fortner, Adrian Buchanan, Rush T. Wray and Everton Powell, as defendants, to try their conflicting claims to the two posts on the Board of Education of Yancey County pursuant to leave granted him by the Attorney-General.

When the cause was heard upon the case agreed, the judge rendered a judgment adjudging "that the defendants Lloyd Fortner and Adrian Buchanan are lawful members of the Board of Education of Yancey County," and declaring "that the defendants Rush T. Wray and Everton Powell are not legal members of the Board of Education of Yancey County." The defendants Rush T. Wray and Everton Powell excepted "to the entry and signing of said judgment" and appealed.

Charles Hutchins for the relator, Bill Atkins, appellee.

R. W. Wilson for the defendants, Lloyd Fortner and Adrian Buchanan, appellees.

C. P. Randolph and W. E. Anglin for the defendants, Rush T. Wray and Everton Powell, appellants.

ERVIN, J. The contention of the appellees that this appeal cannot be heard because the appellants have not brought to this Court a case on appeal is untenable. The record proper is before us. It contains the case agreed, which is equivalent to a special verdict. McIntosh: North Carolina Practice and Procedure in Civil Cases, sections 518 and 679. The exception to the judgment suffices to raise the legal question whether the facts embodied in the case agreed support the adjudication that Fortner and Buchanan rather than Wray and Powell are entitled to occupy the posts on the Board of Education of Yancey County until the regular meeting of the General Assembly in 1953. *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53; *In re Hall,* 235 N.C. 697, 71 S.E. 2d 140; *Development Co. v. Parmele,* 235 N.C. 689, 71 S.E. 2d 474.

The two sets of rival claimants base their respective claims to the offices at issue upon the statute codified as G.S. 115-42, which reads as follows: "All vacancies in the membership of the board of education in such counties by death, resignation, or otherwise shall be filled by the action of the county executive committee of the political party of the member causing such vacancy until the meeting of the next regular session of the General Assembly, and then for the residue of the unexpired term by that body. If the vacancy to be filled by the General Assembly in such cases shall

have occurred before the primary or convention held in such county, then in that event nominations for such vacancies shall be made in the manner hereinbefore set out, and such vacancy shall be filled from the candidates nominated to fill such vacancy by the party primaries or convention of such county. All vacancies that are not filled by the county executive committee under the authority herein contained within thirty days from the occurrence of such vacancies shall be filled by appointment by the State Board of Education."

It may be argued with much reason that the Constitution does not permit the Legislature to vest the power to appoint public officers in non-governmental bodies or persons, and that in consequence the provision of this statute which purports to authorize the county executive committee of a political party to fill a vacancy in the membership of a county board of education is invalid. See in this connection: 67 C.J.S., Officers, section 30, and cases cited. We by-pass this interesting question without discussion or decision, and take it for granted without so adjudging for the purpose of this particular appeal only that the statute codified as G.S. 115-42 is valid in all respects.

This course imposes upon us the task of construing G.S. 115-42 in conjunction with G.S. 115-37 and G.S. 115-38. When the two statutes last cited are read aright, they provide that the political parties of the State shall nominate at their county primaries or conventions in each even numbered year candidates for membership on county boards of education, and that the General Assembly shall elect from the candidates so nominated at its regular session in the ensuing odd numbered year members of county boards of education for terms of office beginning on the first Monday in April of the year in which they are elected and lasting for two years.

When G.S. 115-42 is reduced to simple terms, it specifies that whenever a vacancy occurs in the membership of a county board of education, the resulting unexpired term is divided into two parts; that the first part begins as soon as the vacancy occurs and continues until the meeting of the next regular session of the General Assembly, and the second part embraces all of the unexpired term thereafter remaining; that the power to fill the vacancy for the first part of the unexpired term resides in the county executive committee of the political party of the former member whose office is vacant during the thirty days next succeeding the occurrence of the vacancy, but passes to and vests in the State Board of Education in case the appropriate county executive committee does not fill the vacancy for the first part of the unexpired term within the thirty days specified; and that the power to fill the vacancy for the second part of the unexpired term belongs to the General Assembly exclusively.

The second sentence of G.S. 115-42 does not undertake to compel the county executive committee or the State Board of Education to fill vacancies in the membership of the county board of education for the first part of the unexpired term from the candidates nominated by the party primaries or conventions of the county. According to its express wording, this sentence applies only to vacancies "to be filled by the General Assembly," *i.e.*, vacancies for the second parts of unexpired terms. If this plain language should be distorted by construction from its true meaning to cover vacancies for the first parts of unexpired terms, such construction would largely nullify the general policy of the law to fill vacancies in public offices as soon as practicable after they occur in so far as vacancies in the membership of county boards of education are concerned because it would rob county executive committees and the State Board of Education of all power to fill vacancies in county boards of education antedating county primaries or conventions until such primaries or conventions name candidates for such vacancies. In addition, such construction would preclude county executive committees from filling any vacancies in the membership of county boards of education other than those occurring during the thirty days next preceding the holding of county primaries or conventions.

Under the relevant statutory provisions, the determinative fact in this case is the time of the occurrence of the vacancies in the membership of the Board of Education of Yancey County. If the vacancies occurred within thirty days preceding 29 April, 1952, the Democratic Executive Committee of Yancey County was authorized to fill them for the first parts of the unexpired terms, and its appointees, Fortner and Buchanan, are entitled to hold the offices at issue until the meeting of the next regular session of the General Assembly; but if the vacancies occurred more than thirty days before 29 April, 1952, the State Board of Education was empowered to fill them for the first parts of the unexpired terms, and its appointees, Wray and Powell, are entitled to occupy the offices in dispute until the meeting of the next regular session of the General Assembly.

A public office is vacant when it is without an incumbent who has the legal right to exercise its functions. *Board of Education of Newark v. Civil Service Commission of New Jersey,* 98 N.J.L. 417, 119 A. 875. The vacancy in the office occurs at the time of the happening of the event which is the cause of the vacancy. *Attorney-General ex rel. O'Hara v. Montgomery,* 275 Mich. 504, 267 N.W. 550; *State ex rel. Grant v. Eaton,* 114 Mont. 199, 133 P. 2d 588; *State ex rel. Austin v. Superior Court of Whatcom County,* 6 Wash. 2d 61, 106 P. 2d 1077.

The facts revealed by the case agreed show that Bennett and Radford engaged in double office holding in violation of Article XIV, Section 7, of the North Carolina Constitution, which makes this declaration: "No

person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, and commissioners for special purposes."

When Bennett violated the constitutional prohibition against double office holding by accepting a second office under the State, *i.e.*, the mayoralty of the town of Burnsville, without surrendering his first office under the State, *i.e.*, his membership on the county board of education, he automatically and instantly vacated his office on the county board of education, and he did not thereafter act as either a *de jure* or a *de facto* officer in performing functions of a member of the county board of education because he had neither right nor color of right to that office. *Edwards v. Board of Education, supra; S. v. Long,* 186 N.C. 516, 120 S.E. 87; *Whitehead v. Pittman,* 165 N.C. 89, 80 S.E. 976.

When Radford violated the constitutional prohibition against double office holding by accepting a second office under the State, *i.e.*, membership on the county board of education, without surrendering his first office under the United States, *i.e.*, the postmastership at Cane River, his attempt to qualify as a member of the county board of education was absolutely void, and he did not act as either a *de jure* or a *de facto* officer in performing functions of a member of the county board of education because he had neither right nor color of right to that office. *Edwards v. Board of Education, supra.*

Since Bennett forfeited the legal right to exercise the functions of the first office in controversy by accepting the mayoralty of the Town of Burnsville, the vacancy in that office occurred on 5 July, 1951, when that event took place; and since Radford never possessed the legal right to exercise the functions of the second office in controversy, the vacancy in that office occurred on 31 August, 1951, when his supposed predecessor, Ayers, resigned.

It necessarily follows that Wray and Powell are lawfully entitled to occupy the two posts on the county board of education until the regular session of the General Assembly in 1953, and that the judgment to the contrary must be reversed.

We have not overlooked the assertion contained in the brief of the appellees Fortner and Buchanan that the members of the Democratic Executive Committee of Yancey County are laymen not well versed in the law; that consequently they had no knowledge of the existence of the vacancies involved in this case until 9 April, 1952, when the decision in

Edwards v. Board of Education, supra, was handed down; and that their appointments ought to be adjudged valid because they acted with dispatch after they acquired knowledge of the existence of the vacancies.

This is simply a new attack on the old legal principle that ignorance of the law excuses no man. Few laws would be observed if ignorance of the law were an acceptable excuse. The eminent English jurist and statesman John Selden expressed this truth in these words three centuries ago: "Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him."

Judgment reversed.

TOWN OF WILLIAMSTON v. THE ATLANTIC COAST LINE RAILROAD COMPANY, DR. H. W. JORDAN, H. G. SHELTON, W. GUY HARGETT, A. WILBUR CLARK, DR. R. E. EARP, J. A. BARNWELL, GEORGE S. COBLE, M. OTIS POOLE, MARK GOFORTH, JOSEPH GRAHAM, AND L. DALE THRASH.

(Filed 8 October, 1952.)

1. Municipal Corporations § 39: Railroads § 3—

A municipality is not entitled to a mandatory injunction to compel a railroad company to widen and improve an underpass in the interest of public safety when such underpass, although within the municipality, constitutes a part of a State highway, since the exclusive control over the underpass in such instance is vested in the State Highway and Public Works Commission. G.S. 136-20 (f).

2. Public Officers § 7a: Highways § 8b—

While the State Highway and Public Works Commission may be sued only in the manner expressly provided by statute, such immunity does not extend to the individuals composing the Commission, who may be sued for acts in disregard of law which invade or threaten to invade the personal or property rights of a citizen, even though the commissioners assume to act under authority of the State.

3. Same: Mandamus § 2b—Mandamus will not lie to compel commissioners to vote for a specific project.

Mandamus or mandatory injunction will not lie at the instance of a municipality to compel the individual members of the State Highway Commission to vote to widen and improve a railroad underpass forming a part of a State highway within the city limits, even though the municipality seeks such action in the interest of public safety, since the courts will not undertake to control the exercise of discretion and judgment on the part of the members of the Commission in performing the functions of a State agency, there being no contention that the individual members were acting in disregard of law or were invading the personal or property rights of citizens, nor that the objective was the performance of a ministerial duty which the individuals were under clear legal duty to perform.

4. Injunctions § 1b—

A mandatory injunction to compel members of a State board to perform an official duty is identical in function and purpose with that of a writ of *mandamus*, and is governed by the rules relating to *mandamus*.

5. Mandamus § 1—

Mandamus lies only to compel the performance of a ministerial act by those under a present legal duty to perform the act.

APPEAL by plaintiff and by the individual defendants from *Frizzelle, J.*, March Term, 1952, of MARTIN.

The plaintiff Town of Williamston instituted this action against the defendant Railroad Company, and the individuals who compose the North Carolina State Highway and Public Works Commission (hereinafter referred to as the State Highway Commission), for the purpose of obtaining a mandatory injunction directing these defendants to repair and remodel a street and State highway underpass under the tracks of the defendant Railroad Company, within the corporate limits of the Town of Williamston.

The substance of the plaintiff's complaint is that State Highway #64 passes through the Town of Williamston and serves as the town's main street; that the tracks of defendant Railroad cross over this highway and street; that the Railroad Company and the State Highway Commission seventeen years ago made certain improvements in this underpass, but this was not done with proper regard for public safety and the underpass was so constructed that the concrete supports interfere with the passage of school buses, and the underpass was not of sufficient width to permit sidewalks for pedestrians through the underpass which carries a large volume of pedestrian as well as vehicular movement; that there is no other convenient way for motor vehicles, pedestrians and school children to move into or out of West Main Street except through this underpass which is inadequate and unsafe in view of the number and variety of those who use it; that the underpass should be widened and remodeled for the safety and convenience of the citizens and visitors to the town; that request to the defendants for improvement of the underpass has been ignored.

Plaintiff prays that an order issue to both defendants to show cause why a mandatory injunction should not be entered requiring them to repair and remodel the underpass to promote the safety and convenience of travelers.

The defendant Railroad Company demurred to the complaint chiefly on the ground that the regulation of highways at railroad intersections has been by statute placed under the exclusive jurisdiction and control of the State Highway Commission, and that in accord with the statute this

underpass was constructed and has since been maintained in the manner prescribed by the State Highway Commission, and that the courts have no authority to direct the Highway Commission how to exercise its judgment or discretion with respect to widening and remodeling a State highway.

The individual defendants also demurred on the ground that the complaint does not state sufficient facts to entitle the Town of Williamston to injunctive relief against them as officers representing the State as Highway Commissioners engaged in public service; that it appears from the complaint that the State is the real party whose action would be controlled by a judgment for the relief sought; that under the statutes creating and empowering the Highway Commission the matter of repairing and remodeling a highway underpass is made to rest upon the judgment and discretion of the Highway Commission as a governmental agency, which the court is without power to control.

The court sustained the demurrer of the defendant Railroad Company, and overruled the demurrer of the individual defendants.

The plaintiff and the individual defendants excepted and appealed.

Chas. H. Manning for Town of Williamston, plaintiff.

M. V. Barnhill, Jr., Peel & Peel, and Rodman & Rodman for Atlantic Coast Line Railroad Company, defendant.

R. Brookes Peters for the individual defendants.

APPEAL OF PLAINTIFF TOWN OF WILLIAMSTON.

DEVIN, C. J. The plaintiff Town of Williamston assigns error in the ruling below sustaining the demurrer of the defendant Railroad Company, and takes the position that in the exercise of its police power in the interest of public safety it has the right to require the Railroad Company to improve and remodel the underpass where the tracks cross over a street carrying a large volume of traffic. Plaintiff relies upon *R. R. v. Goldsboro,* 155 N.C. 356, 71 S.E. 514; *Durham v. R. R.,* 185 N.C. 240, 117 S.E. 17; *Powell v. R. R.,* 178 N.C. 243, 100 S.E. 424.

In the recent case of *Austin v. Shaw,* 235 N.C. 722, 71 S.E. 2d 25, referring to those cases, this Court said: "The broad principle stated in those decisions is in accord with the consensus of judicial opinion in other jurisdictions, but in its application to particular cases consideration must be given to the limitation on the exercise of municipal power in this respect that it must not be arbitrary or unreasonable in the light of all the facts."

However, the principle stated in those cases does not apply where it is sought to compel a railroad company to repair, widen or remodel a State

highway at a railroad crossing, since the exclusive control over these crossings, in so far as the railroad is concerned, is vested in the State Highway Commission. Where such crossings affect a State highway the railroad company must yield obedience to the authority of the Highway Commission. G.S. 136-20 (f); *Mosteller v. R. R.*, 220 N.C. 275, 17 S.E. 2d 133; *Rockingham County v. R. R.*, 197 N.C. 116, 147 S.E. 832.

Whether the town has the power to require the railroad company to provide safe means of crossing for pedestrians otherwise than in connection with the widening of a State highway at a railroad crossing is not presented by this appeal. On the pleadings here we think the demurrer of defendant Railroad Company was properly sustained.

APPEAL OF THE INDIVIDUAL DEFENDANTS.

The complaint to which the appealing individual defendants demurred alleges in substance that these defendants are members of and compose the North Carolina State Highway and Public Works Commission; that the highway underpass at Williamston constructed by or under the authority of the Highway Commission is inadequate and unsafe for the citizens of the town and the public; that the Highway Commission when requested to repair and remodel the underpass failed to act and this suit was instituted to obtain a mandatory injunction to compel the individual members of the Commission to take immediate steps to repair and remodel the highway at the underpass to the end that it be made safe for the traveling public.

From the language of the complaint it is difficult to distinguish between action which the plaintiff demanded of the State Highway Commission, and that now sought to be compelled on the part of each of the individual persons who compose the Commission.

The State Highway Commission is an agency of the State created by the General Assembly to perform functions of the State in the building, maintenance and control of the public roads and highways of the State. Its official acts are public acts, and are determined by the votes of the members composing it. The plaintiff alleges the Commission has failed on plaintiff's request to remodel a State highway underpass, and thereupon sues for a mandatory injunction to compel each individual member of the Commission to take steps to bring about the desired official action of the Commission. This would seem to mean in effect to require the individuals sued to vote for the things plaintiff alleges should be done at the Williamston underpass. But no individual member has the power to do the things asked to be done. Only the State Highway Commission as a Commission can act. The widening of the State highways and remodeling railroad crossings are matters committed by statute to the State High-

way Commission as an agency of the State. The contribution of the individual members to the consummate action of the Commission involves discretion and judgment on the part of each. There is no allegation that these individuals are acting in disregard of law or are invading the personal or property rights of citizens. Nor does it appear that they are under a clear legal duty to perform a ministerial act. *Wilkinson v. Board of Education,* 199 N.C. 669, 155 S.E. 562. Moreover, the facts set out in the complaint do not show such an abuse of discretion as would warrant the interposition of a Court of Equity to restrain or compel. The court cannot compel a member of the Highway Commission to vote for a particular project though it be alleged that it is in the interest of public safety.

Courts will not undertake to control the exercise of discretion and judgment on the part of the members of a commission in performing the functions of a State agency. It was held in *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484, that courts have no power to control the actions of officers of a corporate body in the absence of fraud or palpable abuse of discretion.

The State Highway Commission is an agency of the State, and as such is not subject to suit save in the manner expressly provided by statute. *Schloss v. Highway Commission,* 230 N.C. 489, 53 S.E. 2d 517. This immunity, however, "does not extend to the individuals (composing the Commission) who in disregard of law invade or threaten to invade the personal or property rights of a citizen even though they assume to act under authority of the State." *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359.

In the *Teer case, supra,* it may be noted, the suit was by a taxpayer to enjoin allegedly unlawful use of public funds.

In *Schloss v. Highway Commission, supra,* it was said: "When public officers whose duty it is to supervise and direct a State agency attempt to enforce an invalid ordinance or regulation, or invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the immunity of the State from suit, even though they act or assume to act under authority and pursuant to the directions of the State."

These decisions seem to delimit the instances in which members of a commission created as a State agency to perform certain functions of the State may be sued individually as distinguished from the Commission itself. There are no allegations in the complaint in the case at bar which bring the suit against the individual defendants in this case within the scope of these authorities.

The ultimate purpose of plaintiff's suit is to obtain a mandatory injunction to require the individual defendants to do the things the town thinks

ought to be done in the interest of public safety, but while the authorities of the town are moved by the desire to obtain action by the defendants in the public interest, we are constrained to hold this laudable purpose cannot be accomplished in this suit against these individual defendants. To do so would violate established rules of law which are necessary in the administration of justice for all.

We do not think the allegations here are sufficient to form the basis for a mandatory injunction.

"A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of *mandamus.*" *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833. *Mandamus* lies only to enforce a clear legal right. Its function is "to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." The board or person against whom it is issued must be under a present clear legal duty to perform the act sought to be enforced. *Hospital v. Joint Committee,* 234 N.C. 673, 68 S.E. 2d 862; *Mears v. Board of Education,* 214 N.C. 89, 197 S.E. 752; *Wilkinson v. Board of Education,* 199 N.C. 669, 155 S.E. 562.

For the reasons stated, we think the court below was in error, and that the demurrer of the individual defendants should have been sustained.

On plaintiff's appeal: Affirmed.

On individual defendants' appeal: Reversed.

STATE v. VIRGINIA P. AVERY AND WILLIE PEACOCK.

(Filed 8 October, 1952.)

1. Criminal Law § 79—

Exceptive assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Intoxicating Liquor § 4a—

The possession anywhere in this State of any quantity of liquor upon which the Federal and State taxes have not been paid is, without exception, unlawful. G.S. 18-48.

3. Intoxicating Liquor § 9d—

Evidence to the effect that defendant had the reputation of dispensing liquor, that when the officers attempted to search his premises defendant objected, tried to get between the officers and the whiskey, and that the officers found about a pint of nontax-paid liquor in his home and a quan-

tity of fruit jars at the back door, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution for unlawful possession of intoxicating liquor.

4. Same—

Testimony of defendant that his wife had rented the premises and that the liquor found therein belonged to her, relates to matters in defense and should not be considered on motion to nonsuit.

5. Criminal Law § 52a (1)—

Defendant's evidence relating to matters in defense should not be considered on motion to nonsuit. G.S. 15-173.

6. Intoxicating Liquor § 4c: Criminal Law § 8b—

If a wife keeps liquor in the home with the knowledge and consent of the husband, the liquor is in his possession within the meaning of the law, even though she has actual custody, since one who aids, abets, or assists another in the commission of a misdemeanor is guilty as a principal.

7. Intoxicating Liquor § 2—

The Turlington Act is the law in this State except in so far as it is modified or repealed by the Alcoholic Beverage Control Act, and the two statutes must be construed *in pari materia* as constituting the law in this State as relating to the purchase, possession and sale of intoxicating liquor.

8. Intoxicating Liquor § 9a—

Allegations in a warrant or indictment that taxes had not been paid on liquor seized in defendant's home is merely descriptive and does not limit the prosecution to any particular section of the liquor law, but merely renders it unnecessary to prove possession of any particular quantity.

9. Indictment and Warrant § 8—

Where the indictment in one count clearly charges two separate and distinct offenses and defendant is acquitted by a verdict of the jury as to one of them, his motion in arrest of judgment for duplicity cannot be allowed. G.S. 15-153.

10. Same: Criminal Law § 56—

Objection to the warrant on account of duplicity must be entered before verdict, and a motion in arrest of judgment on this ground after verdict comes too late.

11. Criminal Law § 77b—

Counsel must observe the rules of court in regard to the order, form, and proper indexing of the record if they desire consideration to be given their appeals.

APPEAL by defendant Peacock from *Harris, J.*, March Term, 1952, JOHNSTON. No error.

Criminal prosecution under a warrant charging (1) the unlawful possession of nontax-paid liquor, and (2) the unlawful possession of nontax-paid liquor for the purpose of sale.

On 12 January 1952, officers of Johnston County procured a search warrant and at about 9:30 p.m. went to the home of defendant to search his premises for liquor. They found fifty to one hundred persons around the house and 150 to 200 at a nearby filling station operated by the *feme* defendant's brother. Some of those around the house were "highly intoxicated." Defendant came up and "started hollering 'you have got to read the search warrant before you enter.'" The officers went in the kitchen. They found a half-gallon jar containing about one pint of nontax-paid liquor between the stove and table. Defendant went in ahead of the officers and tried to get between them and the whiskey.

The officers also found about a "dump body load" of one-half gallon fruit jars right at the back door. They were just like the one on the inside. There was evidence also that defendant has a bad reputation for selling whiskey.

The defendant offered evidence tending to show that the whiskey belonged to the *feme* defendant, that she was using it under the direction of a physician, and that he did not know the whiskey was in the house.

The jury returned a verdict of guilty of the unlawful possession of nontax-paid liquor and not guilty on the second count charging possession for the purpose of sale. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert L. Emanuel, Member of Staff, for the State.

C. J. Gates and M. E. Johnson for defendant appellant Peacock.

BARNHILL, J. The record contains eleven exceptive assignments of error. Only one of these, to wit, the exception to the refusal of the court to dismiss under G.S. 15-173, is brought forward and discussed in defendant's brief. The others are deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562; *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700; *S. v. Muse,* 230 N.C. 495, 53 S.E. 2d 529.

The demurrer to the evidence and motion to dismiss under G.S. 15-173 is untenable. The possession of any quantity of liquor upon which the Federal and State taxes have not been paid is, without exception, unlawful. G.S. 18-48; *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629.

Nontax-paid liquor was found in defendant's home. A large number of people were gathered around his house. Some of them were intoxicated. A "dump body load" of one-half gallon jars was found just outside

his house. His conduct toward the officers making the search tended to show guilty knowledge. He bears the reputation of being a dispenser of liquor. These and other circumstances disclosed by the testimony constitute more than a scintilla of evidence and made out a case for the jury.

That the house was rented by the *feme* defendant, and the liquor was owned by her were matters offered in defense. They were not to be considered on the motion to dismiss.

Furthermore, that the liquor belonged to the *feme* defendant, if such be the fact, does not necessarily exculpate the defendant. He is the head of his household. If his wife kept liquor in his home with his knowledge and consent, it was in his possession within the meaning of the law even though actual custody was in the wife, *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Pierce,* 192 N.C. 766, 136 S.E. 121, for it is axiomatic that one who aids, abets, or assists another in the commission of a misdemeanor is guilty as a principal. *S. v. Ward,* 222 N.C. 316, 22 S.E. 2d 922; *S. v. Jarrett,* 189 N.C. 516, 127 S.E. 590; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907.

The Turlington Act, now G.S. Ch. 18, Art. 1, except as modified or repealed by the Alcoholic Beverage Control Act, now G.S. Ch. 18, Art. 3, is still the law in this State. *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104; *S. v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449.

After the adoption of this statute, the State imposed no tax on alcoholic beverages and it was, with certain exceptions, unlawful to possess any quantity of intoxicating liquor. Under the ABC Act, liquor may be purchased from ABC stores and now it is not unlawful to possess liquor in the quantities and under the conditions prescribed by that Act. But, to make certain that this modification of the Turlington Act applies only to liquor upon which the taxes imposed by the Federal and State governments have been paid, the General Assembly wrote into the ABC Act the provision which is now G.S. 18-48, making it unlawful to possess any quantity of liquor upon which such taxes have not been paid.

The two Acts constitute the body of our law relating to the purchase, possession, and sale of intoxicating liquor and must be construed *in pari materia.* When so construed, it becomes apparent that an allegation in a warrant or bill of indictment to the effect that the Federal and State taxes had not been paid upon the liquor seized or that it was illicit liquor is merely descriptive, *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804, and does not, as contended by defendant, limit the prosecution to any particular section of the liquor law or deprive the State of the benefit of the general provisions of the law as it now exists. Instead, it facilitates proof of the unlawfulness of the possession and renders it unnecessary to prove possession of any particular quantity.

The defendant moves in this Court that the judgment pronounced be arrested "in the event the Court should find that he was arrested, tried and convicted under G.S. Section 18-48, on the grounds that the said warrant was defective because it alleged two separate offenses in one count." The motion is without merit and is overruled. *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85.

Construing the warrant with that degree of liberality required by the statute, G.S. 15-153, it clearly appears that it charges two separate and distinct offenses: (1) unlawful possession, and (2) unlawful possession for the purpose of sale. Furthermore, objection to the warrant on account of duplicity, entered for the first time after verdict, comes too late. *S. v. Burnett,* 142 N.C. 577; *S. v. Mundy,* 182 N.C. 907, 110 S.E. 93; *S. v. Puckett,* 211 N.C. 66, 189 S.E. 183.

We feel compelled to call attention to the state of the record in this cause. In almost every respect it fails to comply with the rules of this Court. Rule 19, Rules of Practice in the Supreme Court, 221 N.C. 553. The case on appeal and assignments of error precede the record proper. Neither the verdict of the jury nor the judgment of the court are made to appear except in a certificate of the clerk. Neither the warrant nor the verdict nor the judgment—indeed no part of the record proper—is indexed. Though the record is relatively small, it has been necessary for us to search from page to page to find in the record essential information bearing on the questions defendant seeks to present. If counsel desire us to give consideration to their appeals, there must be at least a semblance of compliance with our rules which, in this respect, are simple and require no great degree of astuteness to understand or to follow.

In the trial in the court below we find

No error.

ROSCOE WELLINGTON BELL, EMPLOYEE, v. DEWEY BROTHERS, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 8 October, 1952.)

1. Master and Servant § 40d—

The words "in the course of" as used in the North Carolina Workmen's Compensation Act refer to the time, place, and circumstances under which the accident occurred.

2. Master and Servant § 40c—

The words "arising out of" as used in the North Carolina Workmen's Compensation Act relate to the origin or cause of the accident, and require that the accident arise out of the work the employee is employed to do and be incidental thereto.

3. Master and Servant § 40a—

In order to be compensable, an injury must be the result of an accident which arises out of and also in the course of the employment.

4. Master and Servant § 40c—

Claimant, employed as a night watchman, was injured on the employer's premises during his hours of duty when his trouser leg caught on the bumper of his car, causing him to fall, as he was washing his personal car for his own purposes with the implied consent of the employer. *Held:* There was no causal relationship between his employment and the injury, and therefore the injury did not arise out of the employment and is not compensable.

APPEAL by defendants from *Hatch, Special Judge,* March Term, 1952, of WAYNE. Reversed.

Claim by Roscoe Wellington Bell for compensation under the Workmen's Compensation Act for an injury by accident alleged to have arisen out of and in the course of his employment by Dewey Brothers, Inc.

From the evidence offered the hearing commissioner found the following facts:

"1. That on 1 April, 1950, and for sometime prior thereto, the claimant had been employed by the defendant employer as a nightwatchman; that his hours of employment were from 12:30 A. M. to 6:30 A. M.; that the duties of his employment required him to remain inside the fence surrounding the employer's premises, to make regular rounds of the premises six times during each tour of duty, to punch six key stations into his time clock on each round, to turn off lights which might have been left burning, to inspect various electric motors which might be operating, and to maintain general surveillance of the employer's premises during his hours of duty.

"2. That on the morning of 1 April, 1950, the claimant reported to work in his usual manner and at the usual time; that he made his first round to all his stations just before 1 o'clock; that he then returned to the shelter or guardhouse maintained inside the premises; that he then decided to wash his personal automobile; that he drove his automobile to a spigot located behind a store building about 50 feet from the guardhouse and approximately the same distance from the gate inside the fence and on the employer's premises.

"3. That it was a custom among the watchmen employed by the defendant employer to wash their personal cars on the premises while on the job; that the supervisory employees of the defendant knew of this practice; that no specific authority therefor had ever been issued; and that no specific instructions against so doing had ever been issued.

"4. That in undertaking to wash his car the claimant stepped up on its rear bumper; that his trousers caught on a bumper guard; that the

claimant was not aware of this; that when he started to step off the bumper the trousers remained caught on the bumper guard and that as a result thereof the claimant fell to the ground on his left hip."

Upon these facts the hearing commissioner concluded that claimant's injury did not arise out of and in the course of his employment, and denied compensation. The full commission adopted the findings and conclusions of the hearing commissioner, and claimant appealed to the Superior Court.

On the hearing in the Superior Court the presiding Judge being of opinion, on the facts found, as a matter of law, that plaintiff's injury did arise out of and in the course of his employment, reversed the order of the Industrial Commission and adjudged the claimant entitled to compensation.

Defendants excepted and appealed to this Court.

John S. Peacock and Scott B. Berkeley for plaintiff, appellee.

Broughton, Teague & Johnson for defendants, appellants.

DEVIN, C. J. It is not controverted that the findings of fact made by the Industrial Commission in this case were supported by competent evidence, and that they are therefore binding upon the court on appeal.

From these findings it is made to appear that the claimant suffered injury at a time when he was on his employer's premises pursuant to his employment as a night watchman, and hence that his injury may be said to have arisen in the course of his employment, but the question presented for review by the appeal is whether the injury arose out of and as an incident to this employment. The Industrial Commission concluded it did not, but the judge was of contrary opinion. The defendants' appeal brings the question here.

As constituting the basis for compensation for injuries resulting from the hazards of industry the statute G.S. 97-2 (f) uses the words "injury by accident arising out of and in the course of employment." These words have been often defined by the decisions of this Court. *Hunt v. State,* 201 N.C. 707, 161 S.E. 203; *Conrad v. Foundry Co.,* 198 N.C. 723, 153 S.E. 266; *Hildebrand v. Furniture Co.,* 212 N.C. 100, 193 S.E. 294; *Stallcup v. Wood Turning Co.,* 217 N.C. 302, 7 S.E. 2d 550; *Taylor v. Wake Forest,* 228 N.C. 346, 45 S.E. 2d 387; *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668; *Matthews v. Carolina Standard Corp.,* 232 N.C. 229, 60 S.E. 2d 93; *Berry v. Furniture Co.,* 232 N.C. 303, 60 S.E. 2d 97. The words "in the course of," as used in the statute, refer to the time, place and circumstances under which the accident occurred, while "out of" relates to its origin or cause.

"Arising out of" means arising out of the work the employee is to do, or out of the service he is to perform. The risk must be incidental to the employment. *Hunt v. State, supra; Berry v. Furniture Co., supra.*

In order to entitle the claimant to compensation the evidence must show that the injury by accident arose out of and in the course of his employment by the defendant. Both are necessary to justify an award of compensation under the Workmen's Compensation Act. *Withers v. Black, supra.*

Upon the facts found by the Industrial Commission, which are in accord with the evidence, we think the judge below was in error in his interpretation of the significance of those facts. The injury which the claimant sustained was not an accident which could be held to have resulted from a risk incident to his employment. Though he was on his employer's premises his injury occurred while he was engaged in washing his own automobile for his own purposes. While so doing he fell and suffered injury. He was engaged in an act in no way connected with the work he was employed to perform, and there appears no causal relationship between his employment as a watchman and the injury he sustained. *Beavers v. Power Co.,* 205 N.C. 34, 169 S.E. 825; *Matthews v. Carolina Standard Corp., supra.*

The court below was in error in holding on the facts found that claimant's injury arose out of and in the course of his employment.

Judgment reversed.

IREDELL TAYLOR DAVIS v. N. B. JENKINS AND WIFE, SARAH F. JENKINS, BERTRAM A. JENKINS AND WIFE, LOUISE T. JENKINS, SADIE JENKINS HARMON AND HUSBAND, J. OBIE HARMON.

(Filed 8 October, 1952.)

1. Executors and Administrators § 13g—Purchase of land by administrator in individual capacity, at sale to make assets, is voidable.

Upon the administrator's petition to sell lands of the estate to make assets, the sale comes within the scope of his trusteeship, and his purchase at the sale in his individual capacity, even though the sale be made by a commissioner appointed by the court, is voidable irrespective of actual fraud, and where an heir at law elects to attack the sale and introduces in evidence the record in the proceedings establishing these facts, he is entitled *prima facie* to judgment setting aside the sale as against the administrator and his grantees in a deed of gift, with the burden upon defendants to show facts that would defeat the equity, and therefore nonsuit should not be entered.

2. Trial § 24a—

Nonsuit may not be entered in favor of the party upon whom rests the burden of proof unless plaintiff's own evidence establishes the truth of an affirmative defense relied on by defendant.

3. Limitation of action § 7—

The suit instituted by an heir at law shortly after becoming of age to set aside sale of lands of the estate to make assets to pay debts, is not barred by any statute of limitations or laches.

VALENTINE, J., having been of counsel, took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Frizzelle, J.*, April Term, 1952, of NASH. Reversed and remanded.

This was a suit to set aside a deed made to defendants, pursuant to an administrator's sale. Plaintiff claims as heir of the decedent Elias T. Taylor. Elias T. Taylor died intestate 7 January, 1929, seized and possessed of a tract of 60 acres of land in Nash County and leaving him surviving his widow and several infant children, the youngest of whom, the present plaintiff, was then one year old.

N. B. Jenkins qualified as administrator of the estate. In 1930 the administrator filed petition to sell this land to make assets to pay debts. In the petition it was alleged there were debts amounting to $2,000, plus $1,000 widow's allowance; that the personal estate amounted to $557, and the land was worth $1,000. Upon this petition a commissioner (the administrator's attorney) was appointed to sell the land. It was offered for sale in March, 1930, and bid off by L. W. Bobbitt, a creditor, for $325, but the sale was not confirmed. The land was again sold in March, 1933, according to the commissioner's report, at which time the defendant N. B. Jenkins bid it off for the sum of one dollar, plus the balance due him as administrator (shown by his return as $121), and the taxes on the land stated to be $264. The land was sold subject to the widow's dower, and the homestead right of decedent's infant children. The sale was confirmed and deed was made to N. B. Jenkins by the commissioner.

In 1941 N. B. Jenkins and wife conveyed the land to their son and daughter, who are defendants in this action, in consideration of love and affection.

Plaintiff offered in evidence the entire record in the special proceeding to sell the land, and the deeds referred to; also evidence tending to show the land was worth at the time ten to twelve dollars per acre. Some of the heirs including plaintiff retained possession of some sort, but N. B. Jenkins or his grantees sold the timber on the land which plaintiff alleged and offered to show was for $3,700. Defendants are now in possession.

At the conclusion of plaintiff's evidence, defendants' motion for judgment of nonsuit was allowed, and from judgment dismissing the action, plaintiff appealed.

F. T. Hall and P. H. Bell for plaintiff, appellant.
Thorp & Thorp for defendants, appellees.

DEVIN, C. J. Though the sale was made by a commissioner appointed by the court, it was made for the administrator and pursuant to the administration of the estate, and upon the administrator's petition, so that in equity the result was the same as if the administrator had purchased at his own sale. *Froneberger v. Lewis,* 79 N.C. 426. The defendant N. B. Jenkins did not buy in the land for the estate as authorized by G.S. 28-183, but purchased in his individual capacity and for his own benefit. He subsequently conveyed it to his son and daughter.

Occupying the fiduciary relationship of administrator of the estate, equity would not permit him to acquire title to the land free from the trust imposed upon him for the benefit of the heirs and creditors of the estate. The deed obtained was voidable at the election of his *cestuis que trustent.* So that upon showing these material facts the burden was cast upon the defendant to show facts which would defeat plaintiff's equity established by the evidence offered. As a rule a judgment of nonsuit is not permissible in favor of the party having the burden of proof, except where the defendant has set up an affirmative defense to plaintiff's *prima facie* case and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law. *MacClure v. Casualty Co.,* 229 N.C. 305, 49 S.E. 2d 742, and cases cited on page 312. But the exception to the rule stated in the cited case has no application here, and the nonsuit was improvidently granted.

Strictly speaking, the land was not an asset in the hands of the administrator, but when the personal estate of the decedent was insufficient to pay the debts and the land was ordered sold to provide assets in the administration of the estate, the sale came directly within the scope of the administrator's trusteeship. *Pearson v. Pearson,* 227 N.C. 31, 40 S.E. 2d 477. Hence when the administrator bought at the sale and took title to the land adverse to the *cestuis que trustent* he was regarded in equity as having acquired it for their benefit. The plaintiff having come of age shortly before this suit was instituted is barred neither by any statute of limitations nor by laches. Though the defendant Jenkins, the administrator, purchased the land at what was equivalent to his own sale, the sale was not void but voidable, and the plaintiff has the election now to affirm or disaffirm the sale.

In *Brothers v. Brothers,* 42 N.C. 150, *Chief Justice Pearson* said: "It is an inflexible rule, that when a trustee buys at his own sale, even though he gives a fair price, the *cestui que trust* has his election to treat the sale as a nullity, not because there is fraud, but there may be fraud." This statement of the rule was repeated in *Patton v. Thompson,* 55 N.C. 285.

In *Froneberger v. Lewis,* 79 N.C. 426, the Court states the resume of the decided cases on this point as follows: "A trustee cannot buy the trust property either directly or indirectly. And if he does so, he may be charged with the full value, or the sale may be declared void at the election of the *cestui que trust,* and this, without regard to the question of fraud, public policy forbidding it." *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873; *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481; *Davis v. Doggett,* 212 N.C. 589, 194 S.E. 288; *Burnett v. Supply Co.,* 180 N.C. 117, 104 S.E. 137; *Warren v. Susman,* 168 N.C. 457, 84 S.E. 760; *Averitt v. Elliott,* 109 N.C. 560, 13 S.E. 785; *Bruner v. Threadgill,* 88 N.C. 361; *Joyner v. Farmer,* 78 N.C. 196.

In *Davis v. Doggett,* 212 N.C. 589, 194 S.E. 288, where the effect of the purchase by a mortgagee at his own sale was discussed, it was said: "The trustor may elect to treat the sale as a nullity and demand a resale as against the trustee, or his agent, or purchasers from them with notice."

In *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481, where the mortgagee had purchased at his own sale and reconveyed, the consequent status of the parties was stated in this way: "The effect is to vest the legal title in the mortgagee in the same plight and condition as he held it under the mortgage, subject to the right of the mortgagor to redeem."

In *Burnett v. Supply Co.,* 180 N.C. 117, 104 S.E. 137, where the question was considered, it was held the trustor, following purchase by the trustee at his own sale, could elect to have the sale set aside and the property restored to the trust fund, or to recover the value of the land.

In the case at bar, it was admitted the sale of the land of his intestate was made for the administrator in order to create assets to pay the debts of the estate, and that the administrator, the defendant N. B. Jenkins, was the purchaser at the sale, taking deed for the land in his own name and reconveying to his codefendants. In the light of these facts equity would regard the sale and deed as voidable, and the heir would have the election to disaffirm and treat the sale as a nullity, putting the title back in the same "plight and condition" as it was held before the sale; that is, subject to the rights of creditors and the exigencies of the administration.

The judgment of nonsuit is stricken out and the cause remanded for such further proceeding as may be necessary to determine and administer the rights of all interested parties.

Reversed and remanded.

VALENTINE, J., having been of counsel, took no part in the consideration or decision of this case.

STATE v. MILTON McLAMB.

(Filed 8 October, 1952.)

Intoxicating Liquor § 9d—

Evidence tending to show that officers found a still and a quantity of nontax-paid whiskey on land some three hundred yards from defendant's house, that there was a path between the house and the still, and also that sugar sacks found at defendant's house were similar to sugar sacks found at the still, but that defendant neither owned nor rented the land upon which the still was found, *is held* insufficient to sustain conviction of defendant for possession of nontax-paid whiskey and possession of nontax-paid whiskey for the purpose of sale. The term "and/or" disapproved in judicial proceedings.

APPEAL by defendant from *Hatch, Special Judge,* at Regular April Term, 1952, of JOHNSTON.

Criminal prosecution upon a warrant dated 23 October, 1951, and issued by a justice of the peace of Johnston County, charging that at and in Meadow Township, said county, on 23 October, 1951, Milton McLamb unlawfully, willfully and feloniously (1) did have in his possession for the purpose of manufacturing illegal whiskey, one complete distillery outfit, about 200 gallon capacity, and 15 barrels of beer; and (2) did have a certain quantity of liquor (to wit) 25 gallons "which the tax imposed by the U. S. Congress and/or the State of North Carolina as imposed has not been paid"; and (3) did have the said liquor for the purpose of sale, etc., on which probable cause was found and defendant was bound over to the recorder's court of Johnston County.

The recorder consolidated for purposes of trial and judgment the case on the above warrant with another on warrant dated 24 October, 1951, issued by same justice of peace, charging in substance that on 23 October, 1951, defendant, at and in said township and county, (1) had in his possession "25 gallons" of nontax-paid whiskey, (2) had possession of same for purpose of sale, and (3) had in his possession for purpose of manufacturing illegal whiskey "one oil burner and one pressure tank." On such trial the jury of six returned a verdict of guilty. From judgment thereon defendant appealed to Superior Court, where he was put on trial under the warrant first above described.

Defendant entered plea of not guilty as to all counts in the warrant as above set forth. Defendant insists here that he was tried on the first

warrant as first hereinabove described, and the Clerk of Superior Court in response to request by this Court certifies to this Court that "If any order was made consolidating the two cases, I do not recall it."

Upon the trial in Superior Court, the State offered evidence tending to show, as of 23 October, 1951, the date of the alleged offenses, and pertinent thereto, substantially the following: The home of defendant is located on a country road between Peacock Cross Roads and Newton Grove. About 9:00 or 9:30 o'clock in the morning of that day deputies sheriff Beasley and Ford, making a trip in the neighborhood of and passing defendant's house, saw defendant and three or four other men, one of whom was Daniel Melvin McLamb, standing in the yard. Later about 1 o'clock in the afternoon these officers came back, and entered the woods from a tobacco barn up the road from defendant's house, and found a still in operation at a point about three hundred yards from defendant's house, but from which it could not be seen. The officers did not know on whose land it was located. However, evidence for defendant showed it to be on land of a person other than defendant, and on land not rented by defendant. The officers saw two men at the still, one of whom, Daniel McLamb, they caught and arrested. The other man ran and escaped arrest. The officers testified that this man was not the defendant. At the still they found five 5-gallon jugs of whiskey, 15 barrels of beer and a 200 or 300-gallon vat type still operated by a burner. There was no path leading from the tobacco barn to the still. But there was a path leading from the still towards defendant's house. And there was a path leading from defendant's house toward the still.

The officers also testified that they did not know where defendant was during the day,—officer Beasley saying, "I believe it was that night that I saw him; we went back to his house and Milton came home."

The officers also testified that they saw sugar sacks hanging on clothes line at defendant's house, and found similar sugar sacks at the still,—officer Ford saying, "I could not say they were the same bags."

And the officers testified without objection that they obtained a search warrant and "went back to search his home," but "didn't find anything there"; that they did find some whiskey near a path leading from the smokehouse at some distance therefrom; and that they found paraphernalia for making whiskey on the premises of defendant, but that it had no connection at all with the manufacturing at the still they cut down that day.

Verdict: 1. Not guilty of the possession of the still and the paraphernalia for the manufacture of liquor.

2. Guilty of possession of nontax-paid whiskey.

3. Guilty of possession of nontax-paid whiskey for the purpose of sale.

Judgment: On the count of possession, confinement to the common jail of Johnston County for a period of 12 months and assigned to perform labor under the supervision of the State Highway and Public Works Commission. Prayer for judgment continued on the count for the purpose of sale.

Defendant objected to the signing of judgment, and moved in arrest thereof. Motion overruled. Exception. Defendant appeals to Supreme Court, and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

J. R. Barefoot, E. R. Temple, and Joseph H. Levinson for defendant, appellant.

WINBORNE, J. The question here: Is there error in the ruling of the trial court in denying defendant's motions for judgment as of nonsuit on the two counts on which he was convicted?

Taking the evidence offered upon the trial below in the light most favorable to the State, the circumstances on which the State relies are insufficient to support the verdict.

The principles of circumstantial evidence and constructive possession recently re-stated in *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268, are applicable here. And as there stated, to hold that there is sufficient evidence to support a finding that the defendant had constructive possession of the whiskey found at the still as charged, is conjecture and speculation. Defendant ought not to be convicted on such evidence. Hence his demurrer to the evidence should have been sustained.

Manifestly, the evidence obtained under the search warrant relates to other charges covered by the warrant of 24 October, 1951, rather than to the charges for which defendant was on trial in the instant case.

In connection with the use of the term "and/or" in the warrant on which this case is tried, attention is directed to the fact that this Court has said that the use of such term in a warrant "adds nothing to its clarity." *S. v. Ingle,* 214 N.C. 276, 199 S.E. 10. And this Court has held that the term "and/or" has no place in judicial proceedings,—pleadings, verdict or judgment. *Gibson v. Ins. Co.,* 232 N.C. 712, 62 S.E. 2d 320, and cases cited.

Hence the judgment from which the appeal is taken is hereby

Reversed.

C. FRANK JAMES v. ATLANTIC & EAST CAROLINA RAILROAD COMPANY, A CORPORATION, AND ATLANTIC & NORTH CAROLINA RAILROAD COMPANY, A CORPORATION.

(Filed 8 October, 1952.)

1. Trial § 22a—

On motion to nonsuit, plaintiff's evidence and so much of defendant's evidence as tends to support plaintiff's case must be accepted as true and liberally construed in plaintiff's favor, giving him every reasonable inference and intendment which may be logically drawn therefrom.

2. Trial § 23a—

More than a scintilla of evidence in support of plaintiff's claim takes the issue to the jury.

3. Trial § 19—

The truth or falsity of the evidence and what it proves are the exclusive province of the jury.

4. Railroad § 4—

Evidence tending to show that defendant's shifting engine approached the grade crossing during the dark hours of early morning, down grade with a minimum of noise, without lights and without any warning signal, and struck the car in which plaintiff was riding as a passenger, *held* to take the case to the jury on the issue of defendant's negligence and plaintiff's contributory negligence in failing to see the train and give warning thereof to the driver in time for the driver to have avoided the accident, and nonsuit was improperly granted.

5. Same—

Both the engineer and passengers in motor vehicles are held to the rule of a reasonably prudent man to avoid accidents at grade crossings.

APPEAL by plaintiff from *Grady, Emergency Judge,* June 1952 Civil Term, WAYNE.

This is a civil action to recover damages for personal injury sustained by plaintiff, allegedly resulting from the actionable negligence of the defendant, Atlantic & East Carolina Railroad Company, in a collision between the automobile in which plaintiff was riding and a shifting engine of said defendant at a grade crossing in the town of Goldsboro, said locomotive, as well as all other parts of the railroad system involved in this litigation, being operated under a lease from the defendant, Atlantic & North Carolina Railroad Company.

Defendants' motion for judgment as of nonsuit made at the close of plaintiff's evidence was renewed and sustained at the close of all the evidence and from the judgment entered, plaintiff appealed, assigning as his only error the action of the court in dismissing the action.

Scott B. Berkeley for plaintiff, appellant.

Matt H. Allen and Dees & Dees for Atlantic & East Carolina Railroad Company, defendant, appellee.

W. A. Johnson for Atlantic & North Carolina Railroad Company, defendant, appellee.

VALENTINE, J. This case was here on appeal at the Spring Term, 1951, and is reported in 233 N.C. 591, 65 S.E. 2d 214. In that opinion, the facts are fully stated and for that reason will not be repeated here, except such as bear directly upon the point raised by this appeal. The only question now for decision is the propriety of the judgment of nonsuit. That question was not raised upon the former appeal.

It is uniformly held by this Court that upon a motion for nonsuit the plaintiff's evidence and so much of that of the defendant as tends to support the plaintiff's case must be accepted as true and liberally construed in favor of the plaintiff's cause of action, and in this process the plaintiff is entitled to every reasonable inference and intendment which may be logically drawn from the evidence in support of his claim. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356; *Jackson v. Browning,* 224 N.C. 75, 29 S.E. 2d 21; *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757; *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791; *Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664. If, upon such an analysis, there appears more than a scintilla of evidence in support of plaintiff's claim, the matter becomes a question for the jury. *Cable v. R. R.,* 122 N.C. 892, 29 S.E. 377; *Cox v. R. R.,* 123 N.C. 604, 31 S.E. 848; *Gates v. Max,* 125 N.C. 139, 34 S.E. 266; *Deaton v. Deaton,* 234 N.C. 538, 67 S.E. 2d 626.

On this record, the evidence in support of plaintiff's position accepted as true and construed with that liberality required by the rule tends to show these facts: The collision occurred on 5 February, 1949, at about 4:40 or 4:50 a.m. in the town of Goldsboro at a point where John Street intersects with Atlantic Avenue. John Street runs approximately north and south, while Atlantic Avenue runs approximately east and west. This intersection is just south of the railroad tracks in question. These tracks run generally east and west and are three in number, the most southerly being the main line track, the next, a spur track, and the third, a pass track or siding. It was very dark and the sky was cloudy. The plaintiff at the time of the collision was riding in a police car belonging to the town of Goldsboro and was engaged in the discharge of his duties as a police officer, which duties included the checking of doors and buildings for burglars or prowlers and the patroling of the streets of Goldsboro. The car was equipped with a trigger spot-light for use of plaintiff in the discharge of his duties. The car in which plaintiff was riding was being driven in a southerly direction along John Street by a fellow officer, who

was in charge of the car and was acting under the direction of the town authorities. The driver operated the automobile, while the plaintiff exercised vigilance in keeping the peace and protecting the citizenry. The defendant's small Diesel shifting engine, to which was attached several cars, was moving easterly down grade on the main track near and across John Street without headlights, without sounding a bell, whistle, horn or other warning, and making very little noise. There were no lights or gongs or other signaling devices maintained at this crossing by defendants for the safety of the public. The defendant's engine was constructed and equipped so that it could be operated either forward or backward with practically the same facility and ease. The cab was located in the center of the Diesel and the engineer when traveling easterly operated from a swivel chair on the right side. Two windows in the front and rear of the cab afforded the engineer the opportunity of a lookout. However, the engine was so constructed that the view of the engineer of objects approaching on his left was obstructed for some distance when the engine was traveling easterly. At the time of the collision, the engineer was alone in the cab and no one was riding on the front of the engine. The engine was silhouetted against a background of darkness and old structures as it came near and into the intersection. The car in which the plaintiff was riding was traveling at a speed of five or six miles an hour, and was struck by the left front part of the Diesel engine with sufficient force to badly damage the car and drag or carry it a distance of 25 feet. The engine after striking the automobile traveled a distance of 350 feet before it came to a full stop. The plaintiff did not see the locomotive until it was within approximately six feet of the car and just before it struck. Shortly before the collision, the plaintiff had looked to his right and neither saw nor heard anything indicating the approach of the engine.

Much of the defendants' evidence is in sharp conflict with plaintiff's interpretation of the surrounding facts and circumstances.

Drawing from the facts every reasonable inference and intendment favorable to the plaintiff, the jury could find as reasonable inferences the following: That the car in which plaintiff was riding approached the grade crossing in a cautious and prudent manner and at a slow rate of speed well within the legal requirements; and that the defendant's Diesel engine was then and there being operated without lights and without the use of any warning signal during the dark hours of early morning and while silhouetted against the background of a wall, buildings and trees, and was driven noiselessly upon its tracks into the crossing and against the automobile in which plaintiff was riding, thereby negligently and proximately injuring the plaintiff as alleged.

These inferences are permissible, but not impelling. We, of course, have no opinion as to the truth or falsity of the evidence. That is a

matter for the jury. The court must say what is evidence, and the jury must say what the evidence proves. *Lewis v. Steamship Co.*, 132 N.C. 904, 44 S.E. 666.

Both the plaintiff and the defendant under the circumstances disclosed by the evidence are held to the rule of the reasonably prudent man, *Meacham v. R. R.*, 213 N.C. 609, 197 S.E. 189; *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Rea v. Simowitz*, 225 N.C. 575, 35 S.E. 2d 871; *Powell v. Lloyd, supra.* The plaintiff as he approached the intersection was charged with the duty of conducting himself with respect to his safety and that of others with that degree of caution required of a reasonably prudent man placed in the same or similar circumstances. The defendant, on the other hand, was charged with the same duty, *Sebastian v. Motor Lines*, 213 N.C. 770, 197 S.E. 539; *Templeton v. Kelley*, 215 N.C. 577, 2 S.E. 2d 696, and whether the plaintiff or the defendant was guilty of a breach of that duty is a question for the jury upon appropriate issues and proper instructions from the court.

On the whole evidence, we reach the conclusion that there was sufficient evidence to take the case to the jury. Therefore, the judgment of nonsuit is

Reversed.

A. R. KEITH v. D. S. SILVIA.

(Filed 8 October, 1952.)

1. Appeal and Error § 14—

An appeal deprives the Superior Court of jurisdiction of all matters involved in the appeal from the time the appeal is taken to the time the decision of the Supreme Court is certified to the Superior Court.

2. Reference § 9—

Where motion to remove the referee is made prior to the time his report is filed, and an appeal is taken from the granting of the motion, the Superior Court, upon the certification of the decision of the Supreme Court reversing the judgment, has discretionary power to allow the filing of exceptions to the report, even though the report was filed prior to the hearing of the motion for removal. G.S. 1-194.

APPEAL by defendant from *Gwyn, J.*, May-June Term, 1952, HENDERSON.

Civil action to recover rent under a lease contract.

This case was here at the Spring Term, 1951, upon an appeal from an order discharging the referee, and is reported in 233 N.C. 328, 64 S.E. 2d 178, where the facts are fully stated and the law applicable to that appeal fully discussed. The order was reversed and the case remanded. One of

the reasons assigned for the reversal was that the referee's report was not before the court for consideration at the time the order was made. The opinion of this Court was certified to the Superior Court of Henderson County on 2 April, 1951, and on the same date, the plaintiff filed exceptions to the referee's report.

At the April-May Term, 1952, of the Superior Court of Henderson County, an order was made and entered holding that the plaintiff's exceptions to the referee's report were filed within time and recited that if it should be held otherwise, then the court within the exercise of its discretion allowed plaintiff's exceptions to be filed *nunc pro tunc.*

At the June Term, 1952, upon plaintiff's exceptions treated as a motion to set aside the referee's report, the court made an order sustaining the plaintiff's exceptions and setting aside the referee's report and retaining the cause for further orders. In the same order, the court overruled the defendant's motion for a confirmation of the referee's report.

To the order of Judge Gwyn allowing plaintiff to file exceptions to the referee's report, the order overruling defendant's motion to confirm the report, and the order setting aside the referee's report and retaining the cause for further orders, the defendant excepted and appealed, assigning errors.

J. E. Shipman and Kellum & Humphrey for defendant, appellant.
L. B. Prince and Isaac C. Wright for plaintiff, appellee.

VALENTINE, J. Conceding without deciding that the defendant's appeal is not premature and fragmentary, we proceed to a discussion of the other question presented by this appeal. Were plaintiff's exceptions to the referee's report properly filed?

When an appeal is certified to this Court, the Superior Court loses jurisdiction of all matters involved in the appeal until action is taken here and the opinion of this Court is certified back to the Superior Court. *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407; *Manufacturing Co. v. Arnold*, 228 N.C. 375, 45 S.E. 2d 577; *In re Puett's Will*, 229 N.C. 8, 47 S.E. 2d 488; *Harris v. Fairley*, 232 N.C. 555, 61 S.E. 2d 619; *Bailey v. McPherson*, 233 N.C. 231, 63 S.E. 2d 559; *Green v. Ins. Co.*, 233 N.C. 321, 64 S.E. 2d 162.

At the time of the making of the order from which the first appeal arose, the report of the referee was not before the court for consideration and therefore no exception could have been filed at that time. When the opinion of this Court was certified on 2 April, 1951, the Superior Court of Henderson County for the first time since the former appeal acquired jurisdiction so that exceptions could be properly filed. In any event, the presiding judge had a right in the exercise of his discretion to permit the

filing of the exceptions *nunc pro tunc*. *Cheshire v. First Presbyterian Church*, 221 N.C. 205, 19 S.E. 2d 855.

Under G.S. 1-194, a judge of the Superior Court has a wide latitude of discretion over the report of a referee, with power to review, modify, confirm in whole or in part, or to set aside the report. *Cummings v. Swepson*, 124 N.C. 579, 32 S.E. 966; *Dumas v. Morrison*, 175 N.C. 431, 95 S.E. 775; *Keith v. Silvia*, 233 N.C. 328, 64 S.E. 2d 178.

There is no evidence of an abuse of discretion by the court below. We, therefore, conclude that the order from which the appeal was taken must be affirmed and the case is remanded for proper proceedings according to the course and practice of the court.

Affirmed.

STATE v. DOUG BRADY.

(Filed 8 October, 1952.)

1. Intoxicating Liquor § 2—

In counties not electing to operate county liquor stores, the Turlington Act applies as modified by the provisions of the Alcoholic Beverage Control Act applicable to such counties.

2. Same—

In a county not electing to operate county liquor stores, the provisions of G.S. 18-11 as modified by G.S. 18-49 and G.S. 18-58, renders the possession of more than one gallon of tax-paid liquor, even though in the home of a resident, *prima facie* evidence that such liquor is kept for the purpose of sale in a prosecution under a warrant or indictment charging that offense, but nevertheless such resident may lawfully have in his home while occupied by him as his dwelling only, an unlimited quantity of tax-paid liquor for the personal consumption of himself, his family and *bona fide* guests when entertained by him therein.

3. Criminal Law § 53d—

It is the duty of the trial judge to charge as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any prayer for special instructions.

4. Intoxicating Liquor § 9f—

In a prosecution of a resident of a county which has not elected to operate county liquor stores on a charge of possession of intoxicating liquor for the purpose of sale, the court is under duty to instruct the jury upon evidence that three gallons of tax-paid liquor was found in defendant's home, that such possession by defendant in his dwelling for the personal consumption of himself, his family and his *bona fide* friends therein would be lawful, and error in failing to give such instruction is emphasized by a charge that a person has a right to have one gallon of tax-paid liquor in his home for the personal use of himself and his *bona fide* guests.

STATE *v.* BRADY.

APPEAL by the defendant from *Stevens, J.*, and a jury, at July Term, 1952, of LEE.

Criminal prosecution tried *de novo* in the Superior Court on an appeal by the defendant from the judgment of the County Criminal Court of Lee County upon a warrant charging the defendant with having and keeping in possession for the purpose of sale intoxicating liquor upon which the taxes imposed by law had been paid.

The only evidence at the trial was that presented by the State. It tended to show that the defendant's dwelling was located near Sanford in Lee County; that it was occupied and used by him as his private dwelling only; that on 10 November, 1951, three deputy sheriffs of Lee County went to the defendant's dwelling with a search warrant and searched it for intoxicating liquor; and that they found within the dwelling twenty-four pints of intoxicating liquor upon which the taxes imposed by law had been paid.

The jury found the defendant "guilty of possession of whiskey for the purpose of sale," and the presiding judge sentenced him to imprisonment as a misdemeanant. The defendant excepted and appealed, making assignments of error sufficient to present the questions discussed in the opinion which follows this statement of facts.

Attorney-General McMullan and Assistant Attorney-General Lake for the State.

D. E. McIver and McLean & Stacy for defendant, appellant.

ERVIN, J. Lee County has not elected to operate county liquor stores under the Alcoholic Beverage Control Act of 1937. In consequence, this case is controlled by the Turlington Act of 1923 as modified by the provisions of the Alcoholic Beverage Control Act applicable to counties not engaged in operating county liquor stores. *S. v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667; *S. v. Welch,* 232 N.C. 77, 59 S.E. 2d 199.

These propositions are established law in counties which do not operate county liquor stores under the Alcoholic Beverage Control Act of 1937:

1. Under the relevant section of the Turlington Act, *i.e.,* G.S. 18-11, as modified by applicable provisions of the Alcoholic Beverage Control Act, *i.e.,* G.S. 18-49 and G.S. 18-58, the possession by the accused, even within his private dwelling, of more than one gallon of intoxicating liquor upon which the taxes imposed by law have been paid constitutes *prima facie* evidence that such liquor is kept for the purpose of being sold where the accused is charged with the commission of that offense by the indictment or warrant. *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623.

2. Under the relevant section of the Turlington Act, *i.e.*, G.S. 18-11, as modified by the applicable provisions of the Alcoholic Beverage Control Act, a person may lawfully have or keep in his private dwelling while the same is occupied and used by him as his dwelling only an unlimited quantity of intoxicating liquor upon which the taxes imposed by law have been paid for use only for the personal consumption of himself, and of his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein. *S. v. Barnhardt, supra; S. v. Hammond,* 188 N.C. 602, 125 S.E. 402.

Under G.S. 1-180, it is obligatory for the trial judge to charge the jury as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any special prayer for instruction to that effect. *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53.

The evidence at the trial indicated that on the occasion named in the warrant the defendant had in his possession in his private dwelling while the same was occupied and used by him as his dwelling only twenty-four pints, *i.e.*, three gallons, of intoxicating liquor upon which the taxes imposed by law had been paid. The jury could have drawn either one of these opposing inferences from the evidence: That the defendant had the liquor for the purpose of sale; or that the defendant possessed the liquor for his own personal consumption. The jury might well have drawn the latter inference and acquitted the defendant had it been given proper instructions respecting his legal right to possess an unlimited quantity of tax-paid liquor in his private dwelling for his own personal consumption. The trial judge gave the jury no instruction whatever on this substantial feature of the case beyond that embodied in the erroneous statement that "a person has a right to have one gallon of tax-paid liquor for his own use in his home for the use of his *bona fide* guests." Law and logic unite in the declaration that the express mention of one thing implies the exclusion of another.

For the reasons given, the defendant is awarded a

New trial.

W. F. COLLINS v. J. W. EMERSON, JR., SHERIFF OF CHATHAM COUNTY, AND ALL OTHER LAW ENFORCEMENT OFFICERS OF CHATHAM COUNTY.

(Filed 8 October, 1952.)

Elections § 18a—

The result of an election held by a board having jurisdiction and legislative authority to act, is binding until set aside in a direct proceeding, and the validity of the election may not be collaterally attacked by suit to restrain its effects.

COLLINS *v.* EMERSON.

APPEAL by plaintiff from *Harris, J.*, at Chambers in Pittsboro, 12 May, 1952, from CHATHAM.

This is an action to restrain the Sheriff of Chatham County and all other law enforcement officers of said county from enforcing the law against the sale of beer on the ground that the election held in Chatham County, 8 March, 1952, at which time 3,150 qualified voters voted against the legal sale of beer and 1,633 qualified voters voted in favor of such sale, was illegal and void by reason of certain irregularities in calling and conducting the election.

The court below heard the evidence and found as a fact, among other things, that the election was duly and properly called and held by the proper officials in full compliance with the provisions of the law, and that two of the three members of the County Board of Elections met at the courthouse in Pittsboro on 11 March, 1952, and canvassed the votes cast in said special election and certified the result thereof to the Clerk of the Superior Court of Chatham County. The motion for a permanent injunction against the defendant and all other law enforcement officers of Chatham County, was denied. Plaintiff appeals, assigning error.

Ottway Burton for plaintiff, appellant.

Bell & Horton, Barber & Thompson, Dixon & Dark, T. Fleet Baldwin, and J. Lee Moody for defendants, appellees.

DENNY, J. There is no exception to the findings of fact. The appellant contends, however, that from the facts found the court should have held, as a matter of law, that the election was invalid and that the plaintiff was entitled to the relief sought. The contention is without merit.

It has been repeatedly held by this Court that when the Legislature has committed to a board the duty of submitting a proposition to the voters, in an area in which such board has jurisdiction, when such duty has been discharged and the result declared, such declaration is binding on everyone, so long as it stands unreversed by a proper judgment or decree in a direct proceeding brought for that purpose. In the meantime, the validity of the election may not be collaterally attacked. *Smallwood v. New Bern*, 90 N.C. 36; *McDowell v. Construction Co.*, 96 N.C. 514, 2 S.E. 351; *S. v. Emery*, 98 N.C. 768, 3 S.E. 810; *Rigsbee v. Durham*, 98 N.C. 81, 3 S.E. 749; *Bynum v. Commissioners*, 101 N.C. 412, 8 S.E. 136; *S. v. Cooper*, 101 N.C. 684, 8 S.E. 134; *Young v. Hendersonville*, 129 N.C. 422, 40 S.E. 89; *Gill v. Commissioners*, 160 N.C. 176, 76 S.E. 203, 43 L.R.A. (N.S.) 293; *Forester v. North Wilkesboro*, 206 N.C. 347, 174 S.E. 112; *Barbee v. Commissioners*, 210 N.C. 717, 188 S.E. 314.

The judgment of the court below is

Affirmed.

STATE v. WILLIE MAE ALSTON.

(Filed 8 October, 1952.)

APPEAL by defendant from *Stevens, J.*, at July Term, 1952, of LEE.

Criminal accusation against Willie Mae Alston. At the conclusion of her testimony, given as a witness on behalf of her husband, Aaron Alston, in a case pending against him, the trial court pronounced the following judgment: "Upon Willie Mae Alston's own testimony, the Court directs a verdict of guilty of possession of 79 jars of liquor for the purpose of sale, against Willie Mae Alston and a verdict of not guilty as to Aaron Alston. Willie Mae Alston is sentenced to Woman's Prison 404 for a term of two years."

From judgment so pronounced, Willie Mae Alston appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

H. F. Seawell, Jr., and J. W. Hoyle for defendant, appellant.

PER CURIAM. The record indicates that the judgment was pronounced and entered without warrant or indictment, or waiver thereof (G.S. 15-140), and without arraignment, plea, or the intervention of a jury. It necessarily follows, then, that the judgment is void. This is conceded by the State. The judgment will be vacated and set aside. Of course, the Solicitor may send a bill, if so advised.

Reversed.

KATIE GARRETT v. I. WOODALL ROSE.

(Filed 15 October, 1952.)

1. Appeal and Error § 2—

The denial of a motion for judgment on the pleadings is not immediately appealable, since otherwise a litigant could delay the administration of justice in contravention of Art. I, sec. 35, of the State Constitution, but movant is entitled to preserve exceptions to the ruling and have the exception considered on appeal from a final judgment adverse to him.

2. Ejectment § 14: Pleadings § 28—

The fact that plaintiff, in her reply, admits the execution of certain instruments in the chain of title set up in defendant's answer does not entitle defendant to judgment on the pleadings when the reply also alleges matters for the purpose of avoiding such instruments and denies the defendant's averment of title and right of possession and leaves unimpaired plaintiff's allegations in the complaint of title and right of possession in herself.

3. Appeal and Error § 2—

An immediate appeal lies from the granting of a motion to strike out certain parts of a pleading.

4. Pleadings § 31—

Allegations of an answer which either in themselves or in connection with other averments tend to state a defense or a counterclaim cannot be held irrelevant and should not be stricken upon motion.

5. Pleadings § 10—

Under G.S. 1-137 (1) defendant may set up as a counterclaim an action existing in his favor either by himself or together with the other defendants against plaintiff, or all plaintiffs, if there be more than one, upon which a several judgment might be had, provided such cause of action arises out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim.

6. Pleadings § 31: Ejectment § 14—Allegations of answer held to state both defense and counterclaim and therefore motion to strike was improperly allowed.

Plaintiff instituted suit in ejectment upon general allegation of title and right of possession. Defendant set up as a further defense that plaintiff was a remainderman under the will of her grandfather, that prior to the contingency upon which the remainder vested, defendant and the other contingent remaindermen executed deed to defendant's grantor upon stipulations that plaintiff's grantor should pay a stated sum within twelve months from the vesting of the remainder, which sum should constitute a charge on the land, and that contemporaneously therewith the remaindermen executed a contract under which they agreed that the consideration should be paid to all of them, share and share alike, instead of going to such as should be living at the date of the happening of the contingency vesting title. *Held:* The allegations in regard to the contract, combined with other averments in the answer, constitute both a defense, as a denial of plaintiff's title, and a counterclaim, since it is connected with the subject matter of plaintiff's action and defendant would be entitled to judgment thereon against plaintiff that defendant owns the land subject to the charge for the monetary consideration, and therefore the allegations in regard to the contract were improvidently stricken on plaintiff's motion.

7. Parties § 10a—

Under G.S. 1-73 the trial court should bring in all parties who have such interest in the subject matter of the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without their presence. Art. I, sec. 17, of the State Constitution.

8. Same—

Defendant in ejectment set up the defense of title in himself subject to a charge upon the land in a specified amount payable to the contingent remaindermen, share and share alike. *Held:* It was error for the court to refuse to permit the administrator of two of such remaindermen to intervene in order that their rights to their respective shares of the consideration could be determined.

GARRETT *v.* ROSE.

APPEALS by the defendant and a third party, to wit, J. Brian Scott, Ancillary Administrator with the will annexed of two separate estates, from *Frizzelle, J.*, at May Term, 1952, of WILSON.

Civil action involving conflicting claims of title to land heard upon motion of plaintiff to strike parts of answer, motion of defendant for judgment on the pleadings, and application of third person for leave to intervene.

The facts necessary to an understanding of the problems posed by the appeals are stated in the numbered paragraphs set forth below.

1. The property in controversy is a large farm in Wilson County.

2. The plaintiff, Katie Garrett, brought this action against the defendant, I. Woodall Rose, to recover possession of the farm. She did not allege in her complaint how she acquired the rights claimed by her in the action. She merely alleged in general terms that she owns the farm in fee simple; that as its fee simple owner she is entitled to its immediate possession; that the defendant is in its actual possession; and that the defendant wrongfully withholds such possession from her. She prayed that she be adjudged to be the fee simple owner of the farm, that she be put in its immediate possession, and that she be awarded any additional appropriate relief.

3. When he answered the complaint, the defendant denied all of its material allegations except the averment that he is in the actual possession of the farm. He then alleged that his possession of the farm is rightful because he owns it under the chain of title described in the portion of the answer entitled "further defense."

4. The "further defense" occupies 47 pages of the record. When its allegations are reduced to ultimate averments, they come to this: David Williams, the one time owner of the farm, died in 1881, leaving a duly probated will whereby he devised the farm to his granddaughter Frances Louisa Harrison for life, with remainder in fee to her issue. The will specified further that if Frances Louisa Harrison should die leaving no issue surviving her, the farm would be "divided . . . equally . . . in fee simple" among such of the other grandchildren of the testator, David Williams, as should "be then living." All of the grandchildren of David Williams were born and attained adultness before 3 November, 1916. They consisted on that day of the plaintiff Katie Garrett and seven others, namely, Frances Louisa Harrison, Margaret Barrow, Frank W. Garrett, Paul Garrett, Alice W. Pender, Dora Vinson, and R. Lloyd Williams. Frances Louisa Harrison was then a widow without living children. On 3 November, 1916, Frances Louisa Harrison, as lessor, and A. P. Petway, as lessee, entered into an agreement in writing whereby Frances Louisa Harrison leased the farm "unto . . . A. P. Petway and his heirs and assigns" for the term of her natural life, and whereby A. P. Petway bound

himself, his personal representatives, and assigns, to pay stipulated annual rents to Frances Louisa Harrison "for the balance of . . . (her) . . . life." On the same day the plaintiff Katie Garrett and six other grandchildren of David Williams, namely, Margaret Barrow, Frank W. Garrett, Paul Garrett, Alice W. Pender, Dora Vinson, and R. Lloyd Williams, and H. G. Connor, Jr., Commissioner, as grantors, and A. P. Petway, as grantee, made certain deeds whereby the grantors conveyed to A. P. Petway in fee simple the remainder interests in the farm of the unborn issue of Frances Louisa Harrison and the remainder interests in the farm of the seven grandchildren of David Williams who joined in the deeds, and whereby A. P. Petway bound himself and his personal representatives to make payment of $15,500.00, the sale price of the remainder, "within twelve months after the death of Frances Louisa Harrison . . . to those persons entitled to said . . . land under the will of . . . David Williams upon the death of . . . Frances Louisa Harrison, with interest thereon at 6% per annum . . . from the date of her death," and whereby it was stipulated that the sale price of the remainder should constitute a charge upon the farm until it should be paid. The conveyance of the remainder interests of the unborn issue of Frances Louisa Harrison was made by H. G. Connor, Jr., Commissioner, in conformity to a prior judgment rendered by Judge Oliver H. Allen, the presiding jurist, at the October Term, 1916, of the Superior Court of Wilson County in a civil action in which all of the grandchildren of David Williams and their spouses were plaintiffs, and "the contingent interest, the possible child and issue of Frances Louisa Harrison not now in being, and H. G. Connor, Jr., Guardian *ad litem* for the unborn and unknown contingent remaindermen," were defendants. On the day on which the deeds were made, to wit, 3 November, 1916, the plaintiff Katie Garrett and Margaret Barrow, Frank W. Garrett, Paul Garrett, Alice W. Pender, Dora Vinson, and R. Lloyd Williams, entered into a contract under seal whereby they covenanted, in substance, that the $15,500.00 to be paid by A. P. Petway for the remainder interests in the farm should belong to all seven of them, share and share alike, instead of going to such of them as should be living at the death of Frances Louisa Harrison. The civil action was brought and the lease, deeds, and contract were executed as a single and indivisible transaction for the purpose of carrying into effect a previous contract between the eight grandchildren of David Williams and A. P. Petway for the sale and conveyance of the farm. Subsequent to the events depicted above, the defendant acquired the farm in fee simple, subject to the charge for $15,500.00, by *mesne* conveyances from A. P. Petway. Margaret Barrow, Frank W. Garrett, Paul Garrett, Alice W. Pender, Dora Vinson, and R. Lloyd Williams predeceased Frances Louisa Harrison, who died on 16 December, 1950, without leaving issue. As a con-

sequence of these things, the plaintiff Katie Garrett, who is the sole survivor of the grandchildren of David Williams, has no interest in the farm except "a lien . . . for whatever part of the $15,500.00 consideration . . . to which she might be . . . entitled."

5. The defendant has paid the sum of $15,500.00 with interest from 16 December, 1950, into the office of the Clerk of the Superior Court of Wilson County. He prays in his answer for this relief: That the action of the plaintiff be dismissed; that he be adjudged to be the owner of the farm in fee simple; that any persons claiming an interest in the $15,500.00 be made parties defendant; that the court declare to whom the $15,500.00 should be paid, and in what proportion; and that the defendant be awarded any additional appropriate relief.

6. The plaintiff replied to the "further answer" of the defendant. The reply admits the execution and probate of the will of David Williams, the institution and prosecution of the civil action in which Judge Allen rendered judgment, and the making of the lease, deeds, and contract of 3 November, 1916, and pleads various matters for the avowed purpose of avoiding the lease, deeds, and contract, and certain alleged subsequent deeds not specifically mentioned in the "further answer" under which the defendant supposedly claims. The reply expressly denies the allegation of the "further defense" that the defendant has acquired title to the farm by *mesne* conveyances from A. P. Petway, and does not abandon or qualify in any way the general averments of the complaint as to the title and right of possession of the plaintiff.

7. Before she filed her reply, the plaintiff moved to strike from the "further defense" all allegations identifying the heirs and devisees of the deceased grandchildren of David Williams, and all allegations asserting that on 3 November, 1916, the plaintiff Katie Garrett and Margaret Barrow, Frank W. Garrett, Paul Garrett, Alice W. Pender, Dora Vinson, and R. Lloyd Williams entered into a contract under seal whereby they covenanted, in substance, that the $15,500.00 to be paid by A. P. Petway for the remainder interests should belong to all seven of the contracting parties, share and share alike, instead of going to such of them as should be living at the death of Frances Louisa Harrison; and after the plaintiff replied to the "further answer," the defendant moved for judgment on the pleadings. When he ruled on these matters, Judge Frizzelle granted the plaintiff's motion to strike, and denied the defendant's motion for judgment on the pleadings; and the defendant excepted and appealed, assigning both rulings as error.

8. J. Brian Scott, as ancillary administrator with the will annexed of the estates of Alice W. Pender and R. Lloyd Williams, made a verified application to Judge Frizzelle for leave to intervene in the action, setting forth in detail matters identical with those stated in the defendant's "fur-

ther answer," and praying that he be made a party defendant to the action as the personal representative of both of these decedents to the end that he might recover from the defendant "for the benefit of each of his said estates, one-seventh of the sum of $15,500.00 with interest thereon at the rate of 6% per annum from December 16, 1950, until paid." Judge Frizzelle denied the application for leave to intervene, and J. Brian Scott, as ancillary administrator with the will annexed of the estates of Alice W. Pender and R. Lloyd Williams, excepted and appealed, assigning that ruling as error.

Allsbrook & Benton and Gardner, Connor & Lee for plaintiff, appellee.

Bunn & Bunn, Lucas & Rand, and Battle, Winslow & Merrell for defendant and J. Brian Scott, ancillary administrator c.t.a., appellants.

ERVIN, J. The defendant undertakes to raise these questions on his appeal:

1. Did the judge err in denying his motion for judgment on the pleadings?

2. Did the judge err in striking from the answer the allegations concerning the contract of the grandchildren of David Williams for the division of the consideration to be paid by A. P. Petway for the remainder interests in the farm?

The first of these questions is not properly before us for the very simple reason that an immediate appeal does not lie from the denial of a motion for judgment on the pleadings. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384. This rule is bottomed on sound reason. It is designed to make effective the constitutional guaranty that justice shall be administered without delay. N. C. Const., Art. I, Section 35; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377. If the law permitted an immediate appeal from the denial of a motion for judgment on the pleadings, any litigant could delay the trial of any action on its merits by the simple expedient of moving for judgment on the pleadings and giving notice of appeal from an adverse ruling on his motion. The rule does not preclude a litigant from obtaining a judicial review of the propriety of the denial of his motion for judgment on the pleadings in case it becomes necessary. He may preserve an exception to the ruling, and have it considered on an appeal from a final judgment adverse to him. *Erickson v. Starling, supra.*

We would be compelled to affirm the ruling of the judge denying the motion for judgment on the pleadings if such ruling were subject to review at this time. The able counsel who represent the defendant have succumbed to the temptation which lies in constant wait for loyal and optimistic advocates, and causes its victims to see in the denials of their adversaries admissions of the justice of their client's cause. The record

does not support their contention that the reply admits all of the material allegations of the answer. While it does concede the execution of certain of the instruments in the defendant's chain of title, the reply denies the crucial averments of the answer relating to the title and right of possession of the defendant, and leaves unimpaired the allegations of the complaint respecting the title and right of possession of the plaintiff.

The statute codified as G.S. 1-153 specifies that "if irrelevant . . . matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby." The judge acted under this statutory provision when he allowed the motion of the plaintiff to strike from the answer the allegations that on 3 November, 1916, the plaintiff entered into a contract under seal with Margaret Barrow, Frank W. Garrett, Paul Garrett, Alice W. Pender, Dora Vinson, and R. Lloyd Williams whereby the contracting parties covenanted, in substance, that the $15,500.00 to be paid by A. P. Petway for the remainder interests in the farm should belong to all seven of them, share and share alike, instead of going to such of them only as should be living at the death of Frances Louisa Harrison. The question of the correctness of this ruling is properly before us because an immediate appeal lies from the granting of a motion to strike out parts of a pleading. *Loan Co. v. Warren,* 204 N.C. 50, 167 S.E. 494; *Ellis v. Ellis,* 198 N.C. 767, 153 S.E. 449.

If allegations in a pleading are relevant upon any admissible theory, they ought not to be stricken out on motion. The test of relevancy of allegations sought to be stricken from an answer is whether such allegations, either in themselves or in connection with other averments, tend to state a defense or a counterclaim. If they do, they are not irrelevant, and ought not to be expunged. *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308; *Ederer v. Froberg,* 115 Ind. App. 414, 59 N.E. 2d 595; 71 C.J.S., Pleading, section 465.

Under the first subdivision of the statute embodied in G.S. 1-137, a cause of action may be pleaded as a counterclaim in an action when it satisfies this twofold requirement:

1. The cause of action must be one existing in favor of a defendant and against a plaintiff between whom a several judgment may be had in the action.

2. The cause of action must either arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or be connected with the subject of the action.

A several judgment may be had on a counterclaim within the purview of the statute when judgment may be rendered for the plaintiff, or all of the plaintiffs, if more than one, or for the defendant, or all of the defendants, if more than one, accordingly as the court may decide in favor of the one side or the other. *Lumber Co. v. Wallace,* 93 N.C. 22. The term

"subject of the action," as used in the statute, denotes the thing in respect to which the plaintiff's right of action is asserted, such as the wrongful act for which damage is sought, or the contract which is broken, or the threatened act which is sought to be restrained, or the property which is sought to be recovered. *Smith v. Gibbons,* 230 N.C. 600, 54 S.E. 2d 924; *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614; *Lassiter v. Railroad Co.,* 136 N.C. 89, 48 S.E. 642, 1 Am. Cas. 456.

When the allegations relating to the contract of 3 November, 1916, and the other averments of the "further defense" of the defendant are combined, they state, in substance, that the defendant owns the farm in fee simple, subject, however, to the unpaid consideration for the remainder interests amounting to $15,500.00 plus accrued interest from 16 December, 1950, which constitutes a charge upon the farm, and which the defendant must pay in equal shares to the plaintiff and the personal representatives of the other six contracting parties, who are now dead, in order to protect his title to the premises.

These facts, if true, show that the claim of the plaintiff to the farm is not good, and for that reason are a defense to the complaint. These facts, if true, likewise constitute a cause of action in favor of the defendant and against the plaintiff, warranting a judgment declaring that the defendant owns the farm in fee subject to the charge for the unpaid consideration with accrued interest, that the plaintiff has no interest in the farm except a charge for one-seventh of the unpaid consideration with accrued interest, and that the defendant is entitled to remove the charge from the farm by paying the unpaid consideration with accrued interest in equal parts to the plaintiff and the personal representatives of the other six contracting parties, who have died. Moreover, the first subdivision of G.S. 1-137 permits the defendant to plead his cause of action against the plaintiff as a counterclaim in the instant action. Such cause of action is connected with the subject of this action, *i.e.,* the farm, and a several judgment may be had between the plaintiff and the defendant in respect to it in this action. *McLean v. McDonald,* 173 N.C. 429, 92 S.E. 148; *Yellowday v. Perkinson,* 167 N.C. 144, 83 S.E. 341; *Lumber Co. v. Wallace, supra.*

Since the allegations relating to the contract of 3 November, 1916, in combination with other averments, state both a defense and a counterclaim, they are not irrelevant, and the judge erred in striking them from the answer.

This brings us to the appeal of J. Brian Scott, ancillary administrator with the will annexed, which presents the question whether the judge erred in denying his application for leave to intervene in the action as a party defendant in his dual capacity as personal representative of Alice W. Pender and R. Lloyd Williams for the purpose of asserting a claim

"for the benefit of each of his . . . estates" to one-seventh of the $15,500.00 allegedly constituting a charge on the farm.

When the decision in the recent case of *Scott v. Jordan,* 235 N.C. 244, 69 S.E. 2d 657, was handed down, we pointed out that under the law of the land clause enshrined in Article I, Section 17, of the North Carolina Constitution a judgment is not binding on those who are not parties to the action in which the judgment is rendered, and suggested that judges and lawyers would do well to ponder the implications of that constitutional principle when they consider who should be made parties to litigation.

The Legislature undoubtedly pondered these implications when it inserted these words in the statute now codified as G.S. 1-73: "When a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in." Under this statutory provision, a person who is a necessary party has an absolute right to intervene in a pending action, and the court commits error when it refuses to permit him to exercise such right. *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554; *Temple v. Hay,* 184 N.C. 239, 114 S.E. 162.

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. *Colbert v. Collins,* 227 N.C. 395, 42 S.E. 2d 349; *Jones v. Griggs,* 219 N.C. 700, 14 S.E. 2d 836; 39 Am. Jur., Parties, section 5; 67 C.J.S., Parties, section 1.

The controversy involved in the case at bar is whether the plaintiff owns the farm in fee simple absolute, or whether the defendant owns the farm in fee simple, subject to a charge of $15,500.00 with interest from 16 December, 1950, payable in equal shares to the plaintiff and the personal representatives of Margaret Barrow, Frank W. Garrett, Paul Garrett, Alice W. Pender, Dora Vinson, and R. Lloyd Williams. It is manifest that the personal representatives of these six decedents are so vitally interested in this controversy that a valid judgment cannot be rendered in this action completely and finally determining the controversy without their presence as parties. This being true, they are necessary parties to the action.

It follows that the judge erred in denying the application of J. Brian Scott, ancillary administrator with the will annexed of the estates of Alice W. Pender and R. Lloyd Williams, for leave to intervene. It also follows that the judge should have had the personal representatives of Margaret Barrow, Frank W. Garrett, Paul Garrett, and Dora Vinson brought in. *Riddick v. Davis,* 220 N.C. 120, 16 S.E. 2d 662; *Barbee v. Cannady,* 191 N.C. 529, 132 S.E. 572; *McKeel v. Holloman,* 163 N.C.

132, 79 S.E. 445; *Burnett v. Lyman,* 141 N.C. 500, 54 S.E. 412; *Parton v. Allison,* 111 N.C. 429, 16 S.E. 415; *Kornegay v. Steamboat Co.,* 107 N.C. 115, 12 S.E. 123.

For the reasons given, the order striking from the answer the allegations relating to the contract of 3 November, 1916, and the order denying J. Brian Scott, ancillary administrator with the will annexed, leave to intervene are

Reversed.

EMMA WILCHER, REB WINSTEAD, JOE ODUM, PAT FUGATE, THOMAS W. COBB AND L. C. COBB v. ALTON B. SHARPE.

(Filed 15 October, 1952.)

1. Nuisances § 3a—

The operation of a hammer feed mill for the processing of corn and other grains is not a nuisance *per se.*

2. Injunctions § 4d—Proposed business will not be enjoined on mere conjecture that its operation would constitute nuisance.

Plaintiffs instituted suit to restrain defendant from erecting and operating a proposed hammer feed mill for corn and other grains on the ground that the operation of such business in the locality would constitute a nuisance from loud noises and from dust and dirt in the atmosphere within the radius of plaintiffs' residences. *Held,* The basis of the suit is the mere apprehension of a nuisance, and plaintiffs are entitled to enjoin the future operation of a legitimate business only upon allegations of fact which show with reasonable certainty that such operation would constitute a nuisance, and may not be granted injunctive relief upon conflicting evidence as to whether the proper operation of such business would constitute a nuisance in fact.

3. Municipal Corporations § 37—

An ordinance of a municipality prohibiting the erection of gins or mills within the corporate limits without the consent of property owners within three hundred feet of each proposed site is void, since it involves the delegation of legislative power to private individuals.

4. Injunctions § 4d—

The refusal of a court of equity to enjoin a legitimate business on allegations of apprehended injury from its future operation does not afford defendant license to operate such business so as to create a nuisance, and plaintiff would not be without remedy in case the apprehended injury should eventuate.

5. Injunctions § 8—

In a suit in which the sole objective is a permanent injunction it is proper, upon the hearing of an order to show cause why the temporary order should not be continued to the hearing, to sustain defendant's demurrer to the complaint when it fails to state facts sufficient to entitle plaintiffs to equitable relief.

APPEAL by defendant from *Bone, J.*, at Chambers, 26 July, 1952, WILSON. Error and remanded.

Plaintiffs instituted this action to restrain the defendant from the erection and operation of a hammer feed mill for processing corn and other grains in the town of Elm City.

Plaintiffs are citizens and residents of Elm City. They alleged that the defendant had begun the erection of a building in which to operate a hammer feed mill on the south side of Main Street in Elm City near the residences of the plaintiffs, and that the operation of such a mill as defendant proposes to use in the shelling, hammering and grinding of corn would cause loud noises and produce dust and dirt, rendering the atmosphere unclean within the radius of plaintiffs' residences; that these disturbances would injuriously affect the health, comfort and pleasure of the plaintiffs; that the maintenance and operation of the proposed mill would constitute a nuisance and cause irreparable damage to plaintiffs in the enjoyment of their property. It was also alleged that shortly before this suit was instituted the town of Elm City had adopted an ordinance "that no more gins or mills be erected in the corporate limits of the town without the consent of all property owners in 300 feet of proposed site of building."

Temporary restraining order and order to show cause were issued by Judge Harris. On the return thereof before Judge Bone the plaintiffs offered the verified complaint and several affidavits in support of the allegations of the complaint, and the defendant offered affidavits *contra* tending to show that the feed mill proposed could and would be so constructed and operated as largely to prevent the escape of dust, and that no unusual noises would be created. The defendant also offered evidence that he had already expended $8,000 for building materials and equipment, and that on the adjoining lot there was a cotton gin which had been operated for several years, and a blacksmith shop in the same block; and that the area around the site of defendant's proposed mill was not an exclusively residential section.

After considering these affidavits Judge Bone entered order continuing the restraining order to the hearing, and the defendant excepted and appealed.

Hooks & Spence for plaintiffs, appellees.

Gardner, Connor & Lee, Sharpe & Pittman, and George Rabil for defendant, appellant.

DEVIN, C. J. The defendant had begun the erection of a building in Elm City with the intention of installing therein a feed mill for processing corn and other grains, and had spent for materials and equipment $8,000

when the plaintiffs entered suit and obtained a temporary restraining order. This was based upon the ground that the proposed mill when completed and in operation would injuriously affect the owners of adjacent residences by loud noises and the discharge of dust from the milling operations. It was alleged that the business as plaintiffs apprehended it would be conducted would constitute a nuisance. Upon the view set forth in plaintiffs' complaint and supporting affidavits the restraining order was continued to the hearing.

We are unable to agree with the learned judge who heard this case below.

The defendant proposes to engage in a legitimate business, and one doubtless not without some advantage to the community. The milling of corn and other grains is not a nuisance *per se.* It can only become so by reason of the manner in which the business is conducted. That is still in the realm of conjecture. It rests only on the allegation of apprehension.

There was conflicting evidence whether other milling plants of the type it was alleged defendant proposed to erect created unusual noises or discharged dust affecting near-by residences. There was also evidence that devices could be installed to prevent these annoyances.

The defendant is entitled to the enjoyment of his property rights in so far as they do not injuriously affect the rights of others. The courts are slow to interfere by injunction with the conduct of business enterprises. *Redd v. Cotton Mills,* 136 N.C. 342, 48 S.E. 761; *Duffy v. Meadows,* 131 N.C. 31, 42 S.E. 460. It was said by the Court in *Dorsey v. Allen,* 85 N.C. 358, "When the anticipated injury is contingent and possible only, or the public benefit preponderates over a private inconvenience, the Court will refrain from interfering."

In *Durham v. Cotton Mills,* 141 N.C. 615, 54 S.E. 453, the Court used this language: "When the interposition by injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate." The mere apprehension of a nuisance is insufficient to warrant equitable relief, and in order to restrain future acts with respect to the use of a proposed building, it is necessary to set forth facts which show with reasonable certainty that such result would likely follow. *Greenville v. Highway Com.,* 196 N.C. 226, 145 S.E. 31.

Where the evidence of a threatened nuisance goes beyond conjecture and is established by satisfactory proof, or by the verdict of a jury as was done in *Barrier v. Troutman,* 231 N.C. 47, 55 S.E. 2d 923, a court of equity will afford relief.

The allegations of the complaint are insufficient to show a public nuisance injuriously affecting the rights of all the people of the commu-

nity, "something inherently injurious to the public health, safety or morals." *Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593. But it is alleged that the proposed use and operation of defendant's mill will create a private nuisance violative of the rights of these plaintiffs, causing annoyance from loud noises and the discharge of unwholesome dust affecting the health and the comfort and enjoyment of their homes. A nuisance was defined in *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church,* 108 U.S. 317, as follows: "That is a nuisance, which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are (is) continuous, courts of equity will interfere and restrain the nuisance." *Barrier v. Troutman, supra.*

"The general rule established in this jurisdiction is that when the owner of property is about to engage in a business enterprise which may or may not become a nuisance according to the manner in which it may be conducted, courts usually will not interfere in advance to restrain such an undertaking, especially when the apprehended injury is "doubtful, or contingent or eventual." This is true when the business may be of some benefit to the community and the injury threatened relates to the comfort and convenience of complainants rather than such as imports immediate and serious injury to health or property rights. In the absence of showing of serious threat of this nature it would seem that adequate redress might in most instances be obtained by an action at law. *Cherry v. Williams,* 147 N.C. 452, 61 S.E. 267; *Berger v. Smith,* 160 N.C. 205, 75 S.E. 1098; *Webb v. Chemical Co.,* 170 N.C. 662, 87 S.E. 633; *Holton v. Oil Co.,* 201 N.C. 744, 161 S.E. 391. "It is a general rule that where the thing complained of is not a nuisance *per se,* but may or may not become so, according to the circumstances, and the injury apprehended is eventual or contingent, equity will not interfere." *Hanes v. Carolina Cadillac Co.,* 176 N.C. 350, 97 S.E. 162. To justify interference with defendant's right of property it must be made to appear that the proposed mill either *per se* or necessarily in the manner of its operation will become a nuisance. 7 A.L.R. 763 (note).

In support of this suit for an injunction against the erection of the proposed mill, the plaintiffs call attention to the ordinance adopted by the town of Elm City shortly before this suit was instituted, but this will not avail the plaintiffs. The ordinance as enacted cannot be upheld either as a zoning regulation under the statute, G.S. 160-172, *et seq.,* or as an exercise of the police power of the town. *Shuford v. Waynesville,* 214 N.C. 135, 198 S.E. 585. The ordinance purports to prohibit the erection of a gin or mill in the town without the consent of neighboring property

owners. Where the effectiveness of an ordinance determining the use of property for a lawful purpose is conditioned upon the assent or permission of private persons, such as the owners of adjacent property, it must be held invalid, as it involves the delegation of legislative power to private individuals. *S. v. Bass,* 171 N.C. 780, 87 S.E. 972; *Re Perrin,* 305 Pa. 42; 37 A.J. 783; 119 A.L.R. 1462; 79 A.L.R. 912.

The refusal of a court of equity to enjoin a legitimate business on allegations of injury apprehended from the future conduct of the business, however, does not leave the plaintiffs without remedy in case the apprehended injury should eventuate, and their rights be injuriously affected by what proves to be a nuisance in the use of the building. In *Pake v. Morris,* 230 N.C. 424, 53 S.E. 2d 300, it was held, under the circumstances there appearing, that a fish factory was not a nuisance *per se.* There was a verdict in that case for the defendant. *Chief Justice Stacy,* speaking for the Court, said: "Of course, the verdict here which negatives any past nuisance settles no more than the present controversy. It affords the defendant no license to operate its plant in the future so as to create a nuisance. The defendant is at all times subject to the law of the land." *Webb v. Chemical Co., supra.*

The defendant's exception to the judgment below continuing the temporary restraining order to the hearing was supplemented in this Court by a demurrer *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action.

It is apparent that plaintiffs' suit to enjoin the erection and operation of the proposed feed mill was based on two grounds. First, it was alleged the town ordinance prohibiting the erection of a "mill" without the consent of adjacent property owners entitled the plaintiffs to injunctive relief, but we have seen that this position cannot be sustained. The second ground relied on for maintenance of the suit is the allegation that if the building is erected and the feed mill installed therein it is apprehended a nuisance will be created by noise and dust to the inconvenience and discomfort of plaintiffs in their homes, constituting a threat to good health. While the maintenance of structures and operations presently producing these annoyances might afford sufficient grounds upon which to base an action, the allegations of the complaint relate only to anticipated injuries which at this time are merely conjectural and contingent. The complaint does not allege any inconvenience has been occasioned, nor does it set out facts showing substantial grounds for anticipating immediate danger to health or comfort of the plaintiffs, or that a nuisance will be created.

The demurrer is sustained, with leave to the plaintiffs to amend, if so advised; otherwise the complaint to stand dismissed.

This disposition of the present appeal would not estop the plaintiffs from taking further or renewed action in the event the mill should be operated in such manner as to create a nuisance injurious to the rights of the plaintiffs.

The order continuing the restraining order is stricken out and the cause is remanded for proceedings not inconsistent with this opinion.

Error and remanded.

STATE v. RODNEY C. KIMREY.

(Filed 15 October, 1952.)

1. Criminal Law § 50d—

The trial court may propound competent questions to a witness in order to clarify what the witness has said or intended to say or to develop some relevant fact overlooked, but in doing so he must exercise extreme care that he does not express an opinion on the facts either by manner or word, and where the interrogation of a witness by the court amounts to cross-examination which impeaches the witness or depreciates his testimony before the jury, it must be held for prejudicial error. G.S. 1-180.

2. Criminal Law § 78c—

It is not required that a defendant take exception at the time to interrogation of a witness by the court which amounts to cross-examination impeaching the credibility of the witness.

APPEAL by defendant from *Phillips, J.*, and a jury, February Mixed Term, 1952, of YADKIN.

Criminal prosecution tried upon a bill of indictment charging the defendant with unlawful possession and transportation of nontax-paid liquor.

The evidence of the State discloses that a highway patrolman gave chase to a motor vehicle on a highway in Yadkin County. As the vehicle was stopped, the operator jumped out, fled through a field, and made his get-away. The vehicle was found to contain 132 gallons of nontax-paid liquor. The patrolman at the time did not know the operator of the vehicle, but was able to describe him in such detail that other officers who knew the defendant later picked him up and brought him into the presence of the patrolman, who immediately identified the defendant as being the operator of the liquor-laden vehicle, and the patrolman so testified at the trial.

The defendant, electing to remain off the witness stand, set up the defense of alibi through the testimony of witnesses who testified in effect that the defendant was at another place in another county at the time of

the chase, fixed by the testimony of the patrolman as being between 10:00 and 10:30 o'clock Sunday morning, 21 October, 1951.

Defense witness Glenn Key testified on direct examination that on the Sunday morning in question he drove from his home in Asheboro over to the defendant's home in Siler City and "got him up" around 8:30 o'clock, and that he and the defendant stayed together from then until 1:00 o'clock that day, and that they did not leave Chatham County. This witness, in concluding his direct examination, said he fixed the Sunday in question as being the day of the stock car races in North Wilkesboro.

The presiding judge then conducted an examination of the witness, in part as follows: "Q. Did you go to North Wilkesboro? A. No. Q. How do you know there was a race over there? A. It was scheduled. Q. I am just asking what you know?"

Then, after cross-examination by the solicitor, the presiding judge conducted a further examination of the witness, in part as follows: "Q. When did you hear or learn that the defendant was charged with this offense? A. Well, it was sometime after. Q. Well, I know, but when? A. I don't know the exact date. Q. About how long afterwards? A. Well, I would say approximately two weeks or ten days or something. Q. That was the first time it was called to your attention he was charged with hauling a load of liquor on the 21st day of October, about ten days or two weeks later? A. Yes, sir. Q. When did you next see him after you heard of this charge? A. Off and on all the time. Q. When did you next see him after you heard about it? A. Don't know exactly. Q. About how long afterwards? A. I would say a week, I usually see him maybe once a week or something like that. Q. You live in Asheboro? A. That is right. Q. Where does he live? A. Siler City. Q. That is how many miles? A. 20 Miles. Q. You went down there to sell him this black Ford that you had? A. That is right, or see if he knew anybody that wanted one. Q. Why did you stay from eight in the morning until one in the afternoon? A. Just sitting there talking with him. Q. That is all the business you had with him? A. Yes, Sir."

Defense witness James D. Payne testified he worked at a filling station in Siler City and that the defendant and witness Key went to the station Sunday morning, 21 October, 1951, between 10:00 and 12:00 o'clock and bought soft drinks. During cross-examination by the solicitor, the court interposed this examination: "Q. Your filling station stays open on Sunday morning? A. Open 24 hours a day, seven days a week. Q. Never closes? A. No sir. Q. Know whose black '40 Ford they were riding in? A. Not at the time, no sir."

The jury returned a verdict of guilty as charged on both counts in the bill of indictment. From the judgment pronounced, imposing penal servitude of eight months, the defendant appealed, assigning errors.

Attorney-General McMullan and Samuel Behrends, Member of Staff, for the State.

W. H. McElwee and Donald L. Paschal for defendant, appellant.

JOHNSON, J. The defendant assigns as error the way and manner in which the trial judge interrogated his witnesses. He contends that the judge extended and elaborated on the solicitor's cross-examination of the witnesses in a manner calculated to discredit and impeach them and cast doubt upon their testimony before the jury.

The rule is firmly fixed with us that "no judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility." *S. v. Simpson,* 233 N.C. 438, 441, 64 S.E. 2d 568; G.S. 1-180, as rewritten, Chapter 107, Session Laws of 1949; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *S. v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378; *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *S. v. Auston,* 223 N.C. 203, 25 S.E. 2d 613.

And under application of this salutary rule, it is well settled that it is improper for a trial judge to ask questions which are reasonably calculated to impeach or discredit a witness. Cross-examination for the purpose of impeachment is the prerogative of counsel, including the district solicitor in a case like this one, but it is never the privilege of the trial judge. *S. v. Bean,* 211 N.C. 59, 188 S.E. 610; *S. v. Cantrell, supra; S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *S. v. Winckler,* 210 N.C. 556, 187 S.E. 792.

It is true that frequently in the course of a trial the presiding judge, in order to make for better understanding or clarification of what a witness has said or intended to say, or to develop some relevant fact overlooked, is entirely justified in propounding competent questions to a witness, but in doing so "care should be exercised to prevent by manner or word what may be understood by the jury as the indirect expression of an opinion on the facts." *S. v. Harvey,* 214 N.C. 9, 11, 197 S.E. 620; *S. v. Perry, supra.*

In the present case, no doubt Judge Phillips in examining the witnesses intended only to clarify the issue by developing relevant facts and circumstances which he felt had been overlooked by counsel. However, in doing this it appears that the thread of his interrogation developed into cross-examination in manner and form calculated to impeach the witness and depreciate his testimony before the jury.

It may be conceded that not every ill-advised or inadvertent comment or question of a presiding judge tending to impeach a witness is of sufficient harmful effect to constitute prejudicial error. Nevertheless, a study of the record in the present case leaves the impression that the over-all effect of the court's participation in the examination of the witnesses

offered by the defendant weighed too heavily against him and amounts to prejudicial error entitling him to a new trial, and it is so ordered.

The fact that no exception was noted by the defendant at the time the judge interrogated these witnesses is immaterial under authoritative decisions of this Court. *S. v. Perry, supra; S. v. Bryant,* 189 N.C. 112, 126 S.E. 107.

New trial.

STATE v. HUBERT DEVONE DAUGHTRY.

(Filed 15 October, 1952.)

1. Automobiles § 32½—

A warrant charging that defendant did violate "Ordinance No. ....., Section ....." of a named town by operating a vehicle upon the public highways with improper muffler contrary to said ordinance, "against the statute in such case made and provided, and against the peace and dignity of the said Town and State," *is held* sufficient to charge violation of G.S. 20-128 (a), made a misdemeanor by G.S. 20-176 (a), the references to the municipality and the ordinance being treated as surplusage. The use of "and/or" in legal proceedings disapproved.

2. Automobiles § 29b—

A warrant charging that defendant violated "Ordinance No. ....., Section ....." of a named town "by operating a motor vehicle upon the public highways of N. C. at a greater rate of speed than allowed by law, to wit: 80 miles per hour, contrary to the said ordinances, against the statute in such case made and provided, and against the peace and dignity of the said Town and State," *is held* sufficient to charge a violation of G.S. 20-141, made a misdemeanor by G.S. 20-180, the reference to the municipality and the ordinances being treated as surplusage.

3. Indictment and Warrant § 9—

Where a warrant is sufficient to charge a violation of statute, the fact that it ineffectively refers also to a municipal ordinance will not render the warrant void, but the reference to the municipality and the ordinance will be treated as surplusage.

4. Indictment and Warrant § 11½—

A plea of guilty waives any defect in a warrant charging a misdemeanor. G.S. 15-140.

5. Criminal Law § 81c (4)—

Where sentences on separate indictments are to run concurrently, any error relating to the lesser sentence alone cannot be prejudicial.

APPEAL by defendant from *Burney, J.,* at March Term, 1952, of PITT.

Criminal prosecutions upon two warrants issued out of Recorder's Court of Ayden and Pitt County, North Carolina, on 20 August, 1951, one upon affidavit charging that "in the town of Ayden, on or about

16 day of August, 1951, Hubert Devone Daughtry did unlawfully and willfully violate an ordinance of the town of Ayden, or (a State Law) to wit: Ordinance No. ....., Section ....., by operating a vehicle upon the public highways of N. C. with improper muffler, the said motor vehicle not being equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke, and/or smoke screens, contrary to the said ordinances, against the statute in such cases made and provided, and against the peace and dignity of the said Town and State." And the other upon affidavit charging that at and in said county and town, and on same date, 16 August, 1951, "Hubert D. Daughtry did unlawfully and willfully violate an ordinance of the Town of Ayden, or (a State Law) to wit: Ordinance No. ....., Section ....., by operating a motor vehicle upon the public highways of N. C. at a greater rate of speed than allowed by law, to wit: 80 miles per hour, contrary to the said ordinances, against the statute in such case made and provided, and against the peace and dignity of the said Town and State."

The record shows that the warrant so issued as first above stated was entered upon the Criminal Trial Docket of the said Recorder's Court as No. 8155, and the warrant so issued as second above stated was entered thereon as No. 8154.

The record also shows (1) as to each case "Judgment. Ask for jury trial. A. W. Sawyer, Clerk," and (2) in each case defendant gave bond for his personal appearance before Superior Court Judge of Pitt County, N. C., at the next term of said court to answer the charge in the warrant,—and not to depart said court without leave.

The record further shows that at March Mixed Term, 1952, of Superior Court of Pitt County, the presiding judge rendered judgment in case State *v.* Hubert Devone Daughtry—4322-4320, as follows: "This cause coming on to be heard and being heard before the undersigned (Judge Presiding), and the defendant being charged in a warrant with operating a motor vehicle upon the highways at a speed of eighty miles an hour, and the defendant having entered a plea of 'guilty as charged,' and in case number 4320 the defendant being charged in a warrant with operating a motor vehicle upon the highways with improper muffler, and the jury after hearing all the evidence, argument of counsel and charge of the court having said for their verdict that the defendant is guilty as charged in said warrant. Thereupon the Solicitor for the State prayed judgment, It is considered, ordered and adjudged in case No. 4322 that the defendant be confined in the common jail of Pitt County, assigned to work the public highways for a term of six months.

"It is further considered, ordered and adjudged in Case No. 4320, upon the charge of operating an automobile upon the public highways with improper muffler, that defendant be confined in the common jail of Pitt

County for a term of thirty days, assigned to work the public highways under the direction and supervision of the State Highway & Public Works Commission. This sentence to run concurrently with the above sentence of six months in case Number 4322."

And the record also shows that "to the foregoing judgment defendant excepts and gives notice of appeal to Supreme Court."

Attorney-General McMullan and Assistant Attorney-General Lake for the State.

Jones, Reed & Griffin for defendant, appellant.

WINBORNE, J. While defendant makes these assignments of error: "(1) That the court erred in entering judgment as it appears in the record for that no criminal charge cognizable by the court and vesting it with authority to proceed to judgment was before the court," and (2) "that the court does not specify with certainty the alleged charge upon which it attempted to proceed to judgment," it is stated in brief of defendant, as appellant, filed in this Court that the only questions involved on this appeal are as to whether or not a warrant stating the charge as above set forth in the affidavits on which the respective warrants are issued is sufficient to charge (1) the crime of operating a motor vehicle with improper muffler, and (2) a crime of speeding eighty miles an hour.

In the light of pertinent statutes, and decisions of this Court, we hold that the warrants are sufficient to withstand the challenge.

It is patent that the affidavit is written on a form for use in charging violation of both town ordinances and State law, as the case might be.

And this Court in dealing with a similar warrant in the case of *S. v. Peters,* 107 N.C. 876, 12 S.E. 74, had this to say: "It is urged here that the warrant in the case against Amos Phillips was entitled 'State and City of Greensboro *v.* Amos Phillips,' and that it charged that the offense was against the ordinance of the city of Greensboro, whereas the illegal sale of spirituous liquor is an offense only cognizable by State authority. No objection was taken below to the introduction of the warrant, nor was there any prayer for instruction that there was a variance between the allegation and proof . . . it is sufficient to say that the warrant in proper terms charges a sale of spirituous liquor without license and as an offense against the State. The additional averments in the warrant that it was a violation of a town ordinance also was mere surplusage, as were the words 'and city of Greensboro' in entitling the warrant," citing *S. v. Collins,* 85 N.C. 511, and *S. v. Brown,* 79 N.C. 642.

Applying this principle to each of the warrants here under consideration and striking from each words pertaining to town ordinances, and to the town, there remain two distinct criminal offenses under the State laws

pertaining to operation of motor vehicles: First: It is declared in G.S. 20-18 (a) that "no person shall drive a motor vehicle on a highway unless such motor vehicle is equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, annoying smoke and smoke screens"; and in G.S. 20-176 (a), in pertinent part, that "it shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this Article, unless such violation is by this Article or other law of this State declared to be a felony."

It is here noted that the statute reads "annoying smoke and smoke screens," and not "annoying smoke 'and/or' smoke screens." And this Court has said that the use of the term "and/or" in a warrant "adds nothing to its clarity," *S. v. Ingle,* 214 N.C. 276, 199 S.E. 10. See also *Gibson v. Ins. Co.,* 232 N.C. 712, 62 S.E. 2d 320, and cases there cited, and *S. v. McLamb, ante,* 287.

Secondly: In respect to speed restrictions, it is declared in G.S. 20-141 (b) (1) (2) and (4) (j) that it shall be unlawful to operate passenger cars in excess of twenty miles per hour in any business district, thirty-five miles per hour in any residential district and fifty-five miles per hour in places other than business and residential district, and that any person violating any of the provisions of this Section shall be guilty of a misdemeanor and shall be punished as provided in G.S. 20-180. (Note amendments to G.S. 20-180; 1947 Session Laws Chap. 1067, Sec. 19, and 1951 Session Laws Chap. 182, Sec. 2.)

See also *S. v. Sumner,* 232 N.C. 386, 61 S.E. 2d 84, where the offense charged was operating a motor vehicle upon a public highway in the State at a speed of 90 miles per hour. It is there stated in opinion by *Barnhill, J.,* that while the criminal charge contained in the warrant might have been more precisely stated, "it is sufficiently intelligible and explicit to (1) inform the defendant of the charge he must answer, (2) enable him to prepare his defense, and (3) sustain the judgment. This is all that is required."

Applying the rule there stated to case in hand, manifestly defendant knew with what offenses he was charged. For he pleaded "not guilty" to the one, and "guilty" to the other. And it is presumed that by the plea of guilty, entered through counsel, in No. 4322, defendant waived any irregularity in matter of procedure. G.S. 15-140. And since the sentence in No. 4320 is to run concurrently with the sentence in No. 4322, prejudicial error is not made to appear in respect thereto.

No error.

STATE v. JOHN WILLIAM TRIPP.

(Filed 15 October, 1952.)

1. Automobiles § 30d—

A warrant charging that defendant did unlawfully and willfully violate "Ordinance No. ....., Article ....., Section ....." of a municipality by driving "a motor vehicle on the public highways . . . while under the influence of intoxicating liquor, contrary to the said ordinance, against the statute in such case made and provided, and against the peace and dignity of the said Town and State," *is held* sufficient to charge defendant with operating a motor vehicle on the public highways of the State while under the influence of intoxicating liquors, the reference in the warrant to the ordinance and the municipality being treated as surplusage.

2. Indictment and Warrant § 11½—

A plea of *nolo contendere* waives any irregularity in a warrant for a misdemeanor. G.S. 15-140.

APPEAL by defendant from *Burney, J.*, at June Term, 1952, of GREENE.

Criminal prosecution upon a warrant issued 27 April, 1952, by the Mayor of the town of Snow Hill, North Carolina, upon an affidavit charging "that at and in said county and in the Town of Snow Hill, on or about the 27th day of April, 1952, Johnnie William Tripp did unlawfully and wilfully violate an ordinance of the Town of Snow Hill, to wit: Ordinance No. ....., Article ....., Section ....., by: Careless and reckless operating a motor vehicle on the public highways and in the town of Snow Hill while under the influence of intoxicating liquors, contrary to the said ordinance, against the statute in such case made and provided, and against the peace and dignity of the said Town and State."

The record shows that Johnnie William Tripp was arrested and brought before the Mayor,—and that the Mayor entered this judgment: "After hearing the evidence in this case, it is adjudged that the defendant . . . Defendant waives hearing . . . bound to County Court for trial May 13, 52."

Then the record of Superior Court shows: "Plea, No. 878—State *v.* John William Tripp—Driving Drunk—Reckless Driving. Upon the calling of this case the defendant, through counsel, tenders a plea of *nolo contendere.*"

And the record shows that judgment was entered that "defendant be confined in the common jail of Greene County and assigned to work the roads under the supervision of the State Highway and Public Works Commission for one year and surrender his license, and the Clerk shall endorse thereon that this is the third conviction of operating a motor vehicle under the influence of intoxicating liquor and forward said license to the Director of Highway and Public Safety, Raleigh, N. C., with the

court's recommendation that defendant's license be revoked as by law provided."

Defendant objected and excepted to the above judgment, and appeals to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorney-General Lake for the State.

Jones, Reed & Griffin for defendant, appellant.

WINBORNE, J. While the assignment of error of defendant is "that the court below erred in entering judgment as it appears in the record, there being no charge before the court vesting it with authority to proceed to judgment," it is stated in brief of defendant, appellant, filed in this Court, that the only question involved on the appeal is as to whether or not the wording of the affidavit on which the warrant issued is sufficient to charge a crime. A kindred question is treated in the case of *S. v. Daughtry, ante,* 316, opinion in which is handed down cotemporaneously herewith. The principle applied there is applicable here.

Here as there the affidavit, stripped of surplusage, charges a criminal offense under the State law. Here it is operating a motor vehicle on the public highways of the State while under the influence of intoxicating liquors. See *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724, where the subject has been recently reviewed. And it is presumed that by the plea of *nolo contendere,* entered through his counsel, defendant waived any irregularity in matter of procedure. G.S. 15-140.

Hence, on the authority of *S. v. Daughtry, ante,* 316, the judgment from which appeal is taken is

Affirmed.

VANCE S. HARRINGTON & COMPANY, A CORPORATION, IN BEHALF OF ITSELF AND ANY OTHER PERSON, FIRM OR CORPORATION OWNING PROPERTY WITHIN THE AREA OF THE HAVELOCK ZONING COMMISSION WHO CARE TO MAKE THEMSELVES PARTIES HERETO; (CRAVEN COUNTY AND THE BOARD OF COMMISSIONERS OF CRAVEN COUNTY, INTERVENERS), v. JOSEPH N. RENNER AND WILLODEAN RENNER.

(Filed 29 October, 1952.)

1. Constitutional Law § 20a—

The owner of property has the right to make any lawful use of it he sees fit subject only to those limitations duly imposed by law.

2. Counties § 1—

A county is not a municipal corporation in a strict legal sense but is an instrumentality of the State by means of which the State performs governmental functions within its territorial limits.

3. Constitutional Law § 8c: Municipal Corporations § 37—

The General Assembly may not delegate to a zoning commission the power to promulgate zoning regulations within a rural section of a county, since such commission is not a municipal corporation and therefore cannot be delegated the authority to exercise a portion of the State's police power. Chap. 455, Session Laws 1949; Chap. 757, Session Laws 1951; G.S. 160-172. This result is not affected by the fact that the zoning commission's regulations are submitted to and approved by the board of county commissioners, since the regulations are nevertheless enacted by the commission and not the county.

4. Public Officers § 1—

Where an office created by the General Assembly imposes duties involving decisions as to property from which an appeal would lie, the office is a public office notwithstanding the absence of substantial compensation, and notwithstanding a legislative declaration that the incumbents should be considered as holding offices as commissioners for a special purpose.

5. Public Officers § 4b—

A statute set up a zoning commission and provided that four of its commissioners should be appointed by the board of commissioners of the county, and that one of its number should be appointed by the commanding officer of a nearby air base. The commanding officer appointed a naval officer to the commission. *Held:* A naval officer holds office under the United States Government and therefore under the provision of Art. XIV, sec. 7, of the State Constitution, he could not hold the office of zoning commissioner under the statute, and was neither a *de facto* nor a *de jure* commissioner.

6. Pleadings § 20—

The filing of answer does not waive the right to demur on the ground that the complaint fails to state a cause of action.

7. Injunctions § 8—

In an action for permanent injunction, demurrer should be sustained and the action dismissed upon the hearing of the order to show cause when the complaint fails to state facts constituting a cause of action.

APPEAL by defendants from *Burney, J.*, 27 June, 1952. From CRAVEN. Reversed.

This was a suit to enjoin defendants from erecting a building to be used for commercial purposes in an area zoned for residences under the act creating the Cherry Point Marine Corps Air Station Zoning Commission.

The complaint of Harrington & Company, in which the Board of Commissioners of Craven County joined as additional party plaintiff,

alleged in substance that by virtue of Chapter 455, Session Laws 1949, the Cherry Point Marine Corps Air Station Zoning Commission was created with the same powers given the legislative bodies and zoning commissions of cities and towns by Article 14 of Chapter 160 of the General Statutes; that pursuant to the provisions of that act, zoning commissioners appointed in accordance with the act proceeded to divide into districts and zones portions of the rural area described in the act, and prepared a map showing the areas zoned and adopted and promulgated rules and regulations dividing and classifying the area into districts and prescribing the height, character and type of buildings permitted to be erected and used in the respective districts; that the report of the Zoning Commission was approved and adopted by the Board of Commissioners of Craven County.

Plaintiffs further alleged that the Act of 1949 contemplated the inclusion of portions of Carteret County in the area described, but that the supplemental Act, Chapter 757, Session Laws 1951, eliminated the area in Carteret County and changed the name to Havelock Zoning Commission to be composed of five persons, four appointed by the Board of Commissioners of Craven County, and one named by the Commanding Officer of Cherry Point Marine Corps Air Station; that the 1951 Act contained the provision that the County Commissioners and the Zoning Commission should have the same powers as those given to the legislative bodies and zoning commissions of cities and towns by G.S. 160-172, *et seq.*

It also appeared from the complaint that the Zoning Commission created by the 1949 Act adopted the zoning regulations for violation of which the suit for injunction was instituted, and that at the time only the two members appointed by the Board of Commissioners and the Naval Officer, Commander Albers, appointed by the Commandant of the Cherry Point Air Base, were present and acting. It was admitted that Commander Albers was a resident of Tennessee, and at the time was residing at the Air Base within the territory ceded to the Federal Government.

It was alleged that plaintiff owned numerous lots and houses in the area set apart as a residence district and that defendant owning real property adjoining and subject to the same restriction was erecting a large building to be used in commercial activities in violation of the zoning regulations to the damage and detriment of plaintiff's property for residential purposes, and that the Chairman of the Zoning Commission would take no action. Both of the Acts referred to were by reference incorporated in the complaint.

The defendants filed answers, and also demurred to both complaints on the ground that the statutes upon which the complaints were based were void for violation of Art. II, sec. 29, of the Constitution of North Carolina; that these Acts do not confer authority on plaintiffs to main-

tain this action; that the attempt to confer upon the Zoning Commission the same powers as those given incorporated cities and towns is ineffective and that the zoning regulations, the basis of plaintiff's action, were invalid; that the plaintiffs have no right to maintain this action, and it should be dismissed.

The demurrers were overruled, and the restraining order continued to the hearing. The defendants excepted and appealed.

Laurence A. Stith, W. B. R. Guion, and D. C. McCotter, Jr., for Vance S. Harrington & Co., Inc., plaintiff, appellee.

R. A. Nunn for interveners, appellees.

R. E. Whitehurst and George B. Riddle, Jr., for defendants, appellants.

DEVIN, C. J. Due to its proximity to the large reservation and air base of the United States Marine Corps at Cherry Point, the theretofore sparsely inhabited rural area adjoining soon became populated by thousands of persons who were drawn there by work within the Air Base, or who, because of relationship to members of the armed forces there stationed, found it convenient to reside in the vicinity, or who came to engage in business and trade. This created a housing situation which unless regulated seemed likely to produce inconvenience and discomfort. The Commanding Officer of the air base with the Board of Commissioners of Craven County undertook to provide the remedy by securing the passage of the Acts of 1949 and 1951 creating a Zoning Commission. The purpose was laudable, but we must examine the methods employed in the light of the Constitution and laws of North Carolina in order to determine whether these measures can be upheld against the attack made thereon by the defendants.

Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined to prevent arbitrary, capricious or oppressive action under the guise of law.

This case involves consideration of the zoning laws of the State. Statutes which have been passed authorizing the governing bodies of municipal corporations to enact zoning ordinances prescribing that in certain areas only designated types of buildings may be erected and used have been generally upheld by the courts as an exercise of the police power of the State. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706; *Ahoskie v. Moye,* 200 N.C. 11, 156 S.E. 130; *Euclid v. Ambler Realty Co.,* 272 U.S. 365.

By Chapter 250, Laws of 1923, now codified as G.S. 160-172, *et seq.,* the General Assembly "for the purpose of promoting health, safety, morals or the general welfare of the community" granted to the legislative

bodies of cities and towns power to regulate the use of real property in respect to the character and purpose of buildings to be erected therein, to divide the municipality into zones in accord with a comprehensive plan, and to provide the manner in which such regulations should be established and enforced. This statute authorized the appointment by the municipality of a Zoning Commission to recommend the boundaries of the various districts and to recommend appropriate regulations to be enforced therein. It is provided that the Zoning Commission should make preliminary report, hold hearings, and thereafter submit its final report to the legislative body of the city. For the further carrying out of the zoning ordinances the statute prescribes that the legislative body of the municipality may provide for the appointment of a board of adjustment which shall hear and decide appeals from and review orders of administrative officials charged with enforcement of any ordinance adopted pursuant to the statute, and shall hear and decide all matters referred to it or upon which it is required to pass under the ordinance, subject to review by *certiorari.* Appeal may be taken by any person aggrieved or by the officers of the municipality.

It will be noted that the power is conferred upon municipal corporations to enact ordinances dividing the municipality into districts or zones of a planned and comprehensive nature, and to establish regulations or restrictions therein as to the character, style and purpose of buildings. This is an enlargement of the corporate powers of the municipality and is predicated upon proper exercise of police power for the purpose of promoting the general welfare of the community. The Act authorizing cities and towns to enact zoning ordinances recognizes that these measures must find their justification in some aspect of the police power. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128; *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706; *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78; *Harden v. Raleigh,* 192 N.C. 395, 135 S.E. 151. As was said by *Justice Ervin,* speaking for the Court in *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897: "In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State (citing cases). The police power is that inherent and plenary power in the State which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society."

In the case at bar, however, power to enact zoning regulations applicable to the rural area near Cherry Point was not based upon authority given by statute to municipal corporations. The power given to municipalities by G.S. 160-172 was to be exercised by enacting zoning ordinances, and implementing that power by the appointment of a zoning commission to plan and a board of adjustment to supervise. The Act of 1949

creates a zoning commission and declares it shall have the same power given municipal corporations and provides that appeals from the zoning commission may be had to the Board of Commissioners of Craven County, and that the Board of Commissioners shall act as a board of adjustment.

Conceding, without deciding, that the General Assembly has the power under the Constitution to empower a County Board of Commissioners to enact ordinances providing for zoning districts in the rural areas of the county, here the Act of 1949 has not done this. Apparently the cart is placed before the horse. It is the Zoning Commission according to the complaint which under the Act prescribed the regulations now sought to be enforced. In *James v. Sutton,* 229 N.C. 515, 50 S.E. 2d 300, it was said: "The power to zone is conferred upon the governing body of the municipality. That power cannot be delegated to the board of adjustment."

While the General Assembly may delegate power to a municipal corporation to enact zoning ordinances in the exercise of police power of the State, 11 A.J. 934-988, it must be remembered that though counties are bodies politic and corporate, created by the State for certain public purposes, they are not in strict legal sense municipal corporations as are cities and towns, but are rather instrumentalities of the State by means of which the State performs governmental functions within its territorial limits. *Martin v. Comrs. of Wake,* 208 N.C. 354, 180 S.E. 777; *Jones v. Comrs.,* 137 N.C. 579, 50 S.E. 291. The General Assembly has not delegated to the Zoning Commission in this case the power of eminent domain, *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563, nor does it attempt to exercise that power.

True, in the case at bar the zoning regulations formulated by the statutory commission were submitted to and adopted by the Board of County Commissioners of Craven County in November, 1950, but that Board had not enacted any zoning ordinances. It's only action was to appoint four of the five members of a zoning commission already in existence. The Act provides that appeals from decisions of the Zoning Commission should be to the Board of Commissioners, and in addition to its appellate functions it was to serve as board of adjustment. In neither capacity was any action taken, and the next appearance of the County Board was to intervene in this suit in June, 1952. Here no municipal corporation was in existence and none was created by the Act, nor can we conclude that it was within the legislative intent that the Commission it created should possess the functions of a municipal corporation, or exercise the police power of the State.

It also appears from the complaint that the zoning regulations, for violation of which this suit was instituted, were formulated and promulgated by the Zoning Commission when of that five-man body only the two

residents of Craven County and the naval officer appointed by the Commandant of the Air Base were present and acting. The naval officer, Commander Albers, a resident of Tennessee, was residing within the area of the Cherry Point Federal Air Station.

It is declared in the Act of 1949, and also in that of 1951, that members of the Zoning Commission should be considered as holding office as commissioners for a special purpose within the meaning of Art. XIV, sec. 7, of the State Constitution. But it would seem that the comprehensive nature of the duties prescribed by the Act of 1949, which involve relations with the public and the exercise of judgment and discretion in matters concerning property rights, should bring the members of this Zoning Commission within the definition of public officers. The office was created by the General Assembly and the duties imposed involve decisions as to property from which an appeal would lie. One who holds a public office is a public office holder. The absence of substantial compensation is immaterial. The following decisions of this Court support this view. *Harris v. Watson,* 201 N.C. 661, 161 S.E. 215; *Groves v. Barden,* 169 N.C. 8, 84 S.E. 1042; *Advisory Opinion in re Phillips,* 226 N.C. 772, 39 S.E. 2d 217; *Bryan v. Patrick,* 124 N.C. 651 (662), 33 S.E. 151; *S. v. Knight,* 169 N.C. 333, 85 S.E. 418; *Eliason v. Coleman,* 86 N.C. 235; *Clark v. Stanley,* 66 N.C. 59; 42 A.J. 880.

Declaring it not a public office does not make it so, or render the incumbent immune from the ordinary requirements of public office holding. *Clark v. Stanley,* 66 N.C. 59. However, failure to take an oath of office, while it might subject one exercising the duties of the office to a penalty (G.S. 128-5) would not deprive his acts of the validity given those of *de facto* officers performing the duties of a *de jure* office. *Bryan v. Patrick,* 124 N.C. 651, 33 S.E. 151; *Clark v. Stanley,* 66 N.C. 59; *Wrenn v. Kure Beach,* 235 N.C. 292, 69 S.E. 2d 492. But to hold membership in the Zoning Commission as created by the Act of 1949 to be a public office would affect the right of Commander Albers, for he was at the time holding office under the United States Government, with the result that he would be incapable of performing the duties of a public officer under the State. In such case he is neither a *de facto* nor a *de jure* officer. *Edwards v. Board of Education,* 235 N.C. 345, 70 S.E. 2d 170.

The plaintiffs appellees call attention to the fact that the defendants have answered, and that an answer overrules a demurrer. But this rule is inapplicable when the demurrer is based on the insufficiency of the complaint to state a cause of action. *Goldsboro v. Supply Co.,* 200 N.C. 405, 157 S.E. 58; *Rosenbacher v. Martin,* 170 N.C. 236, 86 S.E. 785.

It may also be noted that in a suit to restrain violation of a zoning ordinance, both the individual alleging threatened injury to his property

and the municipality may be parties plaintiff. *Goldsboro v. Supply Co., supra;* G.S. 160-178.

We conclude that the zoning regulations formulated by the Zoning Commission under authority of Chap. 455, Session Laws 1949, and by which it is sought to restrict the right of the defendants to use their property for a lawful purpose must be held invalid, and that the demurrers to the complaint upon which restraining order was issued should be sustained, and the restraining order dissolved.

It is unnecessary to determine the question debated, whether the Acts of 1949 and 1951 referred to violate Art. II, section 29, of the Constitution.

Reversed.

M. P. LIPE, SR., DOING BUSINESS AS LIPE MOTOR LINES, v. GUILFORD NATIONAL BANK, A CORPORATION.

(Filed 29 October, 1952.)

1. Banks and Banking § 7a—

The relationship between a depositor and the bank is that of debtor and creditor, and the ownership of the money deposited passes to the bank.

2. Assignments § 3—

A contract for money due or to become due may be assigned by agreement which manifests an intention to make the assignee the present owner of the debt, and such agreement operates as a binding transfer of the title to the debt as between the assignor and the assignee regardless of notice to the debtor.

3. Assignments § 6—

Where a debt has been assigned by valid agreement, the debtor, upon receiving notice of the assignment, is under duty to pay the debt to the assignee, irrespective of who gives notice.

4. Banks and Banking § 7a—

Where a depositor's own evidence shows that he assigned his right to the entire deposit in controversy to another, he may not maintain an action against the bank for such deposit, since he is not the real party in interest, G.S. 1-57, and the bank's motion to nonsuit such action is properly allowed.

5. Appeal and Error § 39c—

The admission of testimony over objection cannot be held prejudicial when substantially the same testimony is thereafter admitted without objection.

6. Same—

The exclusion of evidence cannot be held prejudicial on appeal when appellant fails to show what the rejected testimony would have been.

7. Evidence § 45—

A party may not testify that his written contract had never been "fulfilled," since testimony of a witness is restricted to facts within his personal knowledge and his opinion or conclusion with respect to matters in issue or relevant to the issue is incompetent.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1952, of CATAWBA.

Civil action by depositor against bank for recovery of general deposit with interest.

The complaint alleges that on 30 September, 1948, the plaintiff, M. P. Lipe, Sr., an individual doing business as Lipe Motor Lines, had $927.77 on general deposit with the defendant, Guilford National Bank; that the defendant subsequently honored a check for a part of the deposit, reducing it to $527.77; that on 1 October, 1950, the plaintiff learned that the balance of the deposit had been transferred to the credit of a third party by the defendant without his authorization or knowledge; that the plaintiff thereupon made demand on the defendant for the payment to him of the balance of the deposit; that the defendant wrongfully refused to make such payment to the plaintiff, who is the owner of the balance of the deposit; and that by reason of these matters the plaintiff is entitled to judgment against the defendant for $527.77 with interest from 1 October, 1950.

The answer denies the material averments of the complaint. In addition, it sets forth that prior to 5 January, 1949, the plaintiff, an individual trading as Lipe Motor Lines, had $854.02 on general deposit with the defendant; that under a written contract bearing date 30 September, 1948, which became effective on 5 January, 1949, the plaintiff sold and transferred to a corporation named Lipe Motor Lines, Incorporated, virtually all his assets and business, including his general deposit with the defendant; that on the following day, *i.e.*, 6 January, 1949, one J. T. Ennis, acting in behalf of both the plaintiff and the corporation, notified the defendant of such sale and transfer, and directed the defendant to transfer the general deposit from the credit of the plaintiff to that of Lipe Motor Lines, Incorporated; that the defendant forthwith complied with this direction; that subsequent to these events, Lipe Motor Lines, Incorporated, made numerous deposits in its own name with the defendant, and withdrew various sums of money from the deposits credited to it; and that as the net result of these transactions "the defendant now has to the credit of Lipe Motor Lines, Inc., the sum of $128.23, representing the balance not withdrawn from the account originally owned by the plaintiff." The answer prays that plaintiff recover nothing by his action.

The only testimony at the trial was that given by the plaintiff in person. He stated in substance on direct examination that on 30 September, 1948, he had a general deposit of $927.77 with the defendant bank; that a sub-

sequent withdrawal made by him before 1 January, 1949, reduced the deposit to $527.77; that he discovered sometime in the summer of 1950 that this deposit had been transferred to the credit of Lipe Motor Lines, Incorporated, by the defendant bank; that he thereupon made demand on the defendant bank for the $527.77; and that the defendant bank refused to pay it to him.

The plaintiff admitted on cross-examination that while he "was operating Lipe Motor Lines as an individual," to wit, on 30 September, 1948, he sold and transferred virtually all of his assets and business, including his general deposit with the defendant bank, to a corporation named Lipe Motor Lines, Incorporated, under a written contract, which was complete on its face and was to become effective when it received the approval of the North Carolina Utilities Commission; that the written contract was approved by the North Carolina Utilities Commission on 5 January, 1949; and that thereafter the business theretofore conducted by the plaintiff as an individual under the trade name of Lipe Motor Lines was carried on by its purchaser, Lipe Motor Lines, Incorporated.

The plaintiff volunteered the additional testimony that although his sale and transfer of his general deposit with the defendant bank to Lipe Motor Lines, Incorporated, as shown by the written contract was absolute in character, there was some contemporaneous oral stipulation between him and Lipe Motor Lines, Incorporated, relating to the deposit, which was "supposed to have been done afterwards" and which was "supposed to . . . (have been) . . . written into the contract." The trial judge virtually struck this evidence from the case without objection on the part of the plaintiff by instructing the plaintiff to "testify to facts and not suppositions."

When the plaintiff had introduced his evidence and rested his case, the defendant moved to dismiss the action upon a compulsory nonsuit, and the trial judge allowed the motion and entered judgment accordingly. The plaintiff appealed, assigning errors.

Joe P. Whitener for plaintiff, appellant.

Hoyle & Hoyle for defendant, appellee.

ERVIN, J. The plaintiff makes these assertions by his assignments of error:

1. That the court erred in dismissing the action upon a compulsory nonsuit.

2. That the court erred in rulings respecting evidential matters.

We will consider the assignments of error in the order stated above.

When a person deposits his money in a bank without any agreement to the contrary, the ownership of the money passes from him to the bank,

and the bank becomes his debtor for the amount of the money deposited. *Bank v. Weaver,* 213 N.C. 767, 197 S.E. 551; *Williams v. Hood,* 204 N.C. 140, 167 S.E. 574; *Bank v. Bank,* 197 N.C. 526, 150 S.E. 34; *Woody v. Bank,* 194 N.C. 549, 140 S.E. 150, 58 A.L.R. 725; *Wall v. Howard,* 194 N.C. 310, 139 S.E. 449; *Trust Co. v. Spencer,* 193 N.C. 745, 138 S.E. 124; *Corporation Commission v. Trust Co.,* 193 N.C. 696, 138 S.E. 22; *Trust Co. v. Rose,* 192 N.C. 673, 135 S.E. 795; *Graham v. Warehouse,* 189 N.C. 533, 127 S.E. 540; *Reid v. Bank,* 159 N.C. 99, 74 S.E. 746; *Hawes v. Blackwell,* 107 N.C. 196, 12 S.E. 245; *Boyden v. The President and Directors of the Bank of Cape Fear,* 65 N.C. 13. The debt thus created is subject to the rule that ordinary business contracts for money due or to become due are assignable. *Wike v. Guaranty Co.,* 229 N.C. 370, 49 S.E. 2d 740; *Bank v. Jackson,* 214 N.C. 582, 200 S.E. 444; *Fertilizer Works v. Newbern,* 210 N.C. 9, 185 S.E. 471; *Trust Co. v. Williams,* 201 N.C. 464, 160 S.E. 484; *Bank v. School Committee,* 121 N.C. 107, 28 S.E. 134; *Motz v. Stowe,* 83 N.C. 434; 9 C.J.S., Banks and Banking, section 288. A valid assignment may be made by any contract between the assignor and the assignee which manifests an intention to make the assignee the present owner of the debt. *Hall v. Jones,* 151 N.C. 419, 66 S.E. 350; *Motz v. Stowe, supra; Winberry v. Koonce,* 83 N.C. 352; *Ponton v. Griffin Bros. & Co.,* 72 N.C. 362; *Thigpen v. Horne,* 36 N.C. 20; 6 C.J.S., Assignments, section 41. The assignment operates as a binding transfer of the title to the debt as between the assignor and the assignee regardless of whether notice of the transfer is given to the debtor. *Trust Co. v. Construction Co.,* 191 N.C. 664, 132 S.E. 804; *Chemical Co. v. McNair,* 139 N.C. 326, 51 S.E. 949. Notice to the debtor is necessary, however, to charge him with the duty of making payment to the assignee. *Chemical Co. v. McNair, supra; Bank v. School Committee,* 118 N.C. 383, 24 S.E. 792. This duty arises whenever the debtor receives notice of the assignment, irrespective of who gives it. *Ellis v. Amason,* 17 N.C. 273; 6 C.J.S., Assignments, section 74. The code of civil procedure requires every action to be prosecuted in the name of the real party in interest. G.S. 1-57. As a consequence of this requirement, a depositor cannot maintain an action against a bank to recover a deposit when it appears from his own evidence that he has assigned the deposit to a third person and has no further interest in it. *Vaughan v. Davenport,* 157 N.C. 156, 72 S.E. 842.

When these rules of law are applied to the case at bar, it becomes obvious that the compulsory nonsuit was proper. This is true because the plaintiff's own evidence showed that he assigned his right to the entire deposit in controversy to the Lipe Motor Lines, Incorporated, on 5 January, 1949, and that in consequence he has no further interest in it.

The assignments of error based on rulings in respect to evidential matters are discussed in the numbered paragraphs which follow.

1. The plaintiff noted certain exceptions to rulings of the court which permitted counsel for defendant to elicit from plaintiff on cross-examination oral evidence of the contents of his written contract with the Lipe Motor Lines, Incorporated. The assignment of error founded on these exceptions is unavailing to plaintiff on his appeal. He lost the benefit of the exceptions covering the receipt of this particular evidence by testifying without objection to substantially the same facts in other portions of his examination. *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179; *Spivey v. Newman,* 232 N.C. 281, 59 S.E. 2d 844.

2. The plaintiff was asked these questions by his own counsel on his re-direct examination: (1) "Would you state to his Honor and the jury what other agreements, if any, you may have had with Lipe Motor Lines, Inc., concerning the status of this account?" (2) "Do you know whether or not the Lipe Motor Lines, Inc., had opened a separate account from yours?" The defendant objected to these questions, and the court sustained its objections. The plaintiff noted exceptions to these rulings without showing what answers he would have made to the questions had he been allowed to respond to them. The assignment of error based on these exceptions falls under the ban of the rule that the question of whether error was committed in excluding evidence will not be considered on appeal unless the appellant shows what the rejected evidence would have been. *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907; *In re Wilder's Will,* 205 N.C. 431, 171 S.E. 611.

3. The plaintiff took an exception to the ruling of the court excluding his opinion that the terms of his written contract with Lipe Motor Lines, Incorporated, had never been "fulfilled." Since his complaint ignores this contract and bases his right to recover on its nonexistence, the plaintiff's insistence that the exclusion of his opinion respecting the supposed nonfulfillment of the terms of the contract was prejudicial to his rights in the action leaves us in somewhat of a quandary. The plaintiff would have no just cause for complaint on this score, however, even if the pleadings made the matter involved in the opinion germane to the issues joined between the parties. The opinion would be rendered incompetent in that event by the rule that "under ordinary circumstances a witness in testifying is to be restricted to facts within his personal knowledge, and his opinion or conclusion with respect to matters in issue or relevant to the issue may not be received in evidence." 32 C.J.S., Evidence, section 438. See, also, in this connection: *Wolf v. Arthur,* 112 N.C. 691, 16 S.E. 843, and *Bailey v. Poole,* 35 N.C. 404.

For the reasons given, the judgment dismissing the action on a compulsory nonsuit is

Affirmed.

STATE v. CARL HENRY CALL.

(Filed 29 October, 1952.)

1. Automobiles § 29b—

The State's evidence tended to show that defendant's car struck a pedestrian after she had crossed the street and was walking on the very edge of the pavement in defendant's lane of travel. The State's evidence further tended to show that the pedestrian was knocked some thirty feet down the street, and that there was no vehicle immediately in front of defendant's car and that there was nothing to obstruct his view of the pedestrian as she crossed the street. *Held:* The evidence was sufficient to take the case to the jury on the charge of reckless driving in violation of G.S. 20-140, notwithstanding that other evidence, some of which was offered by the State, was sharply conflicting.

2. Automobiles § 16—

It is unlawful for a pedestrian to cross between intersections at which traffic control signals are in operation except in a marked cross-walk, but where a pedestrian violates this provision a motorist is nonetheless required to exercise due care to avoid colliding with him. G.S. 20-174 (c).

3. Automobiles § 29b—

Defendant was charged with reckless driving in violation of G.S. 20-140 as a result of his car's striking a pedestrian on the very edge of the pavement in his lane of travel. All the evidence tended to show that the injured pedestrian had crossed the street in the middle of a block between intersections at which traffic control signals were in operation, and there was no evidence that there was a marked cross-walk at the place. *Held:* An instruction to the effect that the pedestrian had a right to cross in the middle of the block and that motorists were under duty to do what was necessary for her protection, constituted prejudicial error.

BARNHILL, J., dissenting in part.

WINBORNE and DENNY, JJ., concur in dissent.

APPEAL by defendant from *Phillips, J.*, and a jury, June Special Term, 1952, of WILKES.

Criminal prosecution tried upon a bill of indictment charging the defendant with (1) operating a motor vehicle upon a public highway at a rate of speed greater than fifty-five miles per hour in violation of G.S. 20-141 as rewritten, Chapter 1067, Section 17, Session Laws of 1947, and (2) reckless driving in violation of G.S. 20-140.

The record discloses that the automobile driven by the defendant struck a pedestrian as she was attempting to walk across a street in a heavy traffic area of the town of North Wilkesboro, on a Saturday afternoon. The pedestrian was crossing from the south to the north side of the street in the middle of a block, between intersections at which traffic control signals were in operation, and was struck after reaching the traffic lane

on the north side in which the defendant was driving in a westerly direction on his right side of the street. The paved portion of the street is about 20 feet wide, with a dirt shoulder on each side.

The evidence is conflicting as to just how the pedestrian came to be struck.

The State relies on evidence which tends to show that the pedestrian was on the south side of the street, intending to cross over to get in her son's car which was parked on the shoulder on the north side of the street; that she waited until all the cars going eastwardly had passed and then walked on over to the north side, turned back toward her son's car, went a step or two westwardly down the street, and was struck from behind by the car driven by the defendant when she was practically off the payment on the north side, as she put it: "One foot was off on the dirt, the other was on the cement." There was no car immediately in front of the defendant, he being the first car in the line at the stoplight at the last intersection, and nothing was seen to obstruct the view between the defendant and the pedestrian as she moved from the south side across the street in front of the defendant's approaching vehicle. She was knocked about 30 feet down the street.

The defendant relies on evidence—offered in part by the State—tending to show that he was proceeding eastwardly along the street at a slow rate of speed, not exceeding 15 miles per hour, and that the pedestrian darted out from between two cars, traveling in the opposite direction, directly in front of his car, with such rapidity that he was barely able to get a glimpse of her and could not avoid hitting her.

At the close of the State's evidence defendant's motion for judgment as of nonsuit was allowed as to the count charging speeding in excess of fifty-five miles per hour. The jury returned a verdict of guilty on the reckless driving count. From judgment pronounced on the verdict, the defendant appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert B. Broughton, Member of Staff, for the State.

W. H. McElwee for the defendant, appellant.

JOHNSON, J. The evidence offered at the trial, while sharply conflicting, was sufficient to carry the case to the jury on the reckless driving count, and the defendant's motion for judgment as of nonsuit was properly denied. See *S. v. Steelman,* 228 N.C. 634, 46 S.E. 2d 845; *S. v. Holbrook,* 228 N.C. 620, 46 S.E. 2d 843; *S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654.

However, the following portions of the charge form the basis of exceptive assignments of error which seem to be meritorious: "Now, the State

insists and contends, gentlemen of the jury, that this woman had a right to cross the street, and the Court charges you she did have a right to cross the street, and if she wanted to cross it in the middle of the block, she had a right to cross it in the middle of the block, she could have gone up to the intersection and crossed there, if she wanted to cross there, she had a right to cross there, but she also had a right to cross at any other place on the street, if she saw fit to do so, and the simple fact that she wasn't at an intersection didn't give anybody the right to run over her, they still were charged with the duty, anybody upon the highway, was still charged with the duty of doing that which was necessary for her protection, when she was crossing the street."

These instructions run counter to the express provisions of G.S. 20-174, which provide in pertinent part as follows: "(a) Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way to all vehicles upon the roadway. . . . (c) Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked cross-walk. . . . (e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, . . ."

Here the evidence discloses no marked cross-walk, and all the evidence tends to show that the injured pedestrian was crossing a street in the middle of a block, between intersections at which traffic control signals were in operation, in violation of the express provisions of G.S. 20-174. True, the defendant was nonetheless required to exercise due care to avoid colliding with the pedestrian, but even so, it must be kept in mind that the defendant was not charged with a violation of this statute. He was on trial for alleged violation of G.S. 20-140, known as the reckless driving statute:

"Reckless driving.—Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in Sec. 20-180."

And as bearing on the ultimate issue of whether the defendant was guilty of violating the reckless driving statute, it may be conceded that under the evidence adduced below it was pertinent and proper for the jury to consider the correlative duties imposed by G.S. 20-174 upon both the pedestrian and the defendant. See *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246.

This being so, the defendant was entitled to have the presiding judge explain and correctly apply to the different phases of the evidence the provisions of G.S. 20-174. This the court failed to do. The instructions given were calculated to lead the jury to believe that the pedestrian had the right to cross the street wherever she wished, at any place within the block, and that the defendant was under the absolute duty to avoid hitting her. The challenged instructions must be held for prejudicial error.

Since the questions raised by the defendant's other exceptive assignments of error may not arise on retrial, we refrain from discussing them.

New trial.

BARNHILL, J., dissenting in part: The defendant's automobile collided with the prosecuting witness as she attempted to cross a heavily traveled street in North Wilkesboro in the middle of a block, or else she was walking along that part of the highway provided for vehicles. If she was walking along the highway she was on the wrong side. As it was unlawful for her to attempt to cross at that point, the defendant was under no duty to anticipate that a pedestrian would appear from behind a line of traffic to his left and walk into his line of traffic. Neither was it his duty to anticipate that a pedestrian would choose to walk along and upon the wrong side of the vehicular portion of the street rather than on the sidewalk. There is no evidence of excessive speed on the part of the defendant. Indeed, the court dismissed on that count. There is no evidence of any other violation by him of the rules of the road other than that he failed to maintain a lookout commensurate with the conditions as they then existed. In my opinion, therefore, the demurrer to the evidence should have been sustained.

To be guilty of the violation of the provisions of G.S. 20-140 one must be guilty of conduct in the operation of his vehicle which evidences a disregard for the rights and safety of others. The record, considered in the light most favorable to the State, discloses simple negligence and nothing more. This is not sufficient to sustain an indictment under G.S. 20-140.

Barring a dismissal, the error in the charge discussed in the majority opinion necessitates a new trial.

WINBORNE and DENNY, JJ., concur in dissent.

STATE OF NORTH CAROLINA ON RELATION OF THE UTILITIES COMMISSION v. ATLANTIC COAST LINE RAILROAD CO.

(Filed 29 October, 1952.)

Carriers § 1½: Utilities Commission § 5—Under facts of this case, motion to remand to Utilities Commission for additional evidence should have been allowed.

Where, on appeal to the Superior Court from order of the Utilities Commission denying a railroad company's petition to discontinue an agency at a particular station, it appears that the finding of the commission that there had been a vast improvement in the receipts of the agency was based upon the revenue for only three months of the year during which the hearing was had, and the carrier moves to remand upon affidavit showing that the receipts of the agency were seasonal and that for the entire year in question its losses were in excess of those for the previous years, *held* the carrier's motion to remand should be allowed in order that the Utilities Commission may have opportunity to consider the proposed evidence and take such action thereon as may be just and proper.

APPEAL by defendant from *Hatch, Special Judge,* March Term, 1952, of WAYNE. Remanded.

This was a proceeding instituted before the North Carolina Utilities Commission by the application of the Atlantic Coast Line Railroad Co. for permission to discontinue agency service at Pikeville, North Carolina.

The application was based on the allegation that the volume of railroad business and the revenues received therefrom at Pikeville were insufficient to justify the continued employment of an agent at that station at a substantial loss to the Railroad Company, and that non-agency service would be adequate to serve the needs of the public and those having dealings with the Railroad Company at that station.

The application was filed December, 1949, and protests against discontinuance of agency service were lodged with the Commission on behalf of the governing body and citizens of Pikeville. The first hearing was had 3 March, 1950. But in order to develop the facts more fully and to ascertain the result of operations in 1950 the matter was held open, and another hearing was had 3 May, 1951, at which time the Railroad Company presented figures from its records tending to show the operations for the years 1949 and 1950 at this station.

In 1949 the total revenue amounted to $11,592. The cost of transportation attributable to Pikeville, based on the proportionate operating ratio for the entire Atlantic Coast Line system at 79.77%, was $9,247, showing a net revenue of $2,345. But the expense of agency service was $3,334, resulting in a loss for the year 1949 of $989, or a monthly average of $82.42.

In 1950 the total revenue was $9,395, and the cost of transportation at the ratio of 74.86% left net revenue $2,362. As the agency expense was $3,359, this showed a net loss of $997, or a monthly average of $83.08.

It also appeared in evidence at the hearing in May, 1951, that for the months of January, February and March, 1951, the figures would show total revenue $4,111, cost of transportation $3,279, and agency expense $904. This would show a net loss of only $72. The defendant, however, contended if the hearing was to be determined on the basis of the year 1951, those three months would not be a fair average for the entire year.

There was evidence offered by the protestants tending to show that Pikeville was an incorporated town of 500 inhabitants, with 22 business houses, including a bank and several wholesale stores, two elementary schools and two high schools, and paved streets; that it was served by numerous motor and bus lines operating on a through highway. There was also evidence that the town was situated in a prosperous agricultural section, on the line of the Atlantic Coast Line Railroad from Rocky Mount to Wilmington, 3.2 miles south of Fremont and 7.7 miles north of Goldsboro.

The Utilities Commission found the following facts:

"1. The agency at Pikeville is being operated at a financial loss to the applicant, insofar as the receipts at said station fall short of sufficient revenues to pay the actual expenses incurred in keeping said agency open.

"2. The loss sustained during the year 1950 amounted to $997.44, or a monthly average of $83.12.

"3. That the loss of the applicant for the year 1950 exceeded its loss for the period December, 1948, to November, 1949, inclusive, by approximately $13.44, or $1.12 per month.

"4. That for the first three months of 1951, January through March, the loss sustained by the applicant amounted to $72.78, or a monthly average of $24.46, and that these figures raised to an annual basis would mean a loss to the applicant of approximately $291.12 for the year 1951.

"5. That the financial results for the period which the Commission required the applicant to report were constant with the period upon which the application was made, and that the results of the first three months of 1951 indicate a vast improvement at the agency.

"6. That the town of Pikeville is growing and expanding industrially, and as a business community.

"7. That the agency at Pikeville is rendering a valuable service to the citizenship of the community, and is a distinct public convenience.

"The question to be determined is whether or not the need for this agency, and the convenience it amounts to for the public who use it, is sufficient to warrant the Commission to require that said agency be continued despite the financial loss the applicant may sustain by continuing

the same. It is the opinion of the Hearing Commissioners that said agency be continued." One commissioner dissented.

Upon these findings the Commission entered order denying the railroad's application to discontinue agency service at Pikeville, overruled defendant's exceptions to the order, and denied petition to rehear.

On appeal to the Superior Court the order of the Utilities Commission was affirmed.

The defendant Railroad Company in its exceptions to the order of the Commission and in its petition to the Commission to rehear noted exception to the incorporation in the Commission's findings as the basis for its order, the figures for the first 3 months of 1951 as misleading and insufficient to form the basis for the finding therefrom that these results indicated a "vast improvement at the agency," and at the hearing before Judge Hatch in March, 1952, the defendant offered an affidavit showing that for the entire year 1951 the loss to the Railroad Company at Pikeville instead of being less than the preceding years was in excess, amounting to $1,254.85, or a monthly average of $104.57. Defendant moved that the proceeding be remanded to the Commission for further consideration of the case in the light of these corrected figures. This motion was denied. In the judgment affirming the order of the Commission the court did not rule on the specific exceptions to the Commission's order, but recites that after consideration of the record the order was in all respects affirmed.

Attorney-General McMullan and Assistant Attorney-General Paylor for State of North Carolina ex rel. North Carolina Utilities Commission, plaintiff, appellee.

J. Russell Kirby for Town of Pikeville, appellee.

Murray Allen for Atlantic Coast Line Railroad Company, defendant, appellant.

DEVIN, C. J. It is apparent that the order of the Utilities Commission, which was affirmed by the court below, was based in part upon these findings:

"4. That for the first three months of 1951, January through March, the loss sustained by the applicant amounted to $72.78, or a monthly average of $24.46, and that these figures raised to an annual basis would mean a loss to the applicant of approximately $291.12 for the year 1951.

"5. That the financial result for the period which the Commission required applicant to report were constant with the period upon which the application was made, and that the results of the first three months of 1951 indicate a vast improvement at the agency."

At the time of the hearing in May, 1951, and the entering of the order appealed from, the result for that year was not known. The defendant Railroad Company now offers evidence tending to show that the railroad revenues at Pikeville for the first three months of 1951 were seasonal and that in fact the loss for the year 1951 instead of being $291, as estimated by the Commission, was $1,254.85.

In justice to the defendant we think the Commission should be permitted to consider the result for the entire year 1951 on evidence properly presented, and to determine what effect, if any, the facts in relation thereto may have on the order continuing agency service at Pikeville. As the defendant had no opportunity to offer evidence of the results for the year 1951 the inclusion in the findings, as material to the decision, of a partial, and, as defendant contends a misleading basis for estimating the loss for the year, would seem to entitle the defendant to have an opportunity to have included in the record the result for the entire year 1951 for the consideration of the Commission as it may bear on the question of the continuance of agency service at Pikeville.

The proceeding, therefore, is remanded to the Superior Court to the end that the Utilities Commission may have opportunity to consider the additional evidence proposed and take such action thereon as may be just and proper.

Remanded.

STATE v. ERNEST RAY SIMMONS.

(Filed 29 October, 1952.)

1. Homicide § 27c—

An instruction to the effect that defendant's counsel had argued that the jury should return a verdict of guilty of murder in the first degree with recommendation for life imprisonment must be held for prejudicial error as tantamount to stating that counsel had tendered a plea of guilty to this offense. The error is not cured by the court's statement that if he was wrong he desired to be corrected, since a defendant will not be permitted to plead guilty to murder in the first degree, and tender of such plea would not be binding on him. G.S. 15-172.

2. Homicide § 27i: Criminal Law § 53n—

An instruction which enumerates the possible verdicts without including the right of the jury to return a verdict of guilty of murder in the first degree with recommendation of life imprisonment, and later charges the jury that upon certain facts it would be its duty to "return" a verdict of guilty of murder in the first degree, rather than that defendant would be guilty of murder in the first degree, must be held for prejudicial error, and such error is not cured by a later charge that if the jury should find the defendant guilty of murder in the first degree the jury could recommend life imprisonment. G.S. 14-17.

STATE *v.* SIMMONS.

APPEAL by defendant from *Burney, J.*, at April Term, 1952, of CRAVEN.

Criminal prosecution upon a bill of indictment charging that defendant on 20 April, 1951, did "feloniously, willfully, and of malice aforethought kill and murder one Joseph McGhee, contrary to the form of the statute," etc.

Defendant, upon arraignment, pleaded not guilty.

Upon trial in Superior Court, as in the former trial in appeal from which a new trial was granted, 234 N.C. 290, 66 S.E. 2d 897, for error in the charge, the evidence offered, taken in the light most favorable to the State, tends to support the charge of murder in the first degree against defendant.

On the other hand, as in former trial, defendant, an illegitimate Negro boy, a waif, sixteen years, ten months and fourteen days old at date of alleged crime, as his evidence tends to show, while admitting that he was at the scene of the homicide, denied upon the witness stand that he was implicated in the killing, and offered other testimony which he contends supports his plea.

Verdict: Guilty of murder in the first degree.

Judgment: Death by inhalation of lethal gas, as provided by law.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Charles L. Abernethy, Jr., for defendant, appellant.

WINBORNE, J. At the outset let it be noted that defendant has been tried twice in the Superior Court of Craven County on substantially the same evidence, and thereon has been twice convicted of murder in the first degree. Nevertheless, substantial prejudicial error in the second trial, from judgment in which this appeal is taken, is made to appear, which entitles him to a third trial.

I. In the course of the charge of the court to the jury, in stating contentions of the State and of the defendant, the court, after saying that the State contends that the jury ought not to believe defendant, and ought to render a verdict of murder in the first degree, stated the following: "Now, the defendant contends and says you should have a reasonable doubt about it. (As I understand the counsel for the defendant has argued to you that you should return a verdict upon this evidence. If I am wrong I want to be corrected. I understand that the counsel for the defendant argued that you should return a verdict of murder in the first degree with mercy" . . .). This is defendant's Exception 24.

In this connection, this Court has held that in this State a defendant will not be permitted to plead guilty to murder in the first degree. *S. v. Blue,* 219 N.C. 612, 14 S.E. 2d 635, and cases there cited. For it is pro-

vided by statute, formerly Sec. 3 of Chapter 85, Laws 1893, later Revisal 3271 and C.S. 4642, now G.S. 15-172, that the "jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." And the Court states in *S. v. Matthews,* 142 N.C. 621, 55 S.E. 342, that this section applies equally to all indictments of murder, whether perpetrated by means of poison, lying in wait, imprisonment, starving, torture or otherwise, formerly C.S. 4200, now G.S. 14-17. In the instant case the defendant had pleaded not guilty, and the presumption of innocence followed him until and unless removed by the verdict of the jury,—the credibility of the testimony being for the jury to determine. *S. v. Maxwell,* 215 N.C. 32, 1 S.E. 2d 125; *S. v. Blue, supra.* And the statement: "I understand that the counsel for the defendant argued that you should return a verdict of guilty of murder in the first degree with mercy," is tantamount to saying that counsel tendered a plea of guilty of murder in the first degree, which counsel for defendant would have no right to make, and the court no authority to accept. Hence it is prejudicial to defendant. And it is no less prejudicial by reason of the court saying: "If I am wrong, I want to be corrected." Indeed, if counsel had then and there admitted that he made such argument the prejudicial effect would be as great, if not greater. And it would not be binding on defendant. *S. v. Redman,* 217 N.C. 483, 8 S.E. 2d 623.

II. Defendant further excepting to portions of the charge contends that the court's charge on the right of the jury to recommend life imprisonment, under provisions of G.S. 14-17, is not clear and tends to confusion.

Upon former appeal, 234 N.C. 290, speaking of G.S. 14-17, as amended by Sec. 1 of Chapter 299 of 1949 Session Laws of North Carolina pertaining to punishment for murder in the first degree, it is said that this amendment to the statute merely gives to the jury the right, at the time of rendering a verdict of murder in the first degree, in open court, to recommend that the punishment shall be imprisonment for life in the State's prison, that is, an unbridled discretionary right. And it is there stated that, true, the statute expressly requires the judge to instruct the jury in the event a verdict of guilty of murder in the first degree shall have been reached, it has the right to recommend that the punishment shall be for life in the State's prison. That no more and no less would be accordant with the intent of the amendment to the statute. See, too, *S. v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212.

Now, in this aspect, testing the charge of the court in the instant case, in the light of the provisions of this amendment to G.S. 14-17, the matter as presented is not clear. Early in the charge the court instructed the jury "that you have the right under the evidence in this case to render

either one of several verdicts. You may find the defendant guilty of the crime of murder in the first degree; you may return a verdict of guilty of murder in the second degree, or you may return a verdict of guilty of manslaughter, or you may return a verdict of not guilty of any offense, just as you find the facts to be from the evidence in the case, applying thereto the law as given to you by the court. So your duty is to say by your verdict whether the defendant is guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty. It is a matter solely for you to determine whether he is guilty of the felony of murder whereof he stands indicted and determine the grade, or degree of guilt, if any you shall find, or to say by your verdict that he is not guilty of either offense charged in the bill of indictment as you may find from the evidence, may find under the rules of law that the court will give you to guide you." So far, so good—under the evidence in the case. But the amendment to G.S. 14-17 added an additional permissible verdict in a trial for murder in the first degree not known to the law prior to the adoption of that amendment, that is, "Guilty of murder in the first degree with recommendation of life imprisonment." Nevertheless, the court did not then instruct the jury that in the event a verdict of guilty of murder in the first degree shall have been reached, the jury had the right to recommend that the punishment shall be for life in the State's prison, that is, that the jury had the right to render a verdict of guilty of murder in the first degree with recommendation of life imprisonment. Hence the court, having undertaken to enumerate the possible verdicts, should then have included all possible verdicts.

It is true the court later read the statute, G.S. 14-17, as amended as above stated, without comment. But later in the charge the court gave further instructions on the law, for example, "I instruct you that if the State has satisfied you from the evidence and beyond a reasonable doubt" as to given state of facts, "it will be your duty to return a verdict of guilty of murder in the first degree." Like instructions were repeated three other times. So worded, these instructions making it the duty of the jury in such event to *return* a verdict of guilty of murder in the first degree, tend to conflict with the amendment to G.S. 14-17 as above recited. The effect would have been different if the court had substituted for the concluding clause, a clause that if the jury so found the given state of facts, defendant would be guilty of murder in the first degree.

And it is true that before concluding the charge the court again read to the jury the statute G.S. 14-17, as amended, following it with the instruction "And I instruct you, gentlemen, that if you find the defendant guilty of murder in the first degree under this statute, you could recommend life imprisonment."

III. There are numerous other assignments of error presented on this appeal. But since there is to be a new trial, it is not now deemed necessary to expressly consider them.

For errors pointed out substantive rights of the defendant, under the law, have been infringed. And for his transgression whatever a jury may find it to be, he may not be deprived of his liberty or required to forfeit his life but by the law of the land.

Let there be a

New trial.

STATE v. ARVILLE LOVE.

(Filed 29 October, 1952.)

1. **Intoxicating Liquor § 9d—**

Evidence tending to show only that a bus driver gave defendant the key to the rear baggage compartment of the bus, and that at defendant's destination a bag containing intoxicating liquor was found in the baggage compartment, without identification of the bag as the one carried by defendant and without testimony that anyone saw defendant put the bag in the compartment, *is held* insufficient to fix defendant with ownership or possession of the liquor found in the baggage compartment.

2. **Criminal Law § 52a (2)—**

Evidence which does no more than raise a strong suspicion of guilt is insufficient to be submitted to the jury.

3. **Criminal Law § 52b—**

The withholding by the court from the jury of one of the counts in the bill of indictment has the effect of a directed verdict of not guilty upon that count, and amounts to an acquittal thereon.

4. **Intoxicating Liquor §§ 4a, 9d—**

Evidence tending to show only that defendant transported in a bus from a county having liquor stores to a dry county one gallon of tax-paid liquor with seals unbroken is insufficient to show unlawful transportation, it being legally established that the transportation was not for the purpose of sale. G.S. 18-49.

5. **Criminal Law § 62f—**

Where the evidence is insufficient to show a violation of the prohibition laws it cannot sustain a finding that defendant had violated the terms of a suspended sentence in that regard, and the order of the court executing the sentence must be reversed.

APPEAL by defendant from *Sink, J.*, at June Special Term, 1952, of WATAUGA.

The bill of indictment charged the defendant with (a) the unlawful possession of intoxicating liquors for the purpose of sale, (b) the unlawful

possession of intoxicating liquors for beverage purposes, and (c) the unlawful transportation of intoxicating liquors.

The evidence of the State consisted of the testimony of two witnesses. Roger Parker, a member of the State Highway Patrol, testified that on 4 February, 1952, in consequence of some information he had, he and another patrolman stopped a bus en route from Newton to Boone on Highway 421. He and the bus driver opened the baggage compartment at the rear of the bus and there discovered a small canvass bag and by feeling the bag could tell it contained pint bottles of some type. He got on the bus and rode to Boone. He did not see the defendant on the bus, but upon reaching Boone saw the defendant at his cab stand near the bus station. He went over to the defendant and questioned him concerning the presence of liquor on the bus. The defendant readily admitted to the patrolman that he had purchased eight pints of liquor in Newton and because he understood it was against the law to transport liquor in a taxi had placed the liquor inside the bus in the rack above the driver's seat. The patrolman then in company with the sheriff went inside the bus and found a small cloth handbag containing eight pints of liquor in the rack where the defendant said he had placed the liquor he had purchased. The bag in the outside rear baggage compartment was then examined and found to contain eight pints of liquor. The defendant did not claim the liquor discovered in the rear baggage compartment. The seals had not been broken on any of the bottles. The liquor in one bag showed that it had been purchased in Hickory at one time, while the labels on that in the other bag indicated that it had been purchased in Newton at another time. The stamps on the liquor disclosed that all of it had been purchased at authorized ABC stores. Neither bag contained a baggage check or an identification tag of any kind. The defendant lives in Boone and drives a taxicab.

Tony Tucker, the bus driver, testified in part that on the day in question he saw the defendant at the bus station at Newton and that the defendant said to him, "I have one piece to go to Boone." The driver then pitched to the defendant the key to the rear baggage compartment and went into the bus station. When he came back to the bus, he found the key lying in front of his seat in the bus. The driver did not see the defendant put anything in the rear baggage compartment, and at the time the defendant spoke to the driver, he had only one bag in his hand. The driver could not remember the color of the bag and could not identify which of the bags the defendant had in his hand when he threw him the key.

The defendant offered no evidence, and his motion for judgment as of nonsuit was overruled.

The trial judge submitted the case to the jury only upon the counts charging him with the unlawful possession of intoxicating liquors for beverage purposes and with the unlawful transportation of liquor. The jury returned a verdict of guilty.

The defendant was under a jail sentence of 90 days which had been suspended upon condition that he not violate any of the liquor laws of the State for a period of two years.

The presiding judge entered judgment upon the verdict of the jury and found as a fact under the judgment so pronounced that the defendant had violated the terms of the suspended sentence and ordered that capias and commitment issue for the defendant activating said suspended sentence.

From the judgment and the order, defendant excepted and appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Edward B. Hipp, Member of Staff, for the State.

Trivette, Holshouser & Mitchell for defendant, appellant.

VALENTINE, J. The evidence was insufficient to fix the defendant with the ownership or possession of the eight pints of liquor found by the officers in the rear baggage compartment. The bus driver did not see the defendant open the compartment, did not see him place anything in the compartment, and could not identify the bag as the one he had seen in the possession of the defendant. Evidence which does no more than raise a strong suspicion is not sufficient. *S. v. Carter,* 204 N.C. 304, 168 S.E. 204; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Kirkman,* 224 N.C. 778, 32 S.E. 2d 328; *S. v. Murphy,* 225 N.C. 115, 33 S.E. 2d 588; *S. v. Heglar,* 225 N.C. 220, 34 S.E. 2d 76. Substantial evidence, more than a scintilla, is required to create a case for the jury in a criminal prosecution.

It should be noted that the trial judge withheld from the jury the count in the bill charging the defendant with the unlawful possession of liquors *for the purpose of sale.* This action by the court had the effect of a directed verdict of not guilty upon that count. This principle has been applied many times in cases where the jury finds a defendant guilty on one count and says nothing concerning other counts in the indictment. Such a verdict amounts to an acquittal upon the counts not referred to. *S. v. Taylor,* 84 N.C. 773; *S. v. Fisher,* 162 N.C. 550, 77 S.E. 121; *S. v. Hampton,* 210 N.C. 283, 186 S.E. 251; *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476.

This leaves for consideration only the question of whether it is a violation of the law for a person to purchase not more than one gallon of whiskey from a liquor store in a county that has brought itself under the provisions of the Alcoholic Beverage Control Act and to transport the

same, with seals unbroken, into a county that has not elected to come under the provisions of said Act.

G.S. 18-49 provides: "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article to or through another county in North Carolina not coming under the provisions of this article: Provided, said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken."

So then, if the defendant purchased eight pints or one gallon of intoxicating liquor at an ABC store in Newton and transported the same with seals unbroken to Boone, even though the town of Boone is located in a nonconforming county, he was within his rights under G.S. 18-49, unless the liquor was transported for the purpose of sale, and the last question is resolved in favor of the defendant by the action of the court in withholding the first count in the bill from the consideration of the jury. Therefore, it cannot be properly said that the defendant possessed and transported the liquor in violation of G.S. 18-49.

The defendant also appealed from the order of the court activating a prior suspended sentence upon the finding that the verdict and judgment in this case constituted a violation of the terms of the suspension. It appears that defendant's point is well taken.

The propriety of executing a suspended sentence ordinarily is a matter addressed to the discretion of the presiding judge. However, there must be a finding that the defendant has violated one or more of the conditions upon which the sentence was suspended, and that finding must be based upon competent evidence. The State in this prosecution has failed to sustain its claim that the defendant has violated a provision of our prohibition laws. The presiding judge was, therefore, without authority to use the same evidence as the basis of a finding that the defendant had breached a condition of his suspended sentence. *S. v. Stallings,* 234 N.C. 265, 66 S.E. 2d 822; *S. v. Robinson,* 232 N.C. 418, 61 S.E. 2d 106.

It follows that the judgment and the order of the court below must be Reversed.

FRANCES HOUSTON STEPHENS, A MINOR, BY NEXT FRIEND, FLORENCE HOUSTON, v. ROBERT D. CHILDERS.

(Filed 29 October, 1952.)

1. Judgments § 27a—

In order to be entitled to have a default judgment set aside under G.S. 1-220, movant must show excusable neglect and also that he has a meritorious defense.

2. Same—

Where the insurance carrier has all the papers sent to it and undertakes with the knowledge and consent of insured to defend a suit against insured, insurer is insured's responsible agent and its neglect to file answer in time will be imputed to insured, and the court's findings to the effect that insurer was guilty of neglect and that such neglect was inexcusable sustains judgment refusing to set aside the judgment by default and inquiry. G.S. 1-220.

3. Same—

Upon motion to set aside judgment under G.S. 1-220, the absence of a sufficient showing of excusable neglect renders the question of meritorious defense immaterial.

APPEAL by defendant from *Sink, J.*, at June Term, 1952, of BURKE.

Civil action to recover damages for personal injuries sustained by the plaintiff in an automobile wreck alleged to have been caused by the negligence of the defendant, heard below on motion of the defendant to set aside judgments by default and inquiry on the ground of excusable neglect.

The record indicates the action was properly instituted in the Superior Court of Burke County, and summons with copy thereof and copy of the verified complaint were duly served upon the defendant on 31 January, 1952. G.S. 1-89; G.S. 1-121. The defendant having failed to file answer or other pleading within the statutory time, the plaintiff obtained judgment by default and inquiry before the Clerk of the Superior Court on 3 March, 1952. Then on 5 March, by supplemental judgment of the Clerk reciting that if because of leap year the former judgment was prematurely entered, it was thereby ratified and confirmed, and the Clerk readjudicated that the plaintiff have and recover of the defendant in manner and form as set out in the former judgment of 3 March, 1952.

Thereafter, at the March Term, 1952, of Burke County Superior Court, which convened on 10 March, counsel for the defendant moved the court, under G.S. 1-220, to vacate the judgments on the ground of excusable neglect of the defendant.

The motion was continued until the June Term, 1952, when it was heard by consent before Judge Sink on affidavits filed by both parties.

The pertinent facts disclosed by the defendant's affidavits are these: The day following service of suit papers upon the defendant notice thereof was given by telephone to his liability insurer's agent in Hickory, North Carolina. In the telephone conversation the insurance agent requested that the suit papers be forwarded to him by mail, and this was done the next day, 2 February. The insurance agent, under date of 4 February, forwarded the papers by mail to the Resident Adjuster of the defendant's liability insurance carrier, at his office in Charlotte. The Resident Adjuster contacted the defendant and assured him that the insurance company would undertake the defense of the litigation and would take all necessary steps to employ counsel and protect the interest of the defendant, and that it would not be necessary for the defendant to employ legal counsel. The suit papers were forwarded by the Resident Adjuster to the Greensboro, North Carolina, Divisional Office of the insurance company "for processing," with direction "to employ as counsel to defend the action the firm of Mull, Patton & Craven." The "date stamp" indicates that the suit papers were received at the Greensboro Divisional Office on 29 February, 1952. The papers were forwarded from that office to Messrs. Mull, Patton & Craven, Morganton, North Carolina, with letter of transmittal posted at 6:30 p.m. 4 March, 1952. It is conceded in brief that the papers were not received by the attorneys until 6 March, the day following the entry of the supplemental judgment.

At the close of the hearing judgment was dictated and entered by Judge Sink. The pertinent findings and conclusions contained in the judgment are as follows:

". . . The Court is of the opinion that the negligence complained of—and patently the negligence that occurred—arose by the conduct of the defendant (defendant's) Insurance Carrier, Iowa Mutual Insurance Company. The Court is therefore of the opinion that the record discloses no evidence or testimony that would warrant any court in finding excusable neglect. The Court is of the opinion and does find that the defendant is in position to set up a plausible defense. In view of the fact that the Statutes of North Carolina provide the procedure in such cases such as that now under consideration by the Court, and the further fact heretofore found by the Court that the Insurance Carrier was negligent in not rendering the duty it owed to the insured within the statutory period, does not warrant this Court in disturbing the judgment by default and inquiry; therefore, the motion is denied—to which the movant in apt time notes his exception. The Court takes the view that to recognize the right of the insurer in instances such as this would be tantamount to permitting Insurance Carriers and others to dictate their own terms with respect to time, and that this would result in delay of the acts of the court and would be an utter lack of regard for it."

The defendant in apt time gave notice of appeal from the findings of fact and conclusions of law and the judgment. The notice recites that the defendant "specifically excepts to the findings of fact that the evidence discloses no testimony that would warrant any court in finding excusable neglect and excepts to the failure of the court to find that the negligence of Iowa National Mutual Insurance Company constituted excusable neglect on the part of the defendant, . . . and excepts to the apparent conclusion of law that the court was without discretionary power under the Statute to set aside the default judgment, and excepts to the Judgment . . ., and gives notice of appeal to the Supreme Court." The exceptions so noted were grouped and brought forward in the defendant's assignments of error.

C. David Swift for plaintiff, appellee.
Mull, Patton & Craven for defendant, appellant.

JOHNSON, J. It is established by the decisions of this Court that a party moving under the provisions of G.S. 1-220 to set aside a judgment rendered against him on the ground of excusable neglect not only must show excusable neglect but also must make it appear that he has a meritorious defense to the plaintiff's cause of action. *Perkins v. Sykes,* 233 N.C. 147, 63 S.E. 2d 133; *Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67; *Parnell v. Ivey,* 213 N.C. 644, 197 S.E. 128; *Dunn v. Jones,* 195 N.C. 354, 142 S.E. 320.

The defendant urges that the court erred in finding (1) "that the record discloses no evidence or testimony that would warrant any court in finding excusable neglect," and (2) in failing to find "that the negligence of Iowa National Mutual Insurance Company constituted excusable neglect on the part of the defendant."

Here the defendant takes the position that the court made no specific finding as to neglect, whether excusable or not, of the defendant, and urges that the court in effect was saying that on the facts presented it had no discretion to set aside the judgments. These contentions are untenable. Negligence of the insurance carrier was conceded. The mooted question was whether its negligence was imputed to the defendant. The clear import of the judgment is that the court found the negligence of the insurance carrier inexcusable and that it was imputed to the defendant. These findings are sustained by the record. All the evidence tends to show that the insurance company assumed the responsibility of defending the action for the defendant with his full knowledge and consent, under circumstances which constituted the insurance company the agent of the defendant for the purpose of employing counsel and arrang-

ing for the defense of the action. On this record the negligence of the insurance company was inexcusable and clearly imputable to the defendant.

The rule is established with us that ordinarily the inexcusable neglect of a responsible agent will be imputed to the principal in a proceeding to set aside a judgment by default. *Stallings v. Spruill,* 176 N.C. 121, 96 S.E. 890. See also *Kerr v. Bank,* 205 N.C. 410, 171 S.E. 367; *Morris v. Ins. Co.,* 131 N.C. 212, 42 S.E. 577; *Norwood v. King,* 86 N.C. 80; *Pate v. Hospital,* 234 N.C. 637, 68 S.E. 2d 288.

The decisions cited and relied on by the defendant are distinguishable.

In the absence of sufficient showing of excusable neglect, the mooted question of meritorious defense becomes immaterial. *Pate v. Hospital, supra; Whitaker v. Raines, supra.*

Upon the record as presented reversible error has not been made to appear.

Affirmed.

JOHN WELLS AND SARAH WELLS v. GEORGIA FOREMAN.

(Filed 29 October, 1952.)

1. Frauds, Statute of, § 3: Pleadings § 31—

The defense of the statute of frauds cannot be raised by demurrer or by motion to strike, notwithstanding that evidence in support of the contract may be rendered inadmissible by a proper plea of the statute.

2. Money Received § 1—

Ordinarily, in the absence of fraud or mistake, money voluntarily expended or a payment voluntarily made to the use of another is not recoverable.

3. Same—

Money paid to the use of another may be recovered when the beneficiary promises to repay the money so expended or induces the expenditure or consciously receives the benefits.

4. Same—Party expending money pursuant to contract precluded by statute of frauds may recover same from party knowingly accepting benefits.

Plaintiffs alleged that they made payments on defendant's mortgage as they became due and expended certain sums in repair of the property in reliance upon defendant's promise to devise the property to them or, if the debt was totally discharged before defendant's death, to convey the property to them subject to a life estate in defendant, and that thereafter defendant breached the contract. Plaintiff sought to recover the money so expended. *Held:* The action is not one to recover for breach of the contract to convey which is precluded by the statute of frauds, but is an action in *assumpsit* for money had and received or for unjust enrichment.

5. Money Received § 3: Pleadings § 31—

In an action by parties to a contract unenforceable by reason of the statute of frauds to recover money expended in reliance on the agreement, allegations relating to the contract as the inducement to plaintiffs to make the expenditures, the conscious acceptance by defendant of the benefits thereof, and the breach of the contract by defendant, are competent to rebut any presumption that the expenditures were gratuitous, and motion to strike on the ground that such allegations related to an unenforceable contract are properly denied.

APPEAL by defendant from *Burgwyn, Special Judge*, April Term, 1952, PITT. Affirmed.

Civil action to recover money expended for the use and benefit of defendant, heard on motion of defendant to strike allegations in the complaint.

The substance of plaintiffs' cause of action, as stated in the complaint, is this: Defendant owns a home in Greenville. In 1934 she executed a deed of trust thereon to secure an indebtedness due the Home Owners Loan Corporation. In May 1939 she was delinquent in her payments on the loan and was threatened with foreclosure of the deed of trust. She verbally proposed to plaintiffs that if they would make the past due payments and discharge future monthly payments of principal and interest as they matured, she would devise the property to them; and if the debt was fully discharged before her death, she would convey the property to them by deed, reserving a life estate for herself. The plaintiffs accepted said proposal and, relying thereon, moved in the home with defendant, furnished her with care and support, paid the matured installments, and discharged the monthly payments as they matured thereafter. In reliance upon the promise of defendant, they further expended the sum of $900 in making repairs, improvements, and additions to the premises. In 1948 they had paid a total of $900 on the mortgage indebtedness when they received a letter from the HOLC requesting larger payments. Defendant refused to permit them to make larger payments because this would discharge the full debt and require defendant to execute a deed in compliance with her agreement. Thereafter the defendant made the payments as they matured and the debt has been fully discharged. The plaintiffs, however, have at all times been ready, able, and willing to make the payments in accord with their agreement. On 2 March 1951 defendant served a written demand on plaintiffs to remove from the premises, and plaintiffs, in compliance therewith, on 9 April 1951 moved elsewhere. The payments made by them to the HOLC and in making repairs, etc., were in compliance with their agreement made and entered into with the defendant. The defendant, by reason of her breach of her contract with plaintiffs, has been unjustly enriched in the sum of $1,800 by the funds

expended by plaintiffs in compliance therewith. They pray recovery of said amount.

The defendant moved to strike specific allegations in the complaint. In short, she moves to strike all references to the verbal agreement between plaintiffs and defendant and all allegations concerning the consideration which moved plaintiffs to make the alleged payments and expenditures. If the motion is allowed, the complaint would merely state in substance that plaintiffs moved into the home of defendant and thereafter voluntarily made certain payments upon the mortgage indebtedness upon the home and in repairing and improving the premises for which they seek recovery.

The motion of defendant was denied and defendant appealed.

Blount & Taft for plaintiff appellees.
Sam B. Underwood, Jr., for defendant appellant.

BARNHILL, J. The motion of defendant rests upon the assumption that the plaintiffs seek to enforce an oral agreement to devise or convey real property. She insists that, as it appears on the face of the complaint the alleged agreement was not in writing, evidence in support thereof is inadmissible and on a motion to strike admissibility of evidence in support of the allegation sought to be stricken is the test of relevancy. *Weant v. McCanless,* 235 N.C. 384.

Even so, her position in this respect is untenable. As said by *Denny, J.,* in *Weant v. McCanless, supra:* "It is settled in this jurisdiction that the provisions of the statute of frauds cannot be taken advantage of by demurrer . . . Neither can such defense be taken advantage of by motion to strike." (See cases cited.)

Evidence of a parol agreement to convey real property is admissible unless the defendant asserts the unenforceability of the contract by reason of the statute of frauds. And such defense can be raised only by answer or reply. *Weant v. McCanless, supra,* and cases cited.

But apparently defendant misconceives the nature of plaintiffs' cause of action. They do not seek to enforce an oral contract to devise or convey real property. They seek to recover money expended to the use and for the benefit of the defendant.

Ordinarily, in the absence of fraud or mistake, money voluntarily expended or a payment voluntarily made to the use of another is not recoverable. *Rhyne v. Sheppard,* 224 N.C. 734, 32 S.E. 2d 316; *Boyles v. Insurance Co.,* 209 N.C. 556, 183 S.E. 721; *Guerry v. Trust Co.,* 234 N.C. 644, 68 S.E. 2d 272; 40 A.J. 820. To support a recovery of funds expended to the use of another, it must be made to appear that the beneficiary promised to repay the money so expended, or by his conduct in-

duced the payer to make the expenditure, or consciously received what did not belong to him. 40 A.J. 820.

When a party to a special contract, unenforceable by reason of the statute of frauds, expends money as contemplated by the contract, and the other party to the contract consciously receives or accepts the benefits thereof and then fails or refuses to perform his part of the special contract, the law implies a promise and obligation to repay the money so expended. *Rhyne v. Sheppard, supra; Whetstine v. Wilson,* 104 N.C. 385; *Dupree v. Moore,* 227 N.C. 626, 44 S.E. 2d 37; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764; *Hawkins v. Dallas,* 229 N.C. 561, 50 S.E. 2d 561; *Ebert v. Disher,* 216 N.C. 36, 3 S.E. 2d 301; Anno. 69 A.L.R. 14 (95). This obligation or implied promise may be enforced in an action in *assumpsit* for money had and received or under the doctrine of unjust enrichment. *Rhyne v. Sheppard, supra; Harrington v. Lowrie,* 215 N.C. 706, 2 S.E. 2d 872.

"The contract being unenforceable under the statute of frauds, no recovery can be had upon it; no damages can be recovered on account of its breach for the same reason; and upon the same principle, the contract being unenforceable, the value of plaintiff's services cannot be concluded by its terms. *Faircloth v. Kenlaw,* 165 N.C. 228, 81 S.E. 299. In place of the unenforceable promise to devise real estate in consideration of services to be performed, the law substitutes the valid promise to pay their reasonable worth. Anno. 69 A.L.R. 95. The mainspring of the statute of frauds is to prevent frauds, not to promote them." *Stacy, C. J.,* in *Stewart v. Wyrick, supra.*

Thus it was necessary for plaintiffs to plead the special contract and defendant's breach thereof as a basis for the recovery of the money expended in reliance thereon. This includes the allegation of the essential facts and circumstances which (1) prompted the parties to enter into the contract; (2) induced the plaintiffs to make the payments on the mortgage indebtedness and expend the money in the repair and improvement of the premises; (3) disclose the conscious acceptance by defendant of the benefits thereof; and (4) constitute a breach of the special contract by defendant.

Such allegations are not made by way of reliance on the terms of the contract but to rebut any presumption that the expenditures were gratuitous. *Barron v. Cain,* 216 N.C. 282, 4 S.E. 2d 618; *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725; *Neal v. Trust Co.,* 224 N.C. 103, 29 S.E. 2d 206; *Rochlin v. Construction Co.,* 234 N.C. 443.

The facts alleged in the complaint are essential to plaintiffs' cause of action. They are stated without any undue prolixity. Hence the court below properly denied the motion to strike.

Affirmed.

MARIE HARDEE SPAIN v. HENRY C. BROWN.

(Filed 29 October, 1952.)

1. Pleadings § 3a—

The function of the complaint is to present a statement of the material, essential, or ultimate facts upon which plaintiff's claim to relief is founded.

2. Pleadings § 7—

The answer must either admit or deny the several allegations contained in the complaint; in addition defendant may allege new matter in confession and avoidance or constituting a setoff, or an affirmative defense, or a cross-action or counterclaim. G.S. 1-135, G.S. 1-137.

3. Pleadings § 13—

The function of a reply is limited to an admission or denial of new matter set up in the answer and to such amplification of plaintiff's cause of action as may be rendered necessary by such new matter, and no reply is necessary or proper when the answer consists only of admissions or denials, and thus closes the issues.

4. Pleadings § 14—

The rule which prohibits the incorporation of extraneous, evidential, irrelevant, impertinent, or scandalous matter in a complaint or answer applies with equal force to a reply. G.S. 1-153. This is particularly true if such matter may well tend to prejudice defendant when read to the jury.

5. Pleadings §§ 3a, 7, 14—

The function of a pleading is not to narrate the evidence nor to throw charges and countercharges not essential to the statement of a cause of action, affirmative defense, or counterclaim; only the facts to which the pertinent, legal, or equitable principles of law are to be applied should be stated in the pleadings.

6. Pleadings §§ 14, 31: Assault and Battery § 4—Extraneous charges in reply should be stricken on motion.

In this action for assault and battery, defendant filed answer denying the material allegations of the complaint and specifically pleading certain facts and circumstances by way of an affirmative defense. Plaintiff filed reply denying the allegations of the further answer, and by "further replication" alleged that defendant had pleaded guilty in criminal prosecutions to charges of assault upon plaintiff, and that defendant well knew that each allegation of the further answer and defense "is absolutely untrue." *Held:* The allegations of the "further replication" constitute no proper part of the reply, and defendant's motion to strike same should have been allowed.

APPEAL by defendant from *Burgwyn, Special Judge,* April Term, 1952, PITT.

Civil action to recover damages for an alleged wrongful assault, heard on motion to strike plaintiff's further replication.

Plaintiff alleges in her complaint that defendant assaulted her with his fists and a blackjack, thereby inflicting personal injuries. She seeks both compensatory and punitive damages. Defendant filed answer in which he denies the material allegations in the complaint and specifically pleads certain facts and circumstances by way of an affirmative defense. Thereupon plaintiff replied denying the allegation in defendant's further answer "and by way of further replication" alleging:

"1. That at the October 1951 Term of Pitt Superior Court the defendant stood indicted upon two warrants charging him with assault upon this plaintiff and with assault with a deadly weapon, to wit: a stick, upon this plaintiff, to both of said indictments the defendant entered a plea of guilty, and upon the trial offered no testimony that would tend to sustain any such defense as he now attempts to assert in his further answer, and the defendant now well knows that each and every allegation set out in his further answer and defense is absolutely untrue."

Defendant moved to strike said further replication. The motion was denied and defendant appealed.

Albion Dunn for plaintiff appellee.
Sam B. Underwood, Jr., for defendant appellant.

BARNHILL, J. In a civil action the issues to be tried by a jury are raised by written pleadings filed in the cause by the parties to the action. Ordinarily these consist of a complaint and answer. When, however, the defendant in his answer pleads new matter as a setoff, affirmative defense, or counterclaim, the plaintiff is permitted to file a further pleading known as a reply to admit or deny the new matter alleged in the answer and, when necessary, plead matters in avoidance of the same.

Each pleading has its own particular function. The function of the complaint is to present a statement of the material, essential, or ultimate facts upon which plaintiff's claim to relief is founded. *Truelove v. R. R.*, 222 N.C. 704, 24 S.E. 2d 537; *Brown v. Hall*, 226 N.C. 732, 40 S.E. 2d 412.

The only pleading on the part of the defendant is either a demurrer or an answer. G.S. 1-124. If he elects to answer he must either admit or deny the several allegations contained in the complaint. G.S. 1-135. In addition he may allege new matter (1) in confession and avoidance, or (2) as a setoff, or (3) as an affirmative defense, or (4) as a cross action or counterclaim. G.S. 1-135, 137.

If the answer contains no new matter, no further pleading is necessary or proper. If, however, the defendant pleads an affirmative defense, setoff, or counterclaim, the plaintiff, if he wishes to raise an issue of fact thereon, may, and under certain conditions must, reply thereto. G.S. 1-140; 41

A.J. 416. The purpose of a reply is to deny such allegations of the answer as the plaintiff does not admit and to meet new matter set up in the answer. 41 A.J. 416; *Moss v. Fitch,* 111 S.W. 475; McIntosh, P. & P. 510.

No reply is necessary or proper when the answer consists only of admissions and denials and closes the issues. 41 A.J. 416. It must be limited to an admission or denial of the new matter set up in the answer. *Hildebrand v. Telegraph Co.,* 216 N.C. 235, 4 S.E. 2d 439; *Revis v. Asheville,* 207 N.C. 237, 176 S.E. 738; *Wadesboro v. Coxe,* 215 N.C. 708, 2 S.E. 2d 876; and such amplification of plaintiff's cause of action as may be rendered necessary by the new matter alleged in the answer. McIntosh, P. & P. 510.

The rule which prohibits the incorporation of extraneous, evidential, irrelevant, impertinent, or scandalous matter in a complaint or answer, G.S. 1-153; *Brown v. Hall, supra; Truelove v. R. R., supra; Parlier v. Drum,* 231 N.C. 155, 56 S.E. 2d 383; *Light Co. v. Bowman,* 231 N.C. 332, 56 S.E. 2d 602; applies with equal force to a reply. This is particularly true if such matter, when read to the jury, may well tend to prejudice the defendant even though evidence thereof is not admitted. *Light Co. v. Bowman, supra; Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925.

The function of a pleading is not the narration of the evidence upon which the pleader relies to establish his cause of action or defense. Nor is any pleading to be used as the vehicle to throw charges and countercharges not essential to the statement of a cause of action, affirmative defense, or counterclaim. Only the facts to which the pertinent legal or equitable principles of law are to be applied should be stated in any pleading. *Truelove v. R. R., supra; Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47.

Here the plaintiff's "further replication" alleges not only that defendant did not testify in his own behalf in the criminal causes which grew out of the assault alleged in the complaint, but also that he has deliberately falsified the facts in his answer. Such allegations constitute no proper part of a reply to the answer filed by defendant. Hence the defendant's motion to strike should have been allowed.

The allegation that defendant entered a plea of guilty when put on trial under the warrants which charged that he had unlawfully assaulted plaintiff is evidential in nature. That this allegation is a part of the paragraph to be stricken does not mean, and is not to be construed to mean, that plaintiff may not offer evidence as to defendant's plea in the criminal causes. We do not at this time chart the course of the trial before a jury. Instead, we leave it to the presiding judge to rule, in the first instance, on the competency of this evidence when and if it is tendered by plaintiff.

For the reasons stated the order entered by the court below is

Reversed.

STATE v. FRED WARREN.

(Filed 29 October, 1952.)

1. Automobiles § 30d—

In a prosecution for drunken driving, the arresting officer may be asked his opinion as to whether at the time the arrest was made the defendant was under the influence of liquor. G.S. 20-138.

2. Criminal Law § 78d (3)—

Ordinarily, where the answer of a witness to a proper question is not responsive and contains an incompetent statement beyond the scope of the question, defendant must object to the answer and move the court to strike it out or instruct the jury not to consider it, and failure to do so will be regarded as a waiver of objection.

3. Same—

The rule that defendant must object to an unresponsive answer containing incompetent testimony does not apply when the answer of the witness contains evidence forbidden by statute in the furtherance of public policy, but in such instance it is the duty of the julge on his own motion to withdraw such testimony.

4. Same: Criminal Law § 41d—

Testimony of a State's witness of a declaration of defendant's wife to the effect that if defendant had not been driving so slow "he wouldn't have been caught" entitles defendant to a new trial notwithstanding his failure to move to strike the answer, since by statute the wife may not be compelled to testify against her husband, G.S. 8-57, and *a fortiori* her declarations against him not made in his presence or by his authority are precluded by the statute.

5. Automobiles § 30d—

Defendant's motion for judgment of nonsuit in this prosecution for drunken driving *held* properly denied under authority of *S. v. Carroll*, 226 N.C. 237. G.S. 20-138.

APPEAL by defendant from *Burney, J.*, February Term, 1952, of GREENE. New trial.

The defendant was charged with operating a motor vehicle on a public highway while under the influence of intoxicating liquor in violation of G.S. 20-138.

In support of the charge the State offered the testimony of a highway patrolman and two other officers to the effect that they observed the defendant driving an automobile on the highway, that they stopped him and found him under the influence of intoxicating liquor and arrested him.

The defendant denied his guilt and offered the testimony of several witnesses tending to show he was not under the influence of intoxicating liquor on the occasion alleged.

The jury returned verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, for the State.

C. W. Beaman and K. A. Pittman for defendant, appellant.

DEVIN, C. J. The defendant assigns error in the ruling of the trial court in the admission of the following testimony elicited by the Solicitor from a State's witness, one of the officers who assisted in making the arrest:

"Q. From your observation of him, state whether or not, in your opinion, he was very much under the influence of liquor?

"Objection—overruled—exception.

"A. Yes, sir, his wife was there talking, and she said if he had not been going so slow he wouldn't have been caught."

At the outset we may observe that it is not entirely clear whether the questioned declaration of defendant's wife, as testified by the witness, referred to the defendant or defendant's witness Vines as having been "caught." But as the defendant was the only person caught, in the sense of having been arrested on that occasion, we must assume the wife's statement referred to the defendant.

There was nothing in the record to show that the statement was made in the presence of the defendant. Subsequently the defendant offered his wife as a witness, but she was not asked about the statement attributed to her by the State's witness.

The objection to the question propounded to the witness is without merit. It was competent for the officer to express his opinion that the defendant was intoxicated. *S. v. Dawson,* 228 N.C. 85, 44 S.E. 2d 527; *S. v. Harris,* 213 N.C. 648, 197 S.E. 142.

The defendant, however, assigns error in the admission of the answer. The general rule is that if the answer of the witness to a proper question is not responsive and an incompetent statement beyond the scope of the question is added, the proper course is to object to the answer and move the court to strike out the answer or instruct the jury not to consider it. *Edgerton v. Johnson,* 217 N.C. 314 (317), 7 S.E. 2d 535; *Hodges v. Wilson,* 165 N.C. 323, 81 S.E. 340. This course was not pursued by the defendant in this instance, with the result that the testimony of the State's witness incorporating the declaration of defendant's wife would be regarded as admitted without objection.

But the defendant challenges the competency of the declaration of defendant's wife on the ground that it violates the statutory prohibition of G.S. 8-57 that neither husband nor wife shall be "competent or com-

pellable" to give evidence against the other, and that the court erred in permitting it to be considered by the jury.

Ordinarily failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission is not assignable as error, but this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute in the furtherance of public policy. *S. v. Ballard,* 79 N.C. 627; *S. v. Gee,* 92 N.C. 756; *Broom v. Broom,* 130 N.C. 562, 41 S.E. 673; *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933; *S. v. Reid,* 178 N.C. 745, 101 S.E. 104; *S. v. Aswell,* 193 N.C. 399, 137 S.E. 174; *S. v. Kluttz,* 206 N.C. 726, 175 S.E. 81.

In *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933, where evidence rendered incompetent by statute was admitted, the Court said: "In such case it became the duty of the trial judge to exclude the testimony, and his failure to do so must be held for reversible error, whether exception has been noted or not." The headnote in *S. v. Ballard,* 79 N.C. 627, accurately states the rule: "In such cases it is the duty of the judge, on his own motion, to disallow the evidence." And in *Broom v. Broom,* 130 N.C. 562, 41 S.E. 673, the Court said that failure to object to testimony prohibited by statute could not make it competent. "No exception at the time was necessary."

In *S. v. Reid,* 178 N.C. 745, 101 S.E. 104, *Justice Hoke,* speaking for the Court, said: "Under our statute, Revisal, Secs. 1634 and 35 (now G.S. 8-57), the wife was neither competent nor compellable to testify to her husband's hurt in a proceeding of this character and, *a fortiori,* her declarations against him should not be received when not made in his presence nor by his authority."

While the statement attributed to the defendant's wife does not contain a direct or positive admission of guilt on the part of her husband, the inference is unmistakably incriminating and harmful.

Defendant's motion for judgment of nonsuit was properly denied. *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

For the reasons stated we think a new trial should be awarded, and it is so ordered.

New trial.

G. W. H. COSTNER, EDITH COSTNER FISTER, MAMIE COSTNER CROOK, AMBROSE COSTNER, JACK F. COSTNER, AND JAMES RAY COSTNER, JR., AND SALLIE ANN COSTNER, MINORS, CHILDREN OF JAMES RAY COSTNER, DECEASED, V. THE LUTHERAN CHILDREN'S HOME OF THE SOUTH, OF SALEM, VIRGINIA, THE OXFORD ORPHANAGE, OF OXFORD, NORTH CAROLINA, MRS. CORA M. CANSLER, AND MRS. BRYTE ROYSTER COSTNER.

(Filed 29 October, 1952.)

1. Wills § 39: Appeal and Error § 50—

Where, in an action to construe a will, it appears of record that infant plaintiffs who are necessary parties were not represented by a next friend, and that other parties having an interest in the *res* dependent upon the interpretation of the will, were not made parties, and that the person having possession of the personalty and who would have to account therefor in accordance with the judgment was also not a party, the cause must be remanded, since a full and final determination of the cause cannot be had until all interested parties are brought in and given an opportunity to be heard.

2. Appeal and Error § 20a—

A stipulation that orders whereby additional parties were made and other formal parts of the record need not be printed does not justify the assumption that any person not named in the caption was made a party.

WINBORNE, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Sink, J.*, April Term, 1952, LINCOLN. Remanded.

Civil action to try title to real and personal property.

The rights of the several parties to this action depend upon the construction of paragraphs four and five of the last will and testament of Thomas H. Cansler, particularly in respect to the time of vesting of the estates therein limited by way of remainder subject to the life estate of testator's widow.

The court below found the facts, made certain conclusions of law, and entered judgment in accord therewith. Plaintiffs excepted and appealed.

Marvin T. Leatherman, A. L. Quickell, and William B. Webb for plaintiff appellants.

Hartsell & Hartsell, R. S. Kime, and Jonas & Jonas for defendant appellees.

BARNHILL, J. James Ray Costner, Jr., and Sallie Ann Costner are infants and are necessary parties to this action. Their names appear in the caption as plaintiffs and the judgment recites that they are duly repre-

sented by their next friend, Lewis B. Carpenter. It is likewise so stipulated by counsel. Yet the record fails to disclose the appointment of a next friend. Although these infants are listed as plaintiffs, Lewis B. Carpenter filed an answer in their behalf as guardian *ad litem,* but they are not defendants and there has been no appointment of a guardian *ad litem. Latta v. Trustees,* 213 N.C. 462, 196 S.E. 862; *Trust Co. v. Deal,* 227 N.C. 691, 44 S.E. 2d 73.

If the remainder estates vested at the time of the death of the testator, as the court below concluded, J. Ray Costner was one of the remaindermen and his widow, Bryte Royster Costner, as one of his distributees, has an interest in the personal estate involved in this controversy. She is therefore a necessary party. Likewise, the widow of J. E. Cansler, brother of the testator, has an interest in the estate. There is no order in the record making either a party to this action. However, as the widow of J. E. Cansler appeared and answered, the defect as to her may have become immaterial.

Furthermore, it is alleged that one Betty Coon, executrix of the last will and testament of Lucy B. Cansler, widow of the testator, took possession of all the chattels devised by the testator to her testatrix and has, since the death of her testatrix, collected all the rents and profits from the real estate and the dividends on the stocks which formed a part of the estate of Thomas H. Cansler and which was devised and bequeathed to his widow for and during her natural life. Since the plaintiffs seek to have her account therefor, she is likewise a necessary party. It is true it is alleged that she is ready and willing to account for the same as the court may direct. But this does not meet the requirements of the law, for she will not be bound by any judgment in this action in the present state of the record.

The title to real property, as well as chattels and choses in action, is at issue. Infants, who apparently are not properly represented and who would not be precluded by any judgment entered, have an interest in the subject matter of the controversy. A full and final determination of the questions presented for decision cannot be had until and unless all interested parties are brought in and given an opportunity to be heard.

In view of the condition of the record as we interpret it, we deem it advisable to vacate the judgment entered and remand the cause for further proceedings accordant with this opinion. It must not be assumed, however, that this disposition of the appeal gives any indication that we approve or disapprove the conclusions of law made by the court below. We reserve decision on the legal questions posed for future consideration after the action is properly constituted.

We are not inadvertent to the stipulation "that . . . orders whereby additional parties were made and other purely formal parts of the record

need not be printed . . ." Even so, the names of the additional parties are not made to appear, and we may not assume that this has reference to any person not named in the caption.

Remanded.

WINBORNE, J., took no part in the consideration or decision of this case.

STATE v. ROBERT MERRITT.

(Filed 29 October, 1952.)

Criminal Law § 41a—

Whether a five-year-old child is competent to testify in a rape prosecution is a matter resting in the sound discretion of the trial judge, and where the evidence upon the *voir dire* as well as the child's testimony upon the trial negates abuse of discretion, the ruling of the trial court that the child was a competent witness will not be disturbed on appeal.

APPEAL by defendant from *Burney, J.*, and a jury, at May Term, 1952, of PITT.

Criminal prosecution tried upon a bill of indictment charging the defendant with rape, in violation of G.S. 14-21 as rewritten, Chapter 299, Section 4, Session Laws of 1949.

The jury returned a verdict of guilty with recommendation of life imprisonment. Thereupon judgment was entered directing that the defendant be confined in the State's Prison for the term of his natural life.

The defendant appealed, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Marvin V. Horton for the defendant, appellant.

JOHNSON, J. The prosecuting witness is a child, who at the time of her alleged ravishment was 4 years, 10 months and 5 days of age. She lived with her mother and other relatives in a downstairs apartment at a rooming house. The defendant, aged 28, had living quarters in an upstairs room at the same house. The gist of the testimony of the prosecutrix is that the defendant picked her up from her seat on the porch and with his hand over her mouth carried her upstairs to his room and there effected the ravishment as charged. When she came back downstairs, her relatives and other roomers, seeing the physical signs and marks of her ravishment and acting upon information given by her, went upstairs and

found the defendant in his room lying across the bed. Officers were called. In the ensuing investigation, and also on later occasions, the prosecutrix identified the defendant as being the one who raped her. Her testimony was strongly corroborated by testimony of the officers and others respecting the condition of the bed and of defendant's wearing apparel, some of which was found in the stove.

The defendant, on the other hand, firmly and unequivacally denied any and all connection with the alleged crime and offered substantial evidence tending to refute the incriminating testimony and circumstances relied on by the State. The trial developed into a controverted issue of fact for the jury on sharply conflicting evidence. It would serve no useful purpose to relate the details of the sordid story which unfolded below.

The defendant insists that the trial court erred in permitting the prosecutrix to testify as a witness in the case. Her competency to testify was a matter resting in the sound discretion of the trial judge. *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; *S. v. Jackson,* 211 N.C. 202, 189 S.E. 510, and cases there cited. See also Wigmore on Evidence, Third Edition, Vol. II, Sections 505, 506, 507, 508 and 509. The rule is succinctly stated by *Reade, J.,* in *S. v. Edwards,* 79 N.C. 648, bot. p. 650: "There being now no arbitrary rule as to age, and it being a question of capacity, and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly if not entirely to the discretion of the presiding Judge. *S. v. Manuel,* 64 N.C. 601. It may be stated, however, that a child of tender years ought to be admitted with great caution; and where there is doubt it ought to be excluded."

Here it appears that the trial court at the conclusion of a lengthy examination of the witness, conducted in the absence of the jury, ruled that she possessed the requisite qualifications to testify. A transcript of the examination appears in the record, from which it appears, among other things, that the witness related where she lived, who her relatives were, her concept of the Diety and responsibility for telling the truth, the details of the ravishment, and identified the defendant as being the perpetrator. The *voir dire* examination of the witness sustains the ruling of the court below, as does the over-all tenor of her testimony later given before the jury. No abuse of discretion has been made to appear. See *S. v. Gibson, supra,* upholding the ruling of the lower court in permitting a girl a little less than six to testify in a rape case; and *S. v. Jensen,* 70 Ore. 156, 140 P. 740, where the trial court was sustained in permitting a child of four to testify in a prosecution charging assault with intent to commit rape.

We have examined the rest of the defendant's exceptive assignments of error and find them to be without substantial merit. A careful study

of the record leaves us with the impression that no prejudicial error has been made to appear.

No error.

STATE v. COY TYNDALL.

(Filed 29 October, 1952.)

Criminal Law § 50h—

The bringing into the courtroom of two jars of nontax-paid whiskey by an officer at the end of the solicitor's argument is improper, the exhibits not having been offered in evidence, but where it appears that the solicitor was not responsible therefor and that the trial judge categorically charged the jury not to consider the jars of whiskey and no reference thereto was made in the argument, the incident does not constitute prejudicial error.

APPEAL by defendant from *Grady, Emergency Judge,* March Term, 1952, of LENOIR.

Criminal prosecution, tried upon a warrant charging the defendant with the sale of nontax-paid whiskey. There was a verdict of guilty and from the judgment imposed, defendant appeals and assigns error.

Attorney-General McMullan, Assistant Attorney-General Love, and Robert L. Emanuel, Member of Staff, for the State.

J. Frank Wooten and John G. Dawson for defendant, appellant.

DENNY, J. The appellant makes no contention that the evidence offered in the trial below was insufficient to carry the case to the jury and to support the verdict rendered. He seeks a new trial bottomed solely upon an incident that occurred while the solicitor was arguing the case to the jury.

The State offered evidence to the effect that on Sunday morning, 13 January, 1952, between 8:30 and 9:00 o'clock, two members of the Police Department of the City of Kinston, while passing the house of the defendant, saw a man coming out of the house. He had a paper sack in his hand; and as the police car approached, he threw the sack down. The officers stopped and picked the bag up and found that it contained a half-gallon jar of nontax-paid whiskey. The man who threw this whiskey down was identified and testified at the trial that he purchased it from the defendant. The officers took the whiskey and went to obtain a search warrant to authorize them to search the defendant's home. When they returned with the search warrant, they saw another man coming out of defendant's home with a half-gallon jar of nontax-paid whiskey. The officers had to run the second man down. He was caught and they took

possession of his whiskey. Immediately thereafter, the officers searched the home of the defendant and found no whiskey.

The whiskey taken by the officers was not brought into court and identified and offered in evidence at the trial below. Mr. Wooten, one of the counsel for defendant, in his argument to the jury, commented on this fact and states in the assignment of error, "I challenged them as to that whiskey; . . ." About the time the solicitor finished his argument, and while the presiding judge was temporarily out of the courtroom, an officer brought the two half-gallon jars of nontax-paid whiskey in the courtroom and placed them on a table near the solicitor. After the solicitor had finished his argument, and immediately upon the return of the judge to the courtroom, Mr. Wooten called his attention to the presence of the liquor and stated that since it had not been introduced in evidence, he objected and excepted to its presence. His Honor said: "I think I can correct that." The court proceeded immediately to charge the jury, and in the charge with respect to the presence of the whiskey, gave the following instruction: "With reference to those two bottles of whiskey over there: They were not offered in evidence during the trial, and you need not pay any attention to them, gentlemen. You will only consider the evidence that came from the lips of the witnesses as they testified."

It was improper for the officer to bring the whiskey in court and display it in the presence of the jury, since it had not been offered in evidence. And this is true even though it is indicated by the record that the officer did exactly what the defendant's counsel had challenged the State to do. However, there is nothing to indicate that the solicitor was responsible for the presence of the whiskey in the courtroom, or that he offered any improper argument to the jury in respect thereto as was the case in *S. v. Eagles,* 233 N.C. 218, 63 S.E. 2d 170, where we held the charge of the court was insufficient to cure the error in failing to sustain the defendant's objection and exception theretofore interposed.

In our opinion, the instruction given by the court in the trial below was sufficient to cure any prejudicial effect the incident might otherwise have had upon the jury. *S. v. Correll,* 229 N.C. 640, 50 S.E. 2d 717; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Ballard,* 191 N.C. 122, 131 S.E. 370.

The judgment of the court below will be upheld.

No error.

JIM WHITE v. J. H. SOUTHARD, JR.

(Filed 29 October, 1952.)

Judgments § 9—

No judgment by default, whether by default final or by default and inquiry, may be entered so long as answer remains filed of record, regardless of whether it was filed within time or not, and where the clerk cannot determine whether answer was filed before or after he signed the default judgment, his order setting aside the default judgment on proper motion will be upheld. In such instance G.S. 1-220 is not applicable and movant is not required to show excusable neglect and a meritorious defense.

APPEAL by plaintiff from *Bennett, Special Judge,* February Term, 1952, of CLEVELAND.

This is a civil action instituted on 25 September, 1950, by the plaintiff against the defendant to recover upon a promissory note executed and delivered by the defendant to the plaintiff on 24 December, 1948, in the sum of $700.00, payable on 24 April, 1949. Ancillary to the action, the plaintiff caused to be issued a writ of claim and delivery for property conveyed in a chattel mortgage given as security for the payment of the note.

The summons, copy of the verified complaint, and writ were served on the defendant 27 September, 1950, and the defendant retained possession of the property by executing bond therefor.

On 28 October, 1950, the Clerk of the Superior Court rendered a default judgment against the defendant and in favor of the plaintiff for $700.00, with interest from 24 April, 1949, until paid, together with the cost of the action, and for the possession of the property seized under the writ of claim and delivery, etc. On the same day the default judgment was signed, the defendant filed with the Clerk his answer in which he admitted the execution of the note and chattel mortgage, but denied his refusal to pay the same. And as a further answer, defense and counterclaim, the defendant alleges that he paid to the plaintiff $600.00 on 22 January, 1949, to apply on the note described in the complaint, and that he holds the plaintiff's receipt therefor. He sets up a counterclaim of $75.00 due the defendant by the plaintiff for wiring and installing an electric range and water heater, payment for which had been demanded but remained unpaid. The defendant admitted that he was indebted to the plaintiff in the sum of $25.00, and tendered such amount in full and complete satisfaction of the amount due to the plaintiff on the note and mortgage described in the complaint.

The defendant moved before the Clerk of the Superior Court on 20 October, 1951, to set aside the judgment entered against him by default on 28 October, 1950, on the ground that the defendant had filed his answer

in the office of the Clerk of the Superior Court before the judgment by default was signed. This motion was heard by the Clerk on 1 February, 1952, who entered an order setting aside the judgment because the answer and default judgment were filed on 28 October, 1950, one day after the expiration of the time for filing the answer, and he could not determine which one was filed first.

The plaintiff appealed from the ruling of the Clerk to the Judge of the Superior Court. His Honor affirmed the ruling of the Clerk, in his discretion, and allowed the defendant five days to file or refile his answer. From this ruling the plaintiff appeals and assigns error.

Horace Kennedy and Joe F. Mull for plaintiff, appellant.

No counsel contra.

DENNY, J. The appellant contends that the appellee is not entitled to have the default judgment, entered 28 October, 1950, set aside, unless he shows excusable neglect and a meritorious defense as required by the provisions of G.S. 1-220. This contention is without merit. The provisions of G.S. 1-220 are inapplicable to the facts disclosed on this record.

A clerk of the Superior Court may, in proper cases, when no answer has been filed, enter a judgment by default final or default and inquiry as authorized by G.S. 1-211, 1-212 and 1-213. G.S. 1-214. However, when an answer has been filed, whether before or after the time for answering had expired, so long as it remains filed of record, the clerk is without authority to enter a judgment by default. *Bailey v. Davis,* 231 N.C. 86, 55 S.E. 2d 919; *Cahoon v. Everton,* 187 N.C. 369, 121 S.E. 612; *Investment Co. v. Kelly,* 123 N.C. 388, 31 S.E. 671. And when the clerk cannot determine whether an answer was filed before or after he signed a judgment by default, such judgment, upon proper motion in the cause, should be set aside.

The judgment below will be upheld.

Affirmed.

CITY OF SHELBY, ZEB MAUNEY, BUILDING INSPECTOR FOR THE CITY OF SHELBY, AND ON BEHALF OF THE CITY OF SHELBY AS ITS BUILDING INSPECTOR, (AND GRIFFIN J. HOLLAND, SINGLE, ELIZABETH CLAYTOR AND HUSBAND, JOHN WILLIAM CLAYTOR, DOROTHY HOLLAND, SINGLE, AND LAWRENCE HOLLAND AND WIFE, ROSLIN HOLLAND, ADDITIONAL PARTIES PLAINTIFF), v. W. D. LACKEY AND WIFE, LILLIAN Z. LACKEY, EVANS LACKEY AND WIFE, MARY I. LACKEY, ISABEL MOSER AND LACKEY PONTIAC, INC.

(Filed 29 October, 1952.)

1. Municipal Corporations § 37—

In an action by a municipality to enforce a zoning ordinance, complaint of individuals, joined as parties plaintiff, which fails to show that such individuals were citizens or property owners of the municipality, or that they would be injuriously affected by the defendants' alleged nonconforming use, is demurrable for failure to state a cause of action in favor of such individuals.

2. Pleadings § 19b—

Where the complaint fails to state a cause of action in favor of additional parties plaintiff, demurrer should be sustained as to such additional parties, but demurrer to the complaint for misjoinder of parties should be denied.

3. Trial § 29—

A directed verdict may not be entered in favor of the party upon whom rests the burden of proof.

4. Trial § 28—

While in proper instances the court may give a peremptory instruction that if the jury finds the facts to be as all the evidence tends to show to answer the issue as indicated, the court must leave it to the jury to determine the credibility of the testimony, and the failure of the court to do so must be held for error.

APPEAL by defendants from *Clement, J.*, August Term, 1952, of CLEVELAND.

This is a civil action instituted by the plaintiffs for the purpose of enforcing the provisions of the zoning ordinance of the City of Shelby and restraining the defendants from continuing to use a lot for business purposes, which lot is classified in the zoning ordinance as residential property. The ordinance became effective 27 May, 1947.

The plaintiffs, Griffin J. Holland, single, Elizabeth Claytor and husband, John William Claytor, Dorothy Holland, single, and Lawrence Holland and wife, Roslin Holland, filed a petition and motion at the January Term, 1952, of the Superior Court of Cleveland County, requesting that they be allowed to become parties plaintiff in this action, and permitted to adopt the complaint theretofore filed in the action by the

original plaintiffs. The defendants interposed a demurrer to the petition and motion. The demurrer was overruled and the motion allowed. The defendants appealed to this Court and we held that the order making the additional parties plaintiff did not impair any substantial right of the defendants which would warrant an appeal. *Shelby v. Lackey,* 235 N.C. 343, 69 S.E. 2d 607.

When this cause came on for hearing in the trial below, the defendants demurred *ore tenus* to the complaint as to these additional parties plaintiff for that the same did not state a cause of action against the defendants in behalf of said plaintiffs, and for misjoinder of parties plaintiff. The demurrer was overruled and the defendants excepted thereto.

The trial below resulted in a verdict for the plaintiffs, and from the judgment entered pursuant thereto, the defendants appeal and assign error.

Falls & Falls for appellants.
Henry B. Edwards and A. A. Powell for appellees.

DENNY, J. An examination of the complaint filed in this action fails to disclose that the additional parties plaintiff are in any way interested in the subject matter of the action, or that they are citizens of the City of Shelby, or property owners therein, or that they will be injuriously affected by the nonconforming use of the defendants' property for business purposes. Hence, we think, in the absence of appropriate pleadings in this respect, the demurrer should have been sustained as to these additional parties plaintiff. The ruling, however, in so far as it may have applied to a misjoinder of parties, will be upheld.

The defendants except to the refusal of the court to sustain their motion for judgment as of nonsuit. The exception is overruled as to the original plaintiffs.

The defendants also except to and assign as error the charge of the court which was as follows: "GENTLEMEN OF THE JURY: There is but one issue submitted to you—Have the defendants in violation of the Zoning Ordinance of the City of Shelby used for business purposes the portion of the lot described in the complaint on the North side of West Marion Street, and designated on the plat PLAINTIFFS' EXHIBIT 5 'Used Car Lot,' enclosed by a fence? If you find from the evidence the facts to be as all of the evidence tends to show, you will answer that issue yes, and with your permission I will answer it for you. Answer: 'Yes.'"

The exception is well taken and must be sustained. A directed instruction in favor of the party having the burden of proof is error. *McCracken v. Clark,* 235 N.C. 186, 69 S.E. 2d 184; *Haywood v. Insurance Co.,* 218 N.C. 736, 12 S.E. 2d 221; *Yarn Mills v. Armstrong,* 191 N.C. 125, 131

S.E. 416; *House v. R. R.*, 131 N.C. 103, 42 S.E. 553; *Manufacturing Co. v. R. R.*, 128 N.C. 280, 38 S.E. 894; *Cox v. R. R.*, 123 N.C. 604, 31 S.E. 848. And when a peremptory instruction is permissible, conditioned upon the jury finding the facts to be as all the testimony tends to show, the court must leave it to the jury to determine the credibility of the testimony. McIntosh's North Carolina Practice & Procedure, 632; *Bank v. School Committee*, 121 N.C. 107, 28 S.E. 134; *Boutten v. R. R.*, 128 N.C. 337, 38 S.E. 920; *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871. This the court below inadvertently failed to do.

The defendants are entitled to a new trial and it is so ordered.

New trial.

STATE v. ALONZA HARPER.

(Filed 29 October, 1952.)

Intoxicating Liquor § 9c: Searches and Seizures § 1—

When an officer of the law sees and recognizes nontax-paid intoxicating liquor in a car driven by defendant and admitted by him to be his automobile, it is the duty of the officer to arrest the defendant without a warrant and to complete the examination of the car for the purpose of discovering the extent to which defendant was engaged in the liquor traffic, and the defendant's motion to suppress the evidence obtained by the search without a warrant is feckless. G.S. 18-6.

APPEAL by defendant from *Burney, J.*, June Term, 1952, GREENE.

Criminal prosecution upon a warrant charging that the defendant did on 24 May, 1951, possess, possess for the purpose of sale, and transport nontax-paid intoxicating liquor.

This case was here on appeal at the Fall Term, 1951, *S. v. Harper*, 235 N.C. 67, and was remanded for a new trial for error committed in the use of a special verdict.

Upon the call of the case at the second trial, the defendant made a motion to suppress the State's evidence for that such evidence would be incompetent and inadmissible in that the officers' search of defendant's car was made without the aid of a search warrant. The motion was denied, defendant excepted and the trial proceeded. Several other exceptions were noted during the trial and are brought forward in the record. However, the defendant frankly admits in his brief that his appeal stands or falls upon the validity of his Honor's ruling on the motion to suppress the State's evidence.

The State's evidence tended to show these facts: While Sheriff Kirby Cobb, together with other officers, were engaged in the search of the prem-

ises of one Harvey Bowen for illicit liquor, the defendant in company with one Roy Davis drove up into the driveway of the Bowen home and stopped his automobile. The officers, upon approaching the car, smelled liquor and saw in the back seat of the car, uncovered and clearly visible, two jars of nontax-paid liquor. The lid to the boot of the car was propped open by some object or objects, which the officers later discovered were cases of illegal liquor. The passenger in defendant's car was highly intoxicated. The defendant left the car from his position in the driver's seat and in conversation with the officers admitted the ownership of both the car and the liquor. The officers then arrested the defendant and completed the examination of the car, which examination disclosed 30 gallons of nontax-paid liquor. Part of the liquor was offered in evidence for inspection and examination by the jury. The officers had no search warrant authorizing the search of the car.

Defendant offered no evidence, but moved for judgment as of nonsuit based upon the same grounds as his motion to suppress the State's evidence, which motion for nonsuit was denied.

From judgment upon the verdict of guilty upon each count, defendant appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

K. A. Pittman for defendant, appellant.

VALENTINE, J. This appeal presents the single question: Did the court commit error in overruling defendant's motion to suppress the evidence of the officers who, without the use of a search warrant, discovered illegal liquor in the back seat and boot of defendant's car?

G.S. 18-6 provides: "Nothing in this section shall be construed to authorize any officer to search any automobile or vehicle or baggage of any person without a search warrant duly issued, except where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage."

Officers may acquire absolute personal knowledge of the presence of liquor in an automobile through the sense of seeing, smelling, or tasting. *S. v. Godette,* 188 N.C. 497, 125 S.E. 24; *S. v. Sigmon,* 190 N.C. 684, 130 S.E. 854; *S. v. Simmons,* 192 N.C. 692, 135 S.E. 866.

Upon approaching the car, the officers smelled liquor. They looked into the car and saw and recognized two jars of contraband liquor uncovered and clearly visible on the back seat. It then became their duty under G.S. 18-6 to arrest the defendant, take his automobile in possession, and seize the liquor. *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470, and cases there cited; *S. v. Harper,* 235 N.C. 67. The officers, upon

smelling and seeing the liquor, were in possession of sufficient personal knowledge that a crime was being committed in their presence to justify them in arresting the defendant without a warrant. *S. v. Campbell,* 182 N.C. 911, 110 S.E. 86; *Perry v. Hurdle,* 229 N.C. 216, 49 S.E. 2d 400; *Alexander v. Lindsey, supra.*

It follows that the officers, upon acquiring absolute personal knowledge that the defendant had in his possession contraband liquor, were duty bound to complete the examination of defendant's automobile for the purpose of discovering the extent to which he was engaged in the liquor traffic. There was nothing illegal or irregular about the procedure followed by the officers, and under the facts in this record, there was no necessity for a search warrant. The position here taken is greatly strengthened by the fact that the defendant, upon being approached by the officers, immediately and readily admitted the ownership and possession of both the liquor and the car and the transportation of the liquor.

The evidence offered by the State was competent and defendant's motion to suppress was properly overruled. The verdict and the judgment of the court below will be upheld.

No error.

M. E. ALLEN v. JOHN M. McDOWELL.

(Filed 29 October, 1952.)

Abatement and Revival § 8—

Where voluntary nonsuit is taken in a prior action subsequent to the filing of answer in the second action between the parties, but prior to the hearing on defendant's motion to abate the motion to dismiss on the ground of pendency of the prior action is properly denied.

APPEAL by defendant from *Sharp, Special Judge,* at 2 June 1952 Term of RANDOLPH.

Civil action to recover on promissory note, and to foreclose chattel mortgage given as security therefor.

The uncontroverted facts seem to be these: That on 14 January, 1951, defendant executed to plaintiff his promissory note in amount of $4,000, to be due on or before 14 November, 1951, and as security therefor executed to plaintiff a chattel mortgage on a certain shovel,—the chattel mortgage being duly registered; that on 20 October, 1951, defendant paid $800 on the note; and that plaintiff instituted this action on 25 February, 1952, for recovery of the balance due on the note, and for possession of the shovel described in the complaint.

Defendant, in his answer, denies that plaintiff is entitled to recover on the note, or the possession of the shovel, at this time, for that on 16 October, 1951, plaintiff instituted another action against defendant for recovery on the same note, and for possession of the shovel; that upon the summons and claim and delivery being served on him, he, the defendant, went to plaintiff and paid his attorney the sum of $800 upon the express agreement that he would make payments as soon as he received the balance of money for his contracts with a named third party, and that plaintiff agreed to drop said action; that the parties to said action were the same, and the subject matter involved therein the same as in the present action; that plaintiff has not taken a voluntary nonsuit, and defendant moves that this action be dismissed for reason that there is another action pending between the same parties concerning the same subject matter.

And defendant avers that pursuant to the agreement with plaintiff at the time he paid plaintiff the $800, plaintiff agreed that if defendant would make payments as soon as he received his money from the named third party, he would be allowed to keep the shovel, and that he has been unable to collect the money due him; and hence this action is premature.

Thereafter the cause came on for hearing on the motion of defendant to dismiss said action in accordance with his plea set up in his answer, and the court finding that though another action between the same parties regarding the same subject matter was pending in the Randolph County Superior Court at the time this action was instituted, plaintiff has taken a voluntary nonsuit in the prior action since the filing of defendant's answer in this case. Thereupon the court denied the motion of the defendant. To order signed in accordance with the above ruling, defendant excepted. Exception 1.

Later the case came on for hearing upon its merits, and issues were submitted to and answered by the jury. And from judgment in favor of plaintiff upon the verdict rendered by the jury, defendant appeals to Supreme Court and assigns error.

Prevette & Coltrane for plaintiff, appellee.
Ottway Burton for defendant, appellant.

WINBORNE, J. The pivotal question here is this: Where at the time of the commencement of an action in Superior Court, there is another action pending in same court between same parties for the same cause, and defendant files answer therein, pleading in abatement thereof the pendency of the former action, and, before hearing on the plea, plaintiff takes voluntary nonsuit in the former action, may the plea be overruled?

Defendant cites, and relies upon the case of *Curtis v. Piedmont Co.*, 109 N.C. 401, 13 S.E. 944, in support of his contention that the court

should have sustained the plea and dismissed the action. A reading of the opinion there seems to support his position.

But, on the other hand, plaintiff cites and relies in the main upon the case of *Cook v. Cook,* 159 N.C. 46, 74 S.E. 639, in support of his contention that the court properly overruled the plea, and denied motion to dismiss the action. A reading of the opinion there supports his position.

Thus divergent opinions have been expressed in these cases. However, we think, and hold, that the *Cook case* presents the better view. There, in opinion by *Hoke, J.,* the Court said: "As a general rule, this right to plead the pendency of another action between the same parties, before judgment had, is regarded to a large extent as a rule of convenience, resting on the principle embodied in the maxim, *'Nemo debet bis vexare,'* " that is, that "No one should be twice harassed for the same cause." Black's Law Dictionary. And the Court continued by saying: "The defect is one that can be waived, and it may also be cured by dismissing the prior action at any time before the hearing," citing *Grubbs v. Ferguson,* 136 N.C. 60, 48 S.E. 551. See also *Brock v. Scott,* 159 N.C. 513, 75 S.E. 724, and also *Kesterson v. R. R. Co.,* 146 N.C. 276, 59 S.E. 871; *Barnett v. Mills,* 167 N.C. 576, 83 S.E. 826; *Reed v. Mortgage Co.,* 207 N.C. 27, 175 S.E. 834. McIntosh N. C. P. & P. 479-480; Annotation 118 A.L.R. 1477. Compare *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690.

Applying the ruling in the *Cook case* to case in hand, a single action remains, and defendant will not be twice vexed for the same cause.

Other assignments of error have been given due consideration, and in them error is not made to appear. Hence, in the judgment from which appeal is here taken, we find

No error.

CHARLES W. CARSWELL v. TOWN OF MORGANTON, A MUNICIPAL CORPORATION.

(Filed 29 October, 1952.)

1. Adverse Possession § 9b—

Presumptive possession to the outermost boundaries of a tract of land can arise only when claimant goes into possession under color of title, and in the absence of color the possessor cannot acquire title to any greater amount of land than that which he actually occupies for the statutory period.

2. Adverse Possession § 5—

Claimant by adverse possession must show possession of a definite area of land which can be located within certain and identifiable boundaries.

3. Adverse Possession § 19—

Plaintiff claimed that his predecessor in title went into possession of two tracts of land through a tenant who possessed both tracts of land for at least twenty years without color of title. Plaintiff's evidence tended to show that the tenant actually occupied only a few acres of one of the tracts, without evidence tending to describe, identify, or locate the particular land actually occupied. *Held:* Nonsuit was properly entered.

APPEAL by plaintiff from *Sink, J.*, at June Term, 1952, of BURKE.

Civil action to quiet title to realty.

The complaint alleges that the plaintiff, Charles W. Carswell, owns two adjoining parcels of land, namely, a 51-acre tract and a 49-acre tract, in the South Mountains of Burke County, and that the defendant, the Town of Morganton, claims some estate or interest in them adverse to him. The complaint prays that the plaintiff's title be quieted as against such claim. The answer denies the material averments of the complaint. In addition, the answer asserts that the defendant owns the lands described in the complaint, and that the plaintiff claims some estate or interest in them adverse to the defendant. It asks for judgment quieting the defendant's title as against plaintiff's claim.

The plaintiff lays claim to the lands in dispute on the theory that Joel Walker, acting through his tenants, adversely possessed both tracts for at least twenty years without color of title; that after such possession had ripened into title, Joel Walker died testate, devising both tracts to his wife, Caroline Walker; and that Caroline Walker thereafter died intestate, leaving both tracts to her only heir, the plaintiff.

The plaintiff presented evidence at the trial sufficient to show the matters summarized in the numbered paragraphs set forth below.

1. Outer boundaries of the two tracts are delimited by corner and line trees bearing "very old" hacks.

2. Mrs. Winnie Chapman and her son, John Chapman, resided in a dwelling house, which formerly stood on the 51 acre tract, "for 20 or 25 years" next preceding 1922. They "farmed . . . about 15 or 20 acres . . . on both tracts" during each of these years. But they did not exercise physical acts of dominion over any portions of the two tracts except those covered by the dwelling-house and its curtilage and the fields cultivated by them.

3. Mrs. Winnie Chapman and John Chapman occupied the lands in controversy to the extent set forth above as tenants of Joel Walker, who claimed title in fee to all of it.

4. Neither Joel Walker nor any person claiming under him was in the actual occupancy of any part of either tract at any time after 1921.

5. Joel Walker died testate subsequent to 29 September, 1925. His will was drafted by Squire Waits A. Cook, a highly respected magistrate

of Burke County, who placed the testamentary character of the instrument beyond dispute for all time by causing Joel Walker to subscribe this subjoined declaration: "It is understood that this will is not to go into effect until after my decease."

6. The will of Joel Walker bears the caption "North Carolina, Burke County," and contains this provision: "I give and devise to my beloved wife Caroline Walker the tracts of land on which I now reside containing 250 acres more or less for her natural life in satisfaction of all dower. This tract known as the Wilson land also a tract known as the Bob tract. In fact I bequeath unto her all of my real estate that is in this County."

7. The lands in controversy are not included within the boundaries described in the will as the Wilson land and the Bob tract. The plaintiff contends that they passed to Caroline Walker under this clause: "In fact I bequeath unto her all of my real estate that is in this County."

8. Caroline Walker died intestate subsequent to 31 July, 1942, survived by an only heir, namely, the plaintiff, her son by a marriage which antedated her union with Joel Walker.

9. There are now no indications on the ground of the boundaries of the portions of the property in controversy once embraced by the dwelling-house and its curtilage and the fields cultivated by Mrs. Winnie Chapman and her son, John Chapman.

When the plaintiff had produced his evidence and rested his case, the defendant moved to dismiss the action upon a compulsory nonsuit. The trial judge allowed the motion, and entered judgment accordingly. The plaintiff excepted and appealed, assigning the entry of the involuntary nonsuit as error.

Mull, Patton & Craven for plaintiff, appellant.
John H. McMurray for defendant, appellee.

ERVIN, J. This question arises at the threshold of the appeal: Does the plaintiff's evidence suffice to show that his supposed predecessor, Joel Walker, acting through tenants, acquired title to all the land embraced within the boundaries of the tracts in controversy by twenty years adverse possession under known and visible lines and boundaries within the purview of the statute codified as G.S. 1-40?

This question must be answered in the negative for the very simple reason that there can be no constructive possession by one holding land adversely unless he holds under color of title.

An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. *Land Co. v. Potter,* 189 N.C. 56, 127 S.E. 343; *Rhodes v. Ange,* 173 N.C. 25, 91 S.E. 356; *Anderson v. Meadows,* 162

N.C. 400, 78 S.E. 279; *May v. Manufacturing Co.*, 164 N.C. 262, 80 S.E. 380; *Berryman v. Kelly*, 35 N.C. 269; 2 C.J.S., Adverse Possession, section 181. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. *Logan v. Fitzgerald*, 87 N.C. 308; *Bynum v. Thompson*, 25 N.C. 578.

The reason for the rule restricting one who holds adversely without color of title to the amount of land actually occupied by him was well stated by that great jurist, *Chief Justice Ruffin*, more than a century ago. He said: "But the question is, what is possession for that purpose? Plainly, it must be actual possession and enjoyment. It is true, indeed, that if one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, *prima facie*, and is so deemed in reality, unless some other person has possession of a part, either actually or by virtue of the title. But when one enters on land, without any conveyance, or other thing, to show what he claims, how can the possession by any presumption or implication be extended beyond his occupation *de facto*? To allow him to say that he claims to certain boundaries beyond his occupation, and by construction to hold his possession to be commensurate with the claim, would be to hold the ouster of the owner without giving him an action therefor. One cannot thus make in himself a possession, contrary to the fact." *Bynum v. Thompson, supra.*

Inasmuch as Joel Walker had no color of title to the two tracts, his claim to ownership of the 100 acres included within their outer boundaries did not extend his possession or his rights an inch beyond the dwelling and the curtilage actually occupied by his tenants and the 15 or 20 acres actually cultivated by them. As a consequence, the plaintiff's evidence is insufficient to establish possession by Joel Walker's tenants of all the land involved in this action for the statutory period. Indeed, the testimony does not warrant a verdict that Joel Walker acquired title by adverse possession to the parts of the land actually occupied by his tenants. This is so because the evidence does not describe, identify, or locate these parts of the property as definite areas of land. *Wainwright v. Marbury Lumber Co.*, 206 Ala. 559, 90 So. 315; *Maney v. Dennison*, 110 Ark. 571, 163 S.W. 783; *Weston v. Morgan*, 162 S.C. 177, 160 S.E. 436. The defective state of the testimony in this respect is undoubtedly due to changes made on the land by the passing years.

These considerations show that the allowance of the motion for a compulsory nonsuit was proper. For this reason, we do not rule on the question whether Caroline Walker took a fee or a life estate in any real property which may have passed to her under this clause of the will: "In fact I bequeath unto her all of my real estate that is in this County."

The judgment dismissing the action upon an involuntary nonsuit is Affirmed.

STATE v. JOHNNIE BRYANT.

(Filed 29 October, 1952.)

Criminal Law §§ 57b, 67b—

An appeal does not lie from a discretionary denial of an application for a new trial on the ground of newly discovered evidence.

APPEAL by defendant Johnnie Bryant from *Burney, J.*, at August Term, 1952, of SAMPSON.

Criminal prosecution upon four separate warrants each upon an affidavit charging defendant and another with larceny of chickens.

Verdict: "That said Johnnie Bryant is guilty of larceny of chickens."

Judgment: Confinement in the common jail, etc.

On appeal therefrom to Supreme Court at Spring Term, 1952, no error was found. See 235 N.C. 420, 70 S.E. 2d 186.

Thereafter at the next succeeding term, August Term, 1952, of Superior Court of Sampson County, N. C., defendant filed, in writing, motion for a new trial on account of newly discovered evidence,—supporting same by certain affidavits. The presiding judge, after considering said written motion and affidavits filed, and an examination of the record of the case on appeal to Supreme Court, as aforesaid, denied the motion in his discretion.

From order in accordance therewith defendant appeals to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

David J. Turlington, Jr., for defendant, appellant.

WINBORNE, J. Appeal to the Supreme Court does not lie from a discretionary determination of an application for a new trial on the ground of newly discovered evidence. See *S. v. Suddreth,* 230 N.C. 754, 55 S.E. 2d 690; also *S. v. Thomas,* 227 N.C. 71, 40 S.E. 2d 412; *S. v. Rodgers,* 217 N.C. 622, 8 S.E. 2d 927; *S. v. Lea,* 203 N.C. 316 (at 322), 166 S.E. 292, and cases there cited. Also *S. v. Grass,* 223 N.C. 859, 27 S.E. 2d 443; *S. v. Parker,* 235 N.C. 302, 69 S.E. 2d 542.

Hence under the authority of these cases the appeal in the present case is

Dismissed.

STATE v. RANSOM MURPHY.

(Filed 29 October, 1952.)

APPEAL by defendant from *Burney, J.*, at August Term, 1952, of SAMPSON.

Criminal prosecution upon warrant issued out of County Recorder's Court, tried in Superior Court of Sampson County, on appeal thereto from judgment of the Recorder's Court charging, as limited by the trial judge, that defendant violated prohibition laws in manner therein stated.

Verdict: "Guilty of possession for the purpose of sale and of operating a public nuisance."

Judgment: Confinement in the common jail, etc.

On appeal therefrom to the Supreme Court at Spring Term, 1952, no error was found. See 235 N.C. 503, 70 S.E. 2d 498.

Thereafter at the next succeeding term, August Term, 1952, of Superior Court of Sampson County, N. C., defendant filed in writing a motion for new trial on account of newly discovered evidence,—supporting same by certain affidavits.

The presiding judge, after considering said written motion and affidavits filed therewith, and on examination of the record of the case on appeal to the Supreme Court, as aforesaid, denied the motion in his discretion.

From order in accordance therewith defendant appeals to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

David J. Turlington, Jr., for defendant, appellant.

PER CURIAM. Appeal to the Supreme Court does not lie from a discretionary determination of an application for a new trial on the ground of newly discovered evidence. Hence, under authority of case of *S. v. Bryant, ante,* 379, opinion this day handed down, the appeal in the present case is

Dismissed.

W. P. PRICE v. DICKSON WHISNANT, GUARDIAN OF A. H. McRARY, NON COMPOS MENTIS; MATTIE McRARY, EARL BRADFORD AND FINLEY McGEE.

(Filed 5 November, 1952.)

1. Adverse Possession § 3—

Where a grantee goes into possession of the tract of land conveyed and also a contiguous tract under the mistaken belief that the contiguous tract was included within the description in his deed, *held* no act of such grantee, however exclusive, open and notorious will constitute adverse possession of the contiguous tract so long as he thinks his deed covers the contiguous tract, since there is no intent on his part to claim adverse to the true owner.

2. Same—

In order for possession to be adverse, claimant must hold openly, notoriously, and continuously under known and visible lines and boundaries by making such use of the land of which it is naturally susceptible continuously in the character of owner so as to make him subject to an action in ejectment, and occasional acts of ownership which are unaccompanied by a continuous possession of public notoriety and which amount to no more than separate and unconnected trespasses, is insufficient.

3. Adverse Possession § 19—Evidence held insufficient to show that possession was continuous and exclusive.

The grantee in a deed went into possession not only of the tract conveyed but also a contiguous tract under the mistaken belief that the contiguous tract was covered by the description in his deed. Later he found the contiguous tract was not included, and thereupon obtained a quitclaim deed to the contiguous tract from the heirs of his predecessor in title. *Held:* His acts of dominion over the contiguous tract prior to ascertaining the inadvertence were not adverse, and where his evidence of adverse use of the contiguous tract after discovering the mistake tends to show that his return of the land for taxes was not increased after he took the quitclaim deed, that on one occasion he sold hickory timber therefrom which required only two days to cut and remove, that his son cut stove wood from the tract, without any evidence as to how much wood was cut or how frequently, and that he posted "No Hunting" signs on the land, is insufficient to show such continuous and exclusive possession subsequent to the execution of the quitclaim deed as would ripen title, and defendants' motion to nonsuit should have been allowed.

APPEAL by defendants from *Sink, J.*, March Term, 1952, of CALDWELL.

This action was brought by the plaintiff against the defendant A. H. McRary, *et als.*, to establish title to 64.4 acres of land which the plaintiff alleges he owns and to recover damages for trespass. He also alleges that the defendant A. H. McRary claims title to the same tract of land and that the defendants in person and through their agents, servants, and employees, have trespassed upon said land and have cut and removed certain timber therefrom.

The additional facts necessary to a disposition of this appeal will be hereinafter stated.

1. The plaintiff purchased a tract of land in 1913 containing 175 acres, more or less, from T. H. Broyhill. He moved on the land in 1916 with his family and has resided thereon continuously since that time.

2. According to plaintiff's testimony, he thought until sometime in 1921 that his deed from Broyhill covered the 64.4 acres of land now in dispute. In 1914, he began to cut timber on this area. In that year a considerable quantity of telephone and light poles were cut and removed by the plaintiff and his sons, Hamp and Fred Price, and Finley Steele. He peeled a considerable amount of tan bark on the premises in 1916. Some tan bark was peeled in three different years. Fred Price testified, "We cut buck oak for crossties, . . . in 1916, and on up until 1926 . . . We cut firewood and stove wood off of it, and hauled to town and sold it, and cut and hauled firewood to the house, and used it. We cleared up a piece back here on the West end of it, and were going to put out a peach orchard. Papa and Hamp and myself did that, but we never did get to put it out. . . . We cleared up another place down there and tended it. That was in 1916, if I remember right, and we put it in Irish potatoes and beans and corn, and in 1917 Papa sold John Bullinger and Berry Bryant a big body of extract (chestnut) wood. . . . They worked in there off and on for three years practically all over the disputed land."

3. W. P. Price, the plaintiff, testified that his first work on the disputed land was peeling tan bark; that he had done more or less work on the disputed land ever since he had been there and some before he moved on the Broyhill land. "I had some of it tended, some of this disputed land, Irish potatoes and beans and corn, and I plowed it with a plow and mule, and on top of the ridge we cleared some for a peach orchard. That was on the disputed land. We cut and hauled telephone poles from this disputed land, and sold them, or somebody did it for me." The plaintiff discovered in 1921 when he had a survey made of the land described in his deed from Broyhill, that the deed did not cover the disputed area. He thereafter obtained a quitclaim deed, remising, releasing and quitclaiming to him the 64.4 acres now in dispute and a portion of the land he obtained from Broyhill. The quitclaim deed, containing a description of 175 acres of land, was not procured from Broyhill but from the Lee heirs who were the grantors in the deed to Broyhill. The quitclaim deed was not dated but was filed for registration on 13 January, 1926.

4. The plaintiff caused "No Hunting" posters to be placed on the original tract of land purchased from Broyhill, and on the disputed area, in 1930 or 1931. He began paying taxes on the Broyhill land in 1913. He returned for taxes the 175 acres of land called for in the Broyhill deed and has continued to pay thereon ever since. He made no change

in his tax returns after he secured the quitclaim deed, and has continued to pay taxes only on 175 acres of land.

5. According to the plaintiff's evidence, he sold some hickory timber off the disputed land in 1938 or 1939. His son, John Price, testified, "We peeled tan bark and hewed crossties, and we cut out stove wood; we cut out firewood and hauled it to town and sold it. We started going on the place in 1918 and from that time on until a few months before this law suit started. In the last ten years my father sold some hickory timber, but I have got wood on it. . . . I have cut stove wood and have also posted the land. We put posters on the land in 1930 and 1931."

6. George Chester testified that he and another party bought from Mr. Price, "certain hickory timber some years ago, a little bit. . . . it was about 1938 or 1939, . . . I was not familiar with the line around the disputed area. . . . Mr. Price showed me where to start, down next to the branch and on top of the mountain, where to go up the mountain. I don't remember about the land being posted with 'No Hunting' signs. The operation I am talking about lasted about two days."

7. The defendant, A. H. McRary, was adjudged *non compos mentis* 7 February, 1947, and Dickson Whisnant is his duly appointed and acting guardian.

8. The defendants offered evidence tending to show that A. H. McRary is the owner of the disputed land; that he has occupied it adversely for a period of more than twenty years.

Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiff the owner and entitled to the possession of the lands in dispute embraced by the letters B-2P-D-G-F-B, as shown on the court map. Answer: YES.

"2. If so, have the defendants trespassed upon the same? Answer: No."

From the verdict and judgment entered thereon, defendants appeal and assign error.

Folger L. Townsend and Fate J. Beal for plaintiff, appellee.
Burke & Burke and Hal B. Adams for defendants, appellants.

DENNY, J. This case was before us at the Fall Term, 1950. We granted a new trial because of errors in the charge with respect to the burden of going forward with the evidence and as to what constituted constructive possession. The opinion on that appeal is reported in 232 N.C. 653, 62 S.E. 2d 56.

In the former opinion, we interpreted the allegations of the complaint and the evidence introduced at the trial from which the appeal was taken, to show that the plaintiff was claiming title to the 175 acres of land

described in the quitclaim deed from the Lee heirs, and that the quitclaim deed contained a description of all the land conveyed from Broyhill to Price in 1913, plus the 64.4 acres now in dispute. This interpretation led to the conclusion that Broyhill did not convey to Price, the plaintiff herein, but approximately 110 acres of land. The deed from Broyhill to Price was not introduced in evidence at the former trial. At the last trial, however, it was introduced in evidence by the defendants to show that the plaintiff did get from Broyhill all the land that Broyhill got from the Lee heirs, to wit: 175 acres. And the survey thereof discloses that the original tract of 175 acres which the plaintiff Price purchased from Broyhill in 1913, lies north and northeast of the 64.4 acres of land now in dispute. And one of the southern boundary lines of the Broyhill tract runs with the Robert McRary line 185 poles which is identical with the northern boundary of the disputed area.

The deed introduced by the defendants explains and clarifies the testimony of the plaintiff with respect to the land he now claims under the two deeds. For the purposes of this lawsuit, the plaintiff only alleges that he is the owner of the 175 acres of land described in his quitclaim deed from the Lee heirs. This quitclaim deed purports to release, remise, and quitclaim unto the plaintiff the 64.4 acres of land now in dispute, plus so much of the acreage conveyed to plaintiff by Broyhill as was necessary to make 175 acres. Actually, according to the plaintiff's evidence, he claims to be the owner of the original tract of 175 acres, which he purchased from Broyhill, and of the 64.4 acres of land contained in the quitclaim deed which was not included in his original deed.

It is apparent from the record that the plaintiff got all of the 175 acres of land described in his deed from Broyhill, but none of the land now in dispute lies within the boundaries called for in that deed. This he discovered for the first time in 1921, when he had the land described in his deed from Broyhill surveyed. In the meantime, he had exercised ownership over much of the premises in dispute in the manner above set forth, under the mistaken belief that the description in his deed included the area. When he made this discovery, he could not obtain title to this additional area from Broyhill, since Broyhill had conveyed to him all the land he purchased from the Lee heirs. Consequently, he later obtained and recorded a quitclaim deed from the Lee heirs.

The defendants assign as error the failure of the court below to sustain their motion for judgment as of nonsuit interposed at the close of the plaintiff's evidence and renewed at the close of all the evidence. Therefore, it becomes necessary to consider whether the plaintiff offered sufficient evidence to show title to the disputed area by adverse possession for twenty years, or under color of title for seven years.

On the former appeal, exceptions to the failure of the court to sustain defendants' motion for judgment as of nonsuit, were assigned as error. However, they were not brought forward in the brief and argued as required by Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 563; hence, they were taken as abandoned and were not discussed or considered.

The plaintiff makes it clear that when he went into possession of the Broyhill tract of land he intended to claim only the land described in his deed from Broyhill and he thought his deed covered the disputed area. There was no occasion for any change in his belief prior to his discovery in 1921 that the land now in dispute was not covered by his deed. As a consequence, so long as he thought his deed covered the disputed area, his possession was not adverse but a claim of rightful ownership. The court below so instructed the jury. This precise question was passed upon in *Gibson v. Dudley,* 233 N.C. 255, 63 S.E. 2d 630, where *Stacy, Chief Justice,* speaking for the Court, said: "If his possession were exclusive, open and notorious, as he now contends, no one regarded it as hostile or adverse, not even the plaintiff himself, for he was not conscious of using his neighbor's land. 'I thought all the time it was mine.' These conclusions are impelled by the plaintiff's own testimony." See also *Vanderbilt v. Chapman,* 175 N.C. 11, 94 S.E. 703, and *King v. Wells,* 94 N.C. 344.

Therefore, no act of the plaintiff, however exclusive, open and notorious it may have been prior to the time he discovered the area now in dispute was not covered by the description in his deed, will be considered adverse.

In order to sustain the verdict below, the evidence must be sufficient to show that after 1921 the plaintiff openly, notoriously and continuously possessed the disputed land under known and visible lines and boundaries, adversely to all other persons for twenty years, or that he possessed it adversely under color of title for seven years.

What have been the acts of the plaintiff since 1921 to establish title by adverse possession for twenty years, or since 1926 under color of title for seven years? Fred Price, a son of the plaintiff, testified that "we cut buck oak for crossties in 1916 and on up to 1926." He testified to no act of adverse possession or use of the land in any respect after 1926. The plaintiff testified, "He had done more or less work on the disputed land ever since he had been there and some before he moved on the Broyhill land." However, he testified to no adverse act or use of the land after 1921 except having "No Hunting" posters placed on the original tract of land purchased from Broyhill and on the disputed area in 1930 or 1931, and the sale of some hickory timber in 1938 or 1939. And according to the testimony of the purchaser of the hickory timber, its removal required about two days.

The plaintiff has only returned and paid taxes on the original 175 acres of land which he purchased from Broyhill in 1913. He testified, "I kept on paying the same amount, returning it for the same amount after I took the quitclaim deed." This negatives any contention that he has listed or paid taxes on the 64.4 acres of land now in dispute.

John Price, son of the plaintiff, testified, "we started going on the place in 1918 and from that time on until a few months before the law suit started." The sole acts tending to show adverse possession, however, on the part of the plaintiff, were enumerated by this witness as follows: "In the last ten years my father sold some hickory timber, but I have got wood on it. . . . I have cut stove wood and have also posted the land. We put posters on the land in 1930 and 1931." How much stove wood he cut and removed from the premises, whether a single load or more is left to conjecture.

In the case of *Loftin v. Cobb,* 46 N.C. 406, it was held where land was not swamp land, but good turpentine land, having a great number of pine trees upon it fit for making turpentine, that the feeding of hogs upon it and cutting of timber trees from it was not making the ordinary use and taking the ordinary profit of which it was susceptible in its present state, and did not, therefore, show that the acts were done in the character of owner and not of an occasional trespasser. *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347; *Alexander v. Cedar Works,* 177 N.C. 137, 98 S.E. 312.

This Court also held in *Bartlett v. Simmons,* 49 N.C. 295, that the acts of the plaintiff in going annually for a few weeks at a time, upon land to cut and take off timber and rails, were separate and unconnected trespasses, and did not amount to the exercise of such ownership as could ripen title.

In *Williams v. Wallace,* 78 N.C. 354, the plaintiff claimed title under color by adverse possession for seven years. The Court, in considering the evidence, said: "No witness proves that the plaintiff or those under whom he claims had been in the actual possession of the lands in dispute for a year, a month, or a week continuously, prior to the commencement of the action. From 1857, the date of the deed under which the plaintiff claims, to 1873, when the action was instituted, a period of sixteen years, only a few single acts of trespass were proved, such as cutting ton timber at one time, firewood at another, making rails at another, making bricks at still another, all occasional and at long intervals, unaccompanied by a continuous possession of public notoriety, such as the law requires to be given to the world that the plaintiff is not a mere trespasser, but claims title to the land against all mankind."

In proving title by continuous, open and adverse possession of land for twenty years, or under color of title for seven years, nothing must be left

to conjecture. "Occasional acts of ownership, however clearly they may indicate a purpose to claim title and exercise dominion over the land, do not constitute a possession that will mature title." *Ruffin v. Overby,* 105 N.C. 78, 11 S.E. 251.

In the case of *Shaffer v. Gaynor,* 117 N.C. 15, 23 S.E. 154, where the "acts of dominion consisted of cutting board timber some time during a particular year on a piece of woodland; but there was no evidence to show that they were continuous or, if they were, that the land, though while covered with timber it was not susceptible to other use, might not have been cleared and cultivated, regardless of its capacity for profitable production," it was held that such acts were not sufficiently adverse to mature title.

Again in the case of *Fuller v. Elizabeth City,* 118 N.C. 25, 23 S.E. 922, there was evidence to the effect that plaintiff had sold off portions of the property and offered the balance for sale, and that he had listed and paid taxes on the land continuously since he got his deed for it in 1870, more than twenty years prior to the institution of the action. The Court said: "Plaintiff showed color of title for a greater length of time than was necessary to ripen into a perfect title against the State and all persons not under disability, if it had been accompanied by adverse possession. . . . But we are unable to see from the evidence that plaintiff has been in possession of this land at all, under any of the rules laid down by the law. The fact that he claimed it and offered it for sale, or that he paid taxes on it, is no possession. It must be such possession and exercise of dominion as would subject him to an action of ejectment." The case of *Perry v. Alford,* 225 N.C. 146, 33 S.E. 2d 665, is in accord with this view.

Likewise, where the plaintiff claimed land under color of title, and the testimony as to acts of possession by him, or those under whom he claimed, was that an agent of his grantor raked and hauled straw off the land for one or two years, and that plaintiff's father had farmed an acre or two of the land in controversy, such evidence was held insufficient to ripen title. *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800.

Adverse possession, necessary to establish title, must be continuous. *Monk v. Wilmington,* 137 N.C. 322, 49 S.E. 345. An occasional entry upon land for the purpose of cutting a few logs is insufficient evidence of adverse possession to establish title. *Land Co. v. Floyd,* 167 N.C. 686, 83 S.E. 687.

Applying the law as laid down in our decisions to the facts disclosed by this record, we are of the opinion that after 1921, the acts of the plaintiff with respect to the premises involved, amount to nothing more than occasional trespasses. Since 1921, the plaintiff has not taken the usual profits from this land or used it in the manner in which it was susceptible of being used. He introduced evidence to the effect that the disputed land

lies "pretty well"; that there is a lot of good timber, white pine, old field oak, and poplar on it. Prior to 1921, when he thought the land belonged to him, he cleared and farmed a small area. He also cleared a small area on which he planned to plant a peach orchard. He peeled tan bark, cut and sold telephone poles, light poles, crossties, firewood and stove wood. However, since 1921, none of the cleared land has been cultivated. The plaintiff has made only one sale of a small number of hickory trees off of the disputed area since 1926; and his son, John Price, who lives with his father, has cut and removed some stove wood from the premises at some time within the last ten years. How much stove wood he cut, and whether he cut such wood more than once, is not made to appear. In our opinion, these isolated cases over a long period of time, together with the posting of "No Hunting" signs on the premises, are insufficient to establish title by adverse possession for twenty years, or under color of title for seven years.

In view of the conclusion we have reached, it is not necessary to consider and determine whether a quitclaim deed that merely releases and quitclaims any interest the grantors may have in the described premises (and not purporting to convey anything), is or is not color of title. What was said in the opinion on the former appeal in this case with respect to the quitclaim deed involved herein being color of title as to the 64.4 acres of land in dispute, while in conformity with the defendants' contention with respect to constructive possession on that appeal, such statement will not be held as determinative of the question whether such quitclaim deed is or is not color of title. A ruling on that question is reserved for future determination in an appeal in which the adjudication thereof is necessary to a decision.

The defendants' motion for judgment as of nonsuit should have been granted, and the ruling to the contrary is

Reversed.

E. G. NARRON, ADMINISTRATOR OF THE ESTATE OF PEORIA WATKINS MUSGRAVE, DECEASED, v. RICHARD MUSGRAVE AND RICHARD MUSGRAVE, JR., STEPHEN BASS AND WIFE, BETTIE BASS.

(Filed 5 November, 1952.)

1. Estates § 9g—

A remainderman may not maintain an action for the possession of the land until after the expiration of the life estate.

2. Same: Limitation of Actions § 5a—

The statute of limitations will not begin to run against the right of a remainderman to maintain action to recover possession of the land until after the expiration of the life estate.

3. Estates § 9g—

A remainderman may move to vacate a void or voidable judgment affecting title to the property before the expiration of the life estate.

4. Infants § 15½: Judgments § 27d—

Ordinarily a judgment against an infant will not be set aside for mere irregularity and no more, but it must be made to appear that the infant has suffered some substantial wrong and that the vacating of the judgment will not prejudice rights of innocent third parties who have purchased for value and without notice.

5. Infants § 15½—

Where an infant is not served but his guardian *ad litem* appears and answers but interposes no real defense, and the court enters judgment on the day of the appointment of the guardian *ad litem*, the judgment against the infant is void for want of jurisdiction. G.S. 1-65.

6. Same—

Where the record proper shows service on the general guardian of an infant but later appointment of a guardian *ad litem* upon allegation of no general guardian, the record is conflicting, and where the guardian *ad litem* files answer and decree is entered on the same day, the record fails to disclose that the decree is void but only voidable for irregularity, and in attacking the judgment the infant must show he has suffered substantial injury and that the rights of innocent purchasers for value have not intervened.

7. Infants § 12—

Where an infant has a general guardian, such guardian is the only one who can defend on behalf of the infant, and defense by a subsequently appointed guardian *ad litem* is a nullity. G.S. 1-65.

8. Homestead § 8—

An infant will not be held to an implied waiver of homestead by reason of the failure of his guardian *ad litem* to demand same in the lands of his parents, but he may not assert it after he has become of age and is no longer entitled thereto.

9. Infants § 15½: Executors and Administrators § 13g—

Even though a decree for the sale of land to make assets by the administrator is valid, the sale pursuant thereto may be set aside by the sole heir, who was a minor at the time of the sale, upon a showing of irregularity in the sale provided he also shows a substantial equity and that vacating the sale will not prejudice the rights of innocent third parties who have purchased for value and without notice.

10. Same: Judgments § 27d—

In an heir's action to set aside decree of sale of land to make assets and sale pursuant thereto on the ground of irregularity, a *prima facie* showing of a substantial equity in the property precludes denial of relief on the asserted ground that petitioner has suffered no substantial wrong as a result of the judgment or sale.

11. Same—

Where, in an heir's action to set aside decree of sale of land to make assets and sale pursuant thereto on the ground of irregularity, it appears of record that there were irregularities in the decree and in the sale pursuant thereto sufficient to put a reasonable man on notice, the purchaser at the sale may not maintain that he was an innocent purchaser for value without notice.

12. Estates § 9c—

The right of a remainderman to maintain an action for waste is dependent upon title, and he may not maintain such action so long as a prior judgment and sale of the land pursuant thereto which divests his title remain in full force and effect, and therefore in such instance demurrer to his cause of action solely upon the allegations of trespass and waste is proper.

13. Same: Judgments § 17d—

In an action by a remainderman to set aside decree of sale of land to make assets by the administrator and sale pursuant thereto on the ground of irregularity, and for possession of the land, and for trespass and waste, *held*, a judgment sustaining demurrer on the ground that petitioner was not presently entitled to possession, but retaining the petition in so far as it alleged acts of trespass and waste must be interpreted as dismissing only the action for possession, since the action for trepass and waste is dependent upon title, and therefore the demurrer could not have been sustained as to those allegations which were necessary to establish title in petitioner as remainderman.

APPEAL by defendant, Richard Musgrave, Jr., from *Godwin, Special Judge,* February Term, 1952, of JOHNSTON.

This proceeding was originally instituted before the Clerk of the Superior Court of Johnston County to sell real estate to create assets to pay debts.

Peoria Watkins Musgrave died intestate in 1928 leaving surviving Richard Musgrave, her husband, and Richard Musgrave, Jr., her sole heir at law who was born 16 February, 1926. E. G. Narron was appointed administrator of her estate on 2 January, 1930. At the time of her death she and her husband were living on the premises of Stephen Bass and were his tenants; she owed no debts except a judgment for $100.00, with interest from 29 December, 1926, in favor of Stephen Bass, which judgment was docketed in the office of the Clerk of the Superior Court in Johnston County. She died seized and possessed of a six acre tract of land of the value of $600.00, according to the administrator's petition.

The summons in the special proceeding was issued 16 January, 1930, and directed the Sheriff of Johnston County to summon Richard Musgrave, Richard Musgrave, Jr., and J. D. Bailey, guardian for Richard Musgrave, Jr. The return of this summons reads as follows: "Received

January 18, 1930. Served January 18, 1930 by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: Richard Musgrave, Richard Musgrave (Jr.), J. D. Bailey, defendants. Sheriff A. J. Fitzgerald, by Jesse Yelverton, D.S."

On 17 January, 1930, the administrator of the estate of Peoria Watkins Musgrave applied to the Clerk of the Superior Court of Johnston County to appoint a guardian *ad litem* for Richard Musgrave, Jr., the infant defendant, stating that he was a minor without general or testamentary guardian and further stating that the said minor had been served with summons. Thereafter, on 11 February, 1930, a guardian *ad litem* (other than J. D. Bailey) was appointed for Richard Musgrave, Jr. The guardian *ad litem* filed an answer admitting every allegation of the petition and joined in the prayer for the relief sought by the administrator. The court entered a final judgment appointing a commissioner and directing him to sell the real estate involved, all on the same day the guardian *ad litem* was appointed.

The commissioner executed a deed for the six acre tract of land on 3 January, 1934, to Bettie Bass, the wife of Stephen Bass, the judgment creditor, for a named consideration of $160.00.

In 1949, Richard Musgrave, Jr., having attained his majority, filed a motion in the original cause and petitioned the court to set aside the purported sale of the aforesaid six acre tract of land to Bettie Bass, on the ground that it was null and void. He alleges, among other things, (a) that on information and belief, neither he nor his father was served with summons in the original proceeding, both of them being residents of Wilson County at the time of the purported service; (b) that the guardian *ad litem* appointed for him by filing his answer on the day of his appointment, admitting every allegation of the petition for the sale of the land and joining in the prayer for the relief sought by the administrator, made no real defense in his behalf; (c) that on the same day the answer of the guardian *ad litem* was filed, the court, contrary to the express provisions of the law, entered a final judgment appointing a commissioner and directing the sale of the property; (d) that the last sale reported to the court was held on 12 May, 1930, at which time Stephen Bass was the highest bidder for $130.00 and no increased bid was made and the sale was not confirmed; (e) that on 22 July, 1932, the administrator filed his final account which was approved by the Clerk of the Superior Court, 26 August, 1932, and in which report the administrator stated that the sale of the land was never consummated, that no assets of any description came into his hands and no further administration was necessary; (f) that the purported sale on 19 June, 1930, was never authorized or reported and the purported confirmation thereof on 5 January, 1933, pursuant to which a commissioner's deed was executed on 3 January, 1934,

to Bettie Bass, wife of Stephen Bass, the judgment creditor, for a named but unpaid consideration of $160.00, was unauthorized and is, therefore, null and void.

The petitioner further alleges that as the sole heir of Peoria Watkins Musgrave, he was entitled to a homestead in the property involved and that the value of the land sold was much less than the homestead exemption allowed by law. It is also alleged that the defendant Stephen Bass and wife, Bettie Bass, went into possession under the deed executed by the commissioner in 1934, and have removed certain timber and wood from the premises of the value of $100.00 and have received the rents and profits therefrom, and that he is entitled to an accounting. Wherefore, the petitioner prays that the deed to Bettie Bass be declared null and void and canceled of record, and that he, Richard Musgrave, Jr., be declared the owner of the real estate involved and given immediate possession thereof, and for such further relief as he may be entitled.

The Clerk of the Superior Court, after a hearing on the matter, dismissed the motion and petition and reaffirmed the final decree which confirmed the sale of the land involved to Bettie Bass on 5 January, 1933. The petitioner appealed to the Superior Court and when the matter came on for hearing before his Honor Chester Morris, at the February Term, 1950, of the Superior Court of Johnston County, the defendant Stephen Bass and wife, Bettie Bass, demurred *ore tenus* to the matters set up in the petition and motion, "for that they do not constitute facts sufficient to state a cause of action, in that it appears that said proceeding is brought by Richard Musgrave, Jr., the (remainderman), who has no present right of possession; and for that the life tenant, Richard Musgrave, Sr., is living (present in court) and not being a party to said proceeding, he having made no motion in the cause nor having sought any relief from original judgment."

The court being of the opinion that the demurrer should be sustained, except as to the allegations of trespass and waste, entered judgment as follows: "It is, therefore, considered, adjudged and decreed by the court that the motion and petition, filed herein by Richard Musgrave, Jr., be and the same is hereby dismissed, except insofar as it may pertain to alleged acts of trespass or waste."

No exception was taken to the above judgment. When the matter came on for hearing on the allegations with respect to trespass and waste, Stephen Bass and wife, Bettie Bass, interposed a demurrer *ore tenus* on the ground (1) that the petitioner, Richard Musgrave, Jr., did not have the legal capacity to sue; and (2) that the petition and motion does not state facts sufficient to constitute a cause of action. The demurrer was sustained. To this ruling the petitioner excepted and appealed to this Court and assigns error.

A. M. Noble and Lyon & Lyon for appellant.

Albert A. Corbett and Shepard & Wood for appellees.

DENNY, J. The ruling of the court below at the February Term, 1950, in so far as it held that Richard Musgrave, Jr., cannot maintain an action for the possession of the land involved herein until after the expiration of the life estate of his father, was correct. *Joyner v. Futrell,* 136 N.C. 301, 48 S.E. 649; *Harris v. Bennett,* 160 N.C. 339, 76 S.E. 217; *Blount v. Johnson,* 165 N.C. 25, 80 S.E. 882; *Loven v. Roper,* 178 N.C. 581, 101 S.E. 263; *Caskey v. West,* 210 N.C. 240, 186 S.E. 324; *Stephens v. Clark,* 211 N.C. 84, 189 S.E. 191. This being true, the statute of limitations, with respect to such action, will not begin to run against him as remainderman until after the expiration of the life estate. *Joyner v. Futrell, supra; Harris v. Bennett, supra; Caskey v. West, supra.* This does not mean, however, that such remainderman may not move to vacate a void or voidable judgment until after the expiration of the life estate. This he may do at any time, if the action is taken seasonably and laches cannot be imputed to him. *Harris v. Bennett, supra; Loven v. Roper, supra.*

As a general rule, the court will not vacate an irregular judgment against an infant as a matter of course. Neither will it do so, "when it appears from the record or otherwise that the infant has suffered no substantial wrong, and the rights of innocent third parties, who have purchased for value and without notice, have intervened and will be prejudiced." *Harris v. Bennett, supra.*

The petitioner takes the position that the judgment entered below is void and that as a matter of course any sale made pursuant thereto is a nullity. In our opinion, the record proper discloses, at most, irregularities which may be construed to render the judgment voidable only. On the other hand, if the petitioner was not served with summons and a copy of the original petition in this cause, and the guardian *ad litem* interposed no real defense in behalf of his ward, and the court entered judgment contrary to the provisions of C.S. 451 (G.S. 1-65), then it was without jurisdiction to do so. *Moore v. Gidney,* 75 N.C. 34; *Welch v. Welch,* 194 N.C. 633, 140 S.E. 436; *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873; *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554. Furthermore, if J. D. Bailey was the general guardian of Richard Musgrave, Jr., as indicated in the summons, he was the only party who could defend in behalf of his ward. G.S. 1-65.

If it should be determined that the original judgment was valid or a voidable one, it would then be the duty of the court to determine, (1) whether the sale of the property was properly and legally conducted; (2) if not, whether the petitioner has suffered any substantial wrong as the result thereof; and (3) whether Bettie Bass was an innocent purchaser for value.

The appellees concede that Richard Musgrave, Jr., was entitled, as a matter of law, to have a homestead allotted to him as provided by the Constitution of North Carolina, Article X, Section 3; *Spence v. Goodwin,* 128 N.C. 273, 38 S.E. 859.

This Court held, in the last cited case, that, "The duty of a guardian *ad litem,* and in fact the object of his appointment, is to protect the interest of his wards, and he has no power to waive any substantial right, especially when such waiver is entirely without consideration. It is true that his failure to assert their rights may in certain cases estop them from doing so, but only where such assertion would interfere with the rights of third parties subsequently acquired in good faith. . . . The law does not favor the implied waiver of homestead exemptions, especially by infant defendants."

It is contended, however, that since the homestead was not allotted, and the petitioner is now of age, he is no longer entitled to such right. This Court so held in *Dickens v. Long,* 112 N.C. 311, 17 S.E. 150.

It is further argued by the appellees that the petitioner had no meritorious defense to the original proceeding and is, therefore, not entitled to have the judgment and sale set aside regardless of any irregularity therein. They are relying upon *Harris v. Bennett, supra,* and similar cases. In the above case it was determined as a fact that the estate was hopelessly insolvent and that the purchaser acted in good faith and paid full value for the property. That is not conceded here. According to the original petition to sell the real estate to create assets to pay debts, the administrator alleged that the six acre tract of land belonging to the estate of Peoria Watkins Musgrave, was worth $600.00; and that the total indebtedness against her estate was about $125.00. Consequently, if it should be determined that the original judgment was valid or voidable, and it should be further determined that Bettie Bass was not an innocent purchaser, without notice, and for value, the petitioner would have sufficient equity in the property to warrant the court to set aside the sale and to direct that the assets of the estate be administered according to law.

According to the petition filed by Richard Musgrave, Jr., the administrator of his mother's estate filed his final account on 22 July, 1932, more than two years after the purported sale on 19 June, 1930, which account was duly accepted and approved by the Clerk of the Superior Court of Johnston County on 26 August, 1932; that the administrator stated in his final account that the sale of the land now in controversy was never consummated. Moreover, it is alleged that the purported sale of 19 June, 1930, at which Bettie Bass is purported to have been the last and highest bidder in the sum of $160.00, was never authorized or reported; and that request for confirmation of such sale was not made until many months after the estate was closed although such sale, according to the decree of

confirmation, took place more than two years prior thereto. In fact, no request for confirmation of the purported sale on 19 June, 1930, was made until 5 January, 1933, and the commissioner did not execute his deed pursuant to such confirmation until 3 January, 1934. Furthermore, it is contended by the petitioner that Bettie Bass never paid the purported consideration for the land. If this is true, she was not an innocent purchaser, without notice, and for value. And there is nothing in the record to indicate that the purchase price was paid into court or to the personal representative of the estate.

Even so, a motion in the cause to set aside a judgment on the ground that it is void or voidable, may not be converted into an action to recover for trespass and waste. Once the remainderman establishes his title as such, he may institute an action for trespass and waste with or without joining the life tenant. *Loven v. Roper, supra.* But, so long as the original judgment in this proceeding, and the orders made pursuant thereto, remain in full force and effect, the petitioner cannot maintain an action for trespass and waste.

The ruling sustaining the demurrer *ore tenus* at the February Term, 1950, of the Superior Court of Johnston County, unquestionably was not intended to dismiss the petition except in so far as it alleged the right of the petitioner to the present possession of the premises. The retention of the petition "insofar as it may pertain to alleged acts of trespass or waste" necessarily implies a retention of all the allegations in the petition which were necessary to establish the petitioner's title as remainderman. Certainly the court did not hold that the petitioner had a cause of action for trespass and waste and at the same time sustain a demurrer to those allegations in his petition which were necessary to establish title in the petitioner as remainderman. However, these allegations having been made primarily in support of the petitioner's present right to possession and to recover for trespass and waste, this proceeding will not be held as prejudicial to the petitioner's right to move to vacate the original judgment and to set aside the sale.

Nevertheless, the ruling of the court below, in sustaining the demurrer with respect to the petitioner's right to recover for trespass and waste in this proceeding, for the reasons herein stated, will be upheld.

Affirmed.

JOHN M. McDOWELL v. BLYTHE BROTHERS COMPANY, INC.

(Filed 5 November, 1952.)

1. Abatement and Revival § 5½—

The pendency of a prior action between the same parties for the same cause of action in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having jurisdiction.

2. Abatement and Revival §§ 7, 8—

An action is pending for the purpose of abating a subsequent action between the same parties for the same cause of action from the time of the issuance of the summons until its final determination by judgment.

3. Abatement and Revival § 6—

The pendency of a prior action between the same parties for the same cause of action may be taken advantage of by demurrer when the fact of such pendency appears on the face of the complaint, G.S. 1-127; but must be raised by answer when the fact of the pendency of the prior action does not appear on the face of the complaint. G.S. 1-133.

4. Pleadings § 17c—

A demurrer tests the legal sufficiency of the facts as alleged in the pleading challenged, and the demurrer may not incorporate a supposed fact not shown by the pleading for the purpose of attack. The allegation of fact in the demurrer constitutes it a "speaking demurrer."

5. Abatement and Revival § 6—

Where the complaint alleges that defendant had instituted another action against plaintiff in another county on the same cause of action, but specifically alleges that such other action was instituted "after this suit had been instituted," demurrer for pendency of the other action is properly denied, since it does not appear from the face of the complaint that such other action was first instituted, nor may the priority of such other action be established by facts alleged in the demurrer.

APPEAL by defendant from *Moore, J.*, at July Term, 1952, of RANDOLPH.

Demurrer to complaint on ground that it appears upon the face of the complaint that there is another action pending between the same parties for the same cause.

The facts are stated in the numbered paragraphs set forth below:

1. This is a civil action pending in the Superior Court of Randolph County in which the plaintiff, John M. McDowell, a resident of Randolph County, seeks to recover damages totaling $25,000.00 from the defendant, Blythe Brothers Company, Inc., a domestic corporation having its principal office in Mecklenburg County, for supposed breaches of contracts allegedly made between them.

2. The summons in the action was issued by the Clerk of the Superior Court of Randolph County on 15 January, 1952, and was served on the defendant by the Sheriff of Mecklenburg County on 17 January, 1952.

3. At the time of the issuance of the summons, the clerk entered two orders in the cause. The first order extended the time for filing the complaint to 4 February, 1952, and the second order commanded F. J. Blythe, Jr., an officer of the defendant corporation, to submit to an adverse examination at the hands of the plaintiff before a designated commissioner on 31 January, 1952. The orders were made by the clerk upon verified applications filed by the plaintiff, who asserted in some detail that the adverse examination was necessary to enable him to procure information requisite for preparing his complaint. The applications and the orders stated the nature and object of the action, and copies of them were delivered to the defendant at the time of the service of the summons.

4. It was not feasible to conduct the adverse examination of F. J. Blythe, Jr., on 31 January, 1952. As a consequence, Judge Susie Sharp, acting with the consent of both the plaintiff and the defendant, entered an order in the cause at the January Term, 1952, of the Superior Court of Randolph County, postponing the holding of the adverse examination until 25 February, 1952, and permitting the plaintiff to file his complaint in the action at any time within the twenty days next succeeding "the filing of the report of said examination by the commissioner."

5. Within the time specified in Judge Sharp's order, to wit, on 4 April, 1952, the plaintiff filed his complaint in the action. In addition to stating the plaintiff's cause of action against the defendant, the complaint sets forth the extraneous averment "that the defendant, in order to harass the plaintiff, instituted a suit in Mecklenburg County after this suit had been instituted about the identical matters and things in this complaint."

6. The Clerk of the Superior Court of Randolph County forthwith made an order directing the Sheriff of Mecklenburg County to serve a copy of the complaint on the defendant, and the Sheriff of Mecklenburg County made return to the clerk within ten days showing that he made such service on the defendant on 11 April, 1952.

7. The defendant thereupon filed this written demurrer: "The defendant demurs to the plaintiff's complaint and for cause of demurrer says, (that) an action was instituted in Mecklenburg County between these parties on the same date this action was instituted in Randolph County, and service was had on the plaintiff in this action in the cause pending in Mecklenburg County prior to service on the defendant in this action; that the complaint in this action was not filed until 4 April, 1952, and was not served on this defendant until 11 April, 1952; that said complaint sets forth the existence and pendency of a suit in Mecklenburg County; that the said action then and now pending in Mecklenburg County was

at issue prior to the filing of pleadings in this action and this suit is between the same parties and involves the same cause of action. Wherefore, the defendant prays that this action be dismissed."

8. Judge Dan K. Moore, who presided at the July Term, 1952, of the Superior Court of Randolph County, entered a judgment overruling the demurrer and granting defendant leave to answer. The defendant excepted and appealed, assigning the ruling on its demurrer as error.

Ottway Burton for plaintiff, appellee.

Cochran, McCleneghan & Miller and Miller & Moser for defendant, appellant.

ERVIN, J. The appeal presents the single question whether the presiding judge erred in overruling the demurrer interposed by the defendant on the ground that the complaint discloses upon its face that there is another action pending between the plaintiff and the defendant for the same cause within the purview of the statute codified as G.S. 1-127.

The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction. *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796; *Seawell v. Purvis,* 232 N.C. 194, 59 S.E. 2d 572; *Brothers v. Bakeries,* 231 N.C. 428, 57 S.E. 2d 317; *Whitehurst v. Hinton,* 230 N.C. 16, 51 S.E. 2d 899; *Taylor v. Schaub,* 225 N.C. 134, 33 S.E. 2d 658; *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690; *O'Briant v. Bennett,* 213 N.C. 400, 196 S.E. 336; *Bowling v. Bank,* 209 N.C. 463, 184 S.E. 13; *Brown v. Polk,* 201 N.C. 375, 160 S.E. 357; *Bank v. Broadhurst,* 197 N.C. 365, 148 S.E. 452; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686, 64 A.L.R. 656; *Morrison v. Lewis,* 197 N.C. 79, 147 S.E. 729; *Crouse v. York,* 192 N.C. 824, 135 S.E. 451; *Bradshaw v. Bank,* 175 N.C. 21, 94 S.E. 674; *Carpenter v. Hanes,* 162 N.C. 46, 77 S.E. 1101; *Emry v. Chappell,* 148 N.C. 327, 62 S.E. 411; *Ridley v. Railroad,* 118 N.C. 996, 24 S.E. 730; *McNeill v. Currie,* 117 N.C. 341, 23 S.E. 216; *Long v. Jarratt,* 94 N.C. 443; *Redfearn v. Austin,* 88 N.C. 413; *Smith v. Moore,* 79 N.C. 82; *Gray v. A. & N. C. R. R. Co.,* 77 N.C. 299; *Claywell v. Sudderth,* 77 N.C. 287; *Sloan v. McDowell,* 75 N.C. 29; *Woody v. Jordan,* 69 N.C. 189; *Harris v. Johnson,* 65 N.C. 478; *Casey v. Harrison,* 13 N.C. 244. The law decrees that the second action is abated by the action which is first in point of time because the court can dispose of the entire controversy in the prior action and in consequence the subsequent action is wholly unnecessary. *Lineberger v. Gastonia,* 196 N.C. 445, 146 S.E. 79; 1 C.J.S., Abatement and Revival, section 33. An action is pending for the purpose of abating a subsequent action between the same parties for

the same cause from the time of the issuance of the summons until its final determination by judgment. *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833; *Atkinson v. Greene,* 197 N.C. 118, 147 S.E. 811; *Morrison v. Lewis, supra; Construction Co. v. Ice Co.,* 190 N.C. 580, 130 S.E. 165; *Pettigrew v. McCoin,* 165 N.C. 472, 81 S.E. 701, 52 L.R.A. (N.S.) 79.

Under the statute codified as G.S. 1-127, the defendant must take advantage of the pendency of a prior suit between the same parties for the same cause by demurrer when the fact of such pendency appears on the face of the complaint; and under the statute embodied in G.S. 1-133, the defendant must take advantage of the pendency of a prior suit between the same parties for the same cause by answer when the fact of such pendency does not appear on the face of the complaint. *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892; *Lumber Co. v. Wilson,* 222 N.C. 87, 21 S.E. 2d 893; *Thompson v. R. R.,* 216 N.C. 554, 6 S.E. 2d 38; *Johnson v. Smith,* 215 N.C. 322, 1 S.E. 2d 834; *Reed v. Mortgage Co.,* 207 N.C. 27, 175 S.E. 834; *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545; *Cook v. Cook,* 159 N.C. 46, 74 S.E. 639, 40 L.R.A. (N.S.) 83, Ann. Cas. 1914A, 1137; *Emry v. Chappell, supra; Alexander v. Norwood,* 118 N.C. 381, 24 S.E. 119; *Curtis v. Piedmont Co.,* 109 N.C. 401, 13 S.E. 944; *Hawkins v. Hughes,* 87 N.C. 115; *Smith v. Moore, supra; Harris v. Johnson, supra; Rogers v. Holt,* 62 N.C. 108. The objection that a prior action is pending between the same parties for the same cause is waived unless it is raised in the mode appointed by law. G.S. 1-134; *Reece v. Reece, supra; S. v. Gant,* 201 N.C. 211, 159 S.E. 427; *Montague v. Brown,* 104 N.C. 161, 10 S.E. 186; *Blackwell v. Dibbrell,* 103 N.C. 270, 9 S.E. 192.

Since a demurrer is itself a critic, it ought to be free from imperfections. *Williams v. Seaboard Air Line Ry. Co.,* 165 Ga. 655, 141 S.E. 805. The only office of a demurrer is to test the legal sufficiency of the facts stated in the pleading of an adversary. In consequence, it is not permissible for a demurrant to incorporate in his demurrer facts not shown by the pleading challenged by the demurrer. Where a demurrer to a complaint invokes the aid of a supposed fact which does not appear in the complaint, it is a "speaking demurrer," and offends both the common law and code systems of pleading. The court will not consider the supposed fact introduced by the "speaking demurrer" in passing on the legal sufficiency of the facts alleged in the complaint. *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371; *Nall v. McConnell,* 211 N.C. 258, 190 S.E. 210; *Morrow v. Cline,* 211 N.C. 254, 190 S.E. 207; *Ball v. Hendersonville,* 205 N.C. 414, 171 S.E. 622; *Southerland v. Harrell,* 204 N.C. 675, 169 S.E. 423; *Ellis v. Perley,* 200 N.C. 403, 157 S.E. 29; *Hamilton v. Rocky Mount,* 199 N.C. 504, 154 S.E. 844; *Reel v. Boyd,* 195 N.C.

273, 141 S.E. 891; *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800; *Latham v. Highway Commission,* 185 N.C. 134, 116 S.E. 85; *Moody v. Wike,* 170 N.C. 541, 87 S.E. 350; *Wood v. Kincaid,* 144 N.C. 393, 57 S.E. 4; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916; *Van Glahn v. De Rossett,* 76 N.C. 292; 71 C.J.S., Pleading, section 256.

The task of applying the relevant rules to the case at bar must now be performed. The demurrer under scrutiny is a "speaking demurrer," for it invokes the aid of supposed facts which do not appear in the complaint. When these supposed facts are disregarded and recourse is had to the complaint itself, it is plain that the only facts properly before the court having any pertinency to the legal question raised by the demurrer are those set out in the extraneous allegation "that the defendant, in order to harass the plaintiff, instituted a suit in Mecklenburg County after this suit had been instituted about the identical matters and things in this complaint."

While this allegation does state that this action and the Mecklenburg suit are between the same parties for the same cause, it does not aver that the Mecklenburg suit is the prior action. Indeed, it makes the diametrically opposite assertion that this action is the first one in point of time and that the Mecklenburg suit was brought "after this suit had been instituted." This being true, the judgment overruling the demurrer must be

Affirmed.

A. C. WARD, T/A VICTORY CAB COMPANY, v. MARTIN WESLEY CRUSE AND AKERS MOTOR LINES, INC.

(Filed 5 November, 1952.)

1. Trial § 22b—

Only so much of defendant's evidence as is favorable to plaintiff or tends to explain or make clear plaintiff's evidence may be considered upon defendant's motion to nonsuit, and evidence offered by defendant in conflict with or contradictory to plaintiff's evidence may not be considered.

2. Automobiles §§ 8i, 14—

Where the driver of a preceding vehicle traveling in the same direction gives a clear signal of his intention to turn left into an intersecting road and leaves sufficient space to his right to permit the overtaking vehicle to pass in safety, the provisions of G.S. 20-149 (a) do not apply, and the overtaking vehicle may pass to the right of the overtaken vehicle, but this rule does not relieve the driver of the overtaking vehicle of the duty of observing other pertinent statutes, including the duty to give audible warning of his intention to pass as required by G.S. 20-149 (b).

3. Automobiles §§ 18h (2), 18h (3)—Evidence held for jury on issues of negligence and contributory negligence in accident at intersection.

Plaintiff's evidence tended to show that he was driving his taxi in a westerly direction on a highway, intending to turn left at an intersecting road, that he gave a left turn signal some 200 or 250 feet before the intersection, but discontinued his left-turn signal some 100 feet before reaching the intersection and was driving along the center of the highway straddling the center line without having completely cleared his right-hand traffic lane, that he looked back to see whether it was safe for him to turn to his right to pick up his prospective passengers whom he had seen on the right side of the highway, when he saw defendant's truck for the first time with its bumper practically against his bumper, and that the collision ensued almost immediately as the truck attempted to pass the taxi to its right. *Held:* Defendant's motion to nonsuit on the issues of negligence and contributory negligence should have been refused, since whether defendant was guilty of negligence is for the determination of the jury upon correct instructions of the court, and plaintiff's own evidence does not warrant the conclusion, as a matter of law, that plaintiff's conduct was a contributing cause of the collision.

4. Appeal and Error § 11—

The cost of preparing the transcription of the record is a part of the costs in the Supreme Court, and the judge of the Superior Court upon the subsequent trial is without jurisdiction to entertain motion for the recovery of such costs. G.S. 6-33.

5. Same—

"The cost of making up the transcription on appeal" refers only to the cost of transcribing the judgment roll and case on appeal which the clerk of the Superior Court is required to certify to the clerk of the Supreme Court, G.S. 1-284, and an amount expended for a transcription of the testimony preliminary to preparing and serving appellant's case on appeal constitutes no part of this cost. G.S. 6-34.

APPEAL by plaintiff from *Clement, J.*, March Term, 1952, RANDOLPH. Reversed.

Civil action to recover compensation for damages to plaintiff's taxicab resulting from a collision with defendant's tractor-trailer.

A highway (49 and 64) extending westwardly out of Asheboro is locally known as the by-pass. Another highway which intersects this road is locally known as the Whitley road. Hereafter they will be referred to by their local names.

On 13 October 1950, plaintiff was operating his taxi westwardly on the by-pass with the intention of turning left on the Whitley road to "pick up" some passengers who had called for a taxi. Defendant Cruse, operating the corporate defendant's tractor-trailer, was traveling in the same direction some distance to the rear. When plaintiff got within 200 or 250 feet of the intersection he gave a left-turn signal. What thereafter oc-

curred, stated in the light most favorable to plaintiff, is best described in the language of the plaintiff. He testified:

"I was going down to Whitley's. I came down 200 or 250 feet and I gave a left-hand signal and the boys were up on my right . . . they whistled and I withdrew my signal and coasted along in the middle of the highway straddle of the white line, and I saw the colored boys on my right . . . I turned and looked through my mirror to see if it was clear to turn in, and when I did, this truck—his bumper was right up over my bumper behind me. He was more to my right . . . I looked back over my shoulder and saw the truck right in behind me with his bumper over mine. I did my best to try to get out. I kept going and he overtook me right here. When he overtook me, he drug his wheels and tried to stop, but he didn't. He hit my right; his front bumper hit my back panel. His bumper scraped me all the way from the back to the front . . . My car was in the center of the intersection when a tractor-trailer operated by Mr. Cruse hit me . . . The truck did not at any time give any warning that he was attempting to pass me . . . I was knocked down the road approximately 30 or 40 feet . . . He stopped in the intersection . . . When I saw the boys I looked back over my shoulder to see if everything was clear to turn to my right, and the bumper was right over mine and I didn't have time to do anything. All I could do was try to get out of the way . . . My car, with respect to the middle of the road, was on the right-hand side when I withdrew my signal. I pulled up to the middle of the road, and I was looking to my left, and I looked back to my right and saw the boys. I was straddle of the middle line, probably a hundred feet back from the center of the road . . . When I first saw the Akers truck, his front bumper was right over my rear bumper. After that it traveled 20 or 30 feet before the collision. His bumper was practically against my bumper . . . I hadn't seen it at all up till then. When I first saw the truck it was 20 or 30 feet from the intersection. My car was straddle of the center line at that time . . . I did not cut my car directly toward the boys and in front of that truck of the defendant in this case."

Defendants offered evidence which sharply contradicts the testimony of plaintiff.

At the conclusion of the testimony the court, on motion of defendants, entered judgment as in case of nonsuit. Plaintiff excepted and appealed.

Ottway Burton for plaintiff appellant.
H. M. Robbins for defendant appellees.

BARNHILL, J. The record on the former appeal, *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257, disclosed that plaintiff testified on the first trial that when he reached the intersection and after seeing his prospective

passengers some distance up the Whitley road to his right, he swerved his vehicle back to his right to enter the north branch of the Whitley road. He did not so testify in the court below. While there was testimony that plaintiff gave a left-turn signal and drove his vehicle completely on the left, or south, side of the by-pass and then cut back sharply to his right to enter the north, or right-hand, branch of the Whitley road, this testimony came from witnesses for the defendant. And it is axiomatic that evidence offered by the defendant which is in conflict with or contradicts the testimony offered by the plaintiff is not to be weighed in the balance in the consideration of an exception to a judgment of involuntary nonsuit. *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Rice v. Lumberton,* 235 N.C. 227.

Only so much of the defendants' evidence as is favorable to the plaintiff or tends to explain or make clear that which has been offered by the plaintiff may be considered in determining whether the evidence, considered in the light most favorable to the plaintiff, makes out a case for the jury. *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740; *Atkins v. Transportation Co., supra; Rice v. Lumber Co., supra.*

G.S. 20-149 (a) requires the driver of a vehicle, in overtaking and passing another vehicle proceeding in the same direction, to pass at least two feet to the left thereof. In discussing this statute in *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613, we said:

". . . notwithstanding the provisions of this statute, a motorist may, in the exercise of ordinary care, pass another vehicle, going in the same direction, on the right of the overtaken vehicle when the driver of that vehicle has given a clear signal of his intention to make a left turn and has left sufficient space to the right to permit the overtaking vehicle to pass in safety."

While we adhere to this rule, it is not controlling here, as a matter of law, so as to warrant or require a judgment of nonsuit.

Considering the evidence in the light most favorable to the plaintiff, he discontinued his left-turn signal some 150 feet before he reached the intersection and was driving along the middle of the highway, straddling the center line. He had not completely cleared the right-hand lane of traffic. Instead, that lane was partly blocked by his taxi when the individual defendant approached from the rear and undertook to pass him on his right-hand side.

Furthermore, plaintiff's evidence tends to show that Cruse undertook to pass plaintiff without first giving audible warning of his intention so to do as required by G.S. 20-149 (b). The rule stated in the *Maddox case* was not intended to and does not relieve a motorist of the duty of observing other pertinent provisions of our statute regulating the operation of motor vehicles upon the public highways of the State.

Therefore, whether the facts and circumstances surrounding the collision, as they are found to be from the conflicting testimony offered, establishes actionable negligence on the part of Cruse is a question for the jury to decide under appropriate instructions by the court, applying the rule stated in the *Maddox case* and the provisions of the pertinent statutory traffic regulations. *Conley v. Pearce-Young-Angel Co., supra.*

The plaintiff's evidence is not such as to warrant the conclusion, as a matter of law, that his conduct was a contributing cause of the collision and the resulting damage to his taxi. This too is a question for the jury. *Conley v. Pearce-Young-Angel Co., supra; Atkins v. Transportation Co., supra; Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121; *Fowler v. Atlantic Co.,* 234 N.C. 542, 67 S.E. 2d 496; *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S.E. 2d 45.

In preparation for his appeal from the judgment entered at the first trial, plaintiff paid the official court reporter $104.46 for a transcript of the testimony offered at that trial. He moved in the court below that he have and recover of defendants said sum as a part of the costs recoverable by him under the provisions of G.S. 6-33, 34. The motion was denied and plaintiff excepted.

G.S. 6-34 provides that: "When an appeal is taken from the superior court to the supreme court, the clerk of the superior court, when he sends up the transcript, shall send therewith an itemized statement of the costs of making up the transcript on appeal, and the cost thereof shall be taxed as a part of the costs of the supreme court."

Under this statute the cost of preparing the transcript of the record becomes a part of the cost incurred in this Court and is taxable as such. There has been no motion to retax the costs assessed by the clerk of this Court and the judge of the superior court was without jurisdiction to entertain the motion filed in the court below. *Bailey v. Hayman,* 222 N.C. 58, 22 S.E. 2d 6; *Ebert v. Disher,* 216 N.C. 546, 5 S.E. 2d 716.

"If in any court of appeal there is judgment for a new trial, or for a new jury . . . the costs shall be in the discretion of the appellate court." G.S. 6-33.

In this connection it is well to note that the decision in *Dobson v. R. R.,* 133 N.C. 624, was rendered prior to the enactment of ch. 456, P.L. 1905, which is now codified as G.S. 6-34.

Even if we waive the questions of jurisdiction and procedure, we must conclude that plaintiff's exception is without merit. "The cost of making up the transcript on appeal," G.S. 6-34, has reference to and includes only the cost of transcribing the judgment roll and case on appeal, as finally agreed or settled, which the clerk of the Superior Court is required to certify to this Court. G.S. 1-284. The amount expended for a transcript of the testimony preliminary to preparing and serving appellant's pro-

posed case on appeal constitutes no part of this cost. Hence the order entered denying the motion is affirmed.

For the reasons stated the judgment entered in the court below dismissing the action as in case of nonsuit is

Reversed.

PAUL PATTERSON v. PAUL MOFFITT, T/A MOFFITT MOTORS.

(Filed 5 November, 1952.)

1. Automobiles § 19a: Negligence § 4a—

A person who is asked to ride in an automobile as a prospective purchaser is an invitee, and the driver owes him the correlative duties, including the duty to exercise ordinary care to avoid committing any act of negligence or imprudence which might add to or increase the danger.

2. Negligence § 9—

Proximate cause is an essential element of actionable negligence and foreseeability is an essential element of proximate cause.

3. Automobiles § 19a: Negligence § 19b (1)—Evidence held to show that accident could not have been reasonably foreseen, and nonsuit was proper.

Plaintiff's evidence tended to show that he was an invitee in defendant's car, that after a trip, defendant, who was driving, first alighted, and that plaintiff, who was sitting on the back seat, in attempting to alight, put his hand on the center post in such manner that when defendant closed the front door, the plaintiff's fingers were caught between the center post and the door, causing painful and serious injury. *Held:* Defendant was not under duty to anticipate or foresee before closing the door that plaintiff's hand was on the door jamb in such manner that his fingers would be caught and crushed by the closing door, and nonsuit was properly entered.

APPEAL by plaintiff from *Clement, J.*, March Term, 1952, RANDOLPH. Affirmed.

Civil action to recover compensation for personal injury.

Both plaintiff and defendant are dealers in used automobiles. On 19 December 1950, about 7:00 or 8:00 p.m., defendant, in an effort to sell plaintiff a second-hand Dodge automobile, invited him to become a passenger to observe how the vehicle operated and performed. "He said if I would drive it that I would buy it." They left the filling station where the automobile was parked, with defendant and one Grady Moffitt on the front seat. Defendant was driving, and plaintiff was sitting on the left side of the rear seat. After driving the automobile about one mile, defendant returned to the filling station where the parties got off about the same time.

The front doors to the vehicle open from the front and are hinged to a door post about the middle of the automobile at or near the back to the front seat. The rear doors open in the same way. As plaintiff, a somewhat stout, heavy person, started to alight, he caught hold of this door post "to pull up." Defendant, having alighted first, closed or "slammed" the front door on the left side. Plaintiff's middle finger on his left hand was caught in the door and the bone was crushed. One or two of the other fingers on his left hand were "pinched," causing blood blisters, but the skin was not broken.

On direct examination plaintiff testified: "I put my hand up to pull up while Paul Moffitt had the door open, and the door opening from the front, I got my finger in the car on the back and before I would (could) get out Mr. Moffitt slammed the door on my finger, was caught in the car. When he slammed or closed the door he did not look to see what he was doing. He did not first know that my finger was caught until he heard from me." Then, on cross-examination: "The purpose of that post is to keep the doors fastened. It was that post that I grabbed hold of in getting out. I am a little heavy, and I took hold of it with my left hand, and all of me begin getting out of the automobile. It is a little harder to get out of the back seat. All of us started to get out at approximately the same time. I didn't tell Mr. Moffitt that I was going to use that door jamb to assist myself to get out. Mr. Moffitt didn't see me. Mr. Moffitt just got out and closed the door. The door caught one of my fingers . . ."

It was dark at the time, but the filling station at which the automobile stopped was sufficiently lighted for people to see.

At the conclusion of the evidence for the plaintiff the court, on motion of defendant, entered judgment as in case of nonsuit. Plaintiff excepted and appealed.

Ottway Burton for plaintiff appellant.
Jordan & Wright for defendant appellee.

BARNHILL, J. The plaintiff was an invitee, and defendant owed him all the duties imposed on a host or inviter under the same or similar circumstances. These include the duty to exercise ordinary care to avoid committing any act of negligence or imprudence which might add to or increase the danger to his invitee. 4 Blashfield 368, sec. 2321.

Plaintiff's only allegation of negligence is that the defendant "negligently . . . and without regard for the safety of . . . the plaintiff, slammed the door on the plaintiff's finger, without first ascertaining that such an act could be done safely."

This poses for decision this simple question: Under the circumstances disclosed by the evidence was it the duty of defendant to ascertain whether

plaintiff's hand was on the door jamb before closing the front door to his automobile on which plaintiff was riding as an invitee passenger?

The record before us fails to disclose with any degree of satisfaction just how the mishap which caused the injury to plaintiff's fingers occurred. The front doors of the automobile were hinged to the center door posts and opened from the front. Plaintiff alleges that he "was attempting to get out of the car and was pulling himself up from the seat by his left hand with the left hand being on the door jamb of the rear seat of the automobile." He testified: "I was in the back seat on the left side, and I opened my door and attempted to get out, and Paul got out first . . . then I put my hand up to pull up while Paul Moffitt had the (front) door open . . ."

It would seem from his explanation of the mishap the plaintiff, a stout, heavy man, was attempting at the time to pull himself up to a standing or stooping position before alighting, or else he was attempting to slide out of the vehicle sidewise. And it is evident that his fingers were partly in the opening between the post and the door which was formed when the front door swung on its hinges as it was opened. Did plaintiff grasp the post on the outside or the inside? Were his fingers in the outer or inner portion of the opening? The record fails to answer.

Proximate cause is an essential element of actionable negligence and foreseeability is an essential element of proximate cause. *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; *Deaver v. Deaver, ante,* p. 186, and cases cited.

The plaintiff is an adult. He is engaged in the purchase and sale of used automobiles and is familiar with motor vehicles. If the accident happened as he testified, he was at the time facing towards the front of the vehicle. It is doubtful whether defendant, in the position the parties were then placed, with the open door intervening, could have seen the left hand of the plaintiff on the door jamb even if he had looked before closing the front door. Be that as it may, we are unable to perceive that it was his duty, under the circumstances here disclosed, to anticipate or foresee that plaintiff had his hand on the door jamb in such manner that his fingers would be caught and crushed by the closing door. Such a high degree of foresight or prevision is not exacted by the law of negligence. In short, the record discloses nothing more than one of those distressing accidents which occur daily and for which no person may be held liable in damages. *Deaver v. Deaver, supra.*

There is no decision in this jurisdiction substantially on all fours. *Skinner v. R. R.*, 128 N.C. 435, and *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917, are most nearly in point. We have carefully examined the decisions from other jurisdictions cited and relied on by plaintiff. (*Moore v. Davis,* 199 So. 205; *Wildes v. Wildes,* 247 N.W. 508; *Mun-*

dinger v. Sewell, 40 S.W. 2d 530; *May v. Abelman,* 179 S.E. 221.) In our opinion all are factually distinguishable. See also *Iaquinto v. Notarfrancesco,* 195 A. 169, and *Jude v. Jude,* 271 N.W. 475, which are likewise distinguishable.

The judgment entered in the court below is

Affirmed.

STATE v. JAMES ROBINSON.

(Filed 5 November, 1952.)

1. Bastards § 1: Criminal Law § 21—

The offense proscribed by G.S. 49-2 is the willful neglect or refusal of a parent to support his or her illegitimate child, and the question of paternity is incidental thereto, and therefore a judgment as of nonsuit in such prosecution does not constitute an adjudication on the issue of paternity and will not support a plea of former acquittal in a subsequent prosecution under the statute, the offense being a continuing one.

2. Bastards § 1—

In a prosecution of a father for willful neglect or refusal to support his illegitimate child, the issue of paternity must first be determined before and separate from the determination of the issue of guilt or innocence of the offense charged. G.S. 49-2, G.S. 49-7.

3. Bastards § 7—

In a prosecution under G.S. 49-2 an affirmative finding that defendant willfully failed and refused to support his illegitimate child does not constitute a verdict of guilty, but merely embraces facts upon which a verdict of guilty should be predicated, and where there is no verdict a new trial must be awarded.

APPEAL by defendant from *Sink, J.,* at April Term, 1952, of CATAWBA.

Criminal prosecution upon a bill of indictment, a true bill found at April Term, 1952, of Catawba County, charging "that James Robinson . . . on the 25th day of February in the year of our Lord one thousand nine hundred and 52, with force and arms, at and in the county aforesaid, did unlawfully and willfully fail, neglect and refuse to support and maintain his illegitimate child, Kathy Louise Smith, which he had theretofore begotten upon the body of Carrie Jean Smith . . .," etc.

Upon the call of the case for trial, on said bill of indictment and prior to the impaneling of the jury, and before the entering of any plea, defendant entered a plea of "former jeopardy" and "former acquittal."

In this connection the record shows: That on 1 December, 1951, a warrant issued out of the Municipal Court of city of Hickory upon affidavit charging that "James Robinson on or about the 1st day of Decem-

ber, 1951, in Catawba County . . . did unlawfully and willfully neglect and refuse to support and maintain his illegitimate child Kathy Louise which he . . . did willfully beget upon the body of Carrie Jean Smith" etc.; that the defendant pleaded not guilty; and that on 4 January, 1952, the Municipal Judge entered judgment as follows: "At close of State's evidence, motion for nonsuit allowed." (This is the judgment on which defendant's plea of "former jeopardy" and "former acquittal" is based.)

The record also shows: That on 12 January, 1952, another warrant issued out of the Municipal Court of the city of Hickory upon affidavit in substantially the same form as that on which the warrant of 1 December, 1951, was issued, except that the date of the alleged offense is 4 January, 1952; that upon call of this criminal action defendant filed a plea of "former jeopardy" and "former acquittal,"—the same as that hereinabove set forth; that defendant pleaded "Not guilty"; that on 30 January, 1952, the Judge of the Municipal Court rendered a special verdict on defendant's plea of former jeopardy, and adjudged that defendant is not guilty of the offense charged in the warrant; that the State appealed from this judgment to Superior Court; and that on 12 February, 1952, upon the call of the appeal, the presiding judge of Superior Court, holding that the Municipal Court of the city of Hickory had no authority to render any kind of special verdict, remanded the matter for proper judgment in said court.

And the record further shows that in said Municipal Court defendant renewed "his plea of former jeopardy and former acquittal" and tendered to the court this issue: "Has the defendant been formerly acquitted of the offense wherewith he now stands charged?"; that the court refused to answer the issue, and thereupon defendant pleaded "Not guilty"; that after hearing the evidence, the court found defendant to be guilty, and rendered judgment dated 14 March, 1952. And it is stipulated of record that defendant appealed from this judgment, and that same was duly docketed in Superior Court of Catawba County, and stood for trial at the April Term, 1952, of said court; at which term a true bill of indictment was found as first hereinabove stated.

The court denied the pleas. Defendant excepted. Exception No. 1.

Thereupon defendant resubmitted in writing the same issue as to former acquittal. It was denied by the court, and to this ruling defendant excepted. Exception No. 2.

The court stated to counsel for defendant that these two issues would be submitted to the jury:

"1. Is the defendant the father of the illegitimate child, as alleged by the State?

"2. If so, has the defendant willfully failed and refused adequately to provide for such illegitimate child, as alleged by the State?"

To these issues, and each of them, defendant, in apt time, objected and excepted. Exception No. 3.

Defendant entered his plea of "not guilty."

And upon the trial in Superior Court Carrie Jean Smith as witness for the State testified in summary as follows: That commencing in February and on various occasions during March and up into April, 1951, she had sexual intercourse with James Robinson, the defendant; that she became pregnant in the latter part of February but did not know it until she went to see a doctor; that she did not tell defendant about it; that he never discussed it with her; that he never came back to see her; that the baby, a girl, was born 29 November, 1951, in Hickory Memorial Hospital, and was named Kathy Louise Smith; that defendant is the father of her child; that she made demand on defendant in February of this year, and, quoting her, "he made no reply when I told him I expected support"; and that he has not provided any support for the child, nor has he paid any part of the hospital or medical expenses.

Defendant, reserving exception to denial of his motion for judgment as of nonsuit entered when the State first rested its case, offered in evidence warrant, dated 1 December, 1951, issued out of the Municipal Court of the city of Hickory, N. C., in the case of *S. v. James Robinson*, together with judgment of the court rendered in the case on 4 January, 1952, allowing motion for nonsuit. The State's objection sustained as to the judgment and adjudication; overruled as to the warrant.

Defendant objected to the ruling of the court disallowing the judgment and adjudication, and to each of them, defendant, in apt time, excepts. Exception No. 7.

The case was submitted to the jury on the two issues, in accordance with statement of the court to counsel for defendant as hereinabove copied, to each of which the jury answered "Yes." Nevertheless there is no verdict as to guilt of defendant.

Motion of defendant to set aside the verdict on each issue, as being contrary to the weight of evidence, and for errors committed in the progress of the trial assigned, and to be assigned. Motion denied. Defendant excepted. Exception No. 4.

Thereupon the court entered judgment that defendant be confined in the common jail of Catawba County six months and assigned to work the roads as provided by law, and pay the costs. Defendant appeals therefrom to the Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

Theodore F. Cummings for defendant, appellant.

WINBORNE, J. Decision on this appeal as to the issue of paternity turns upon the answer to this question: Does the granting of a motion under G.S. 15-173 for judgment of nonsuit, or verdict of not guilty in a criminal prosecution, charging defendant with willful neglect or refusal to support and maintain his illegitimate child, constitute a negative finding on the issue of paternity? If so, the plea of former acquittal set up by defendant would be well taken. But if not, then the plea of former acquittal must fail. And in the light of the statutes, G.S. 49-2, G.S. 49-7, as interpreted and applied in decisions of this Court, we are of opinion, and hold that such judgment of nonsuit does not constitute an adjudication on the issue of paternity.

G.S. 49-2 provides that "any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor . . ."

The only prosecution contemplated under this statute is that grounded on the willful neglect or refusal of a parent to support his or her illegitimate child,—the mere begetting of the child not being denominated a crime. *S. v. Dill,* 224 N.C. 57, 29 S.E. 2d 145; *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Bowser,* 230 N.C. 330, 53 S.E. 2d 282; *S. v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157. See also *S. v. Tyson,* 208 N.C. 231, 180 S.E. 85.

The question of paternity is incidental to the prosecution for the crime of nonsupport. *S. v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462; *S. v. Bowser, supra; S. v. Stiles, supra; S. v. Thompson, supra.*

Moreover, this statute, as interpreted by this Court, creates a continuing offense. *S. v. Johnson,* 212 N.C. 566, 194 S.E. 319; *S. v. Bradshaw,* 214 N.C. 5, 197 S.E. 564; *S. v. Davis,* 223 N.C. 54, 25 S.E. 2d 164.

And G.S. 49-7, after prescribing jurisdiction of the courts in such matters, declares that "The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted," and that, "After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to support and maintain the child who is the subject of the proceeding."

Thus it seems clear that the Legislature intended that the issue of paternity first be determined before, and separate from determination on the issue of guilt or innocence of the offense charged.

Indeed, in the case of *S. v. Wilson,* 234 N.C. 552, 67 S.E. 2d 748, *Barnhill, J.,* in a concurring opinion, summarizes decisions of this Court by saying: "The only prosecution contemplated under the statute is grounded on the willful neglect or refusal of a parent to support his illegitimate child. The mere begetting the child is not denominated a crime. The question of paternity is incidental to the prosecution for the

crime of nonsupport—a preliminary requisite to conviction," and then concludes by saying: "Hence a verdict of not guilty on the charge of willful nonsupport does no more than find the defendant not guilty of the crime laid in the bill. The verdict could not be construed to be a verdict of not guilty of begetting the child." This declaration, when delivered, was *obiter dictum*. But, being so pertinent to situation in hand, it is here adopted as the law of the present case.

Hence the verdict on the first issue, that is, as to paternity, will stand. However, since there is no verdict as to guilt of defendant on the fact found as to the offense charged, there must be a new trial on the second issue,—with instruction that if the issue be answered "Yes" the jury should return a verdict of guilty, or guilty as charged.

New trial.

STATE v. CHARLIE HOSKINS, JAMES LANCASTER, AND CHRISTOPHER LOCKLEY.

(Filed 5 November, 1952.)

1. Receiving Stolen Goods § 4—

Possession of recently stolen property, without more, raises no presumption that the possessor received it with knowledge that it had been feloniously stolen. G.S. 14-71.

2. Receiving Stolen Goods § 6—Evidence held insufficient for jury in this prosecution for receiving stolen goods.

The State's evidence tending to show merely that the thieves of tires went to defendant's house late at night and asked him if he wished to buy some tires, that defendant said it was too late to talk about buying tires and to come back the next day, and that the next day the stolen tires were found covered up on a disabled truck in defendant's woodyard, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt of receiving stolen property with knowledge that the property had been stolen, and *held further*, testimony of the officers to the effect that defendant did not know that the tires were on his property and was surprised when they were found there would seem to exculpate defendant of even receiving the property.

3. Criminal Law § 52a (1)—

Exculpatory testimony of the State's witnesses may be considered on motion to nonsuit, since the State by offering such testimony presents it as worthy of belief.

APPEAL by defendant Christopher Lockley from *Burney, J.*, at June Term, 1952, of CRAVEN.

Criminal prosecution upon a bill of indictment charging Charlie Hoskins, James Lancaster and Christopher Lockley in separate counts with these offenses (1) felonious breaking and entering building of Jake Hill, (2) larceny of automobile tires of value of $400, goods of Jake Hill, and (3) feloniously receiving stolen automobile tires of value of $400, goods of Jake Hill, knowing them to have been stolen.

Upon the trial in Superior Court the evidence offered by the State tends to show that the service station of Jake Hill was broken into and twenty-six new tires and two re-caps were taken therefrom on Monday night, 6 May, 1952, and that the defendants Charlie Hoskins and James Lancaster were implicated in both offenses.

And the evidence offered by the State as it relates to defendant Christopher Lockley is substantially as follows: Between one and two o'clock on the night of the breaking, and as the tires were being stacked by defendant Charlie Hoskins behind Hugh Smith's real estate office, quoting James Lancaster, as a witness for the State, "I went down to Diz Lockley's with Quinn . . . to Diz Lockley's house which was about two or three blocks from the filling station. I figure it was between one and two o'clock. When I got to Lockley's I knocked on the door and it was some time before he came down, and he said it was too late for him to go and look at any tires. Quinn asked him about the tires, and he said it was late at night and he would see him in the morning, and he also recommended a guy to him to move the tires. Lockley did that . . . Then me and Quinn went back, and when we got to where the tires were behind that building I left and went home . . ."

Then on cross-examination, this witness continued: "I didn't see Lockley until about three thirty that afternoon. I asked him if he would like to buy some tires and he asked what size they were, and I told him and he wrote it down on a piece of paper. And at that time I did not tell him I was going to steal any tires . . . He knew I wasn't in the tire business. When I went to Diz Lockley's house that night I did not tell him I had stolen the tires. I told him I had some tires. He didn't know where they came from and I did not tell him anything about them. So far as I knew he did not have any reason to think they were stolen . . . After he told me it was too late at night to talk about buying any tires he said come back in the morning and I will look at them. I saw him on Tuesday morning. He passed me at Five Points. I didn't talk to him. And I did not see the tires any more after that night behind the filling station. As to what happened to them after they were at Isaac Smith's place, I do not know. I left and went home."

Capt. Brinson, as witness for the State, testified: ". . . I came in on this matter on Wednesday when the tires were found . . . Mr. Jernigan, Mr. Toler and myself got a search warrant for Christopher Lockley's

woodyard and went up there looking for tires. It is a closed-up woodyard. We went there and Lockley was asleep and we gave him a minute to get up and get himself straight. And we asked him if he had some tires, and told him we had a search warrant, and started to read it. And he said, 'You needn't read it, they are here.' We went in and saw some tires that looked like second-hand tires . . . and I told him I was looking for mostly new tires, that that was not what I was looking for. And Diz said they weren't there. He said, 'You can go and look anywhere you want to on the place.' . . . And there was a truck parked inside the woodyard —about a ton-and-a-half Chevrolet which had a flat body with sides about 4½ feet—just boards nailed on top of the other. I walked up to the truck . . . and there were some tires in there . . . that had some boards over them and partially covered up. I called Diz and said, 'Diz, here's the tires I am looking for.' And Diz started raising sand, that is, about the tires being there, about somebody putting them on his property . . . there were 18 new tires and 2 re-capped ones . . . He said it was his truck, but he didn't know how the tires got in there. . . . We loaded them (the tires) . . . and took them to Jake Hill's station. There Jake Hill identified the tires as being his . . . While we were there at the station . . . I went over and got in the back seat of the police car where Diz was, and Diz . . . Christopher Diz Lockley told me at that time that James Lancaster and a fellow called Quinn came to his house on Tuesday morning about 2 :00 or 2 :30 and asked him if he wanted to buy some tires . . . that he told them that it was too late to talk about any tires then,—that he would see them tomorrow; that they asked him if he could take his car and go move the tires, or let them have the car." That he "told them he did not have anything there but the Buick and he wasn't going to move it out of the yard that night. So they left and went back uptown." The officer continued: "I did not see James Lancaster . . . arrested. I was there when they brought him in. He made a statement. He said that he and Quinn went to Diz's home the night before," saying in presence of "Diz" about the same he related on the witness stand.

And this officer continued: "Quinn said they had to move the tires because it would be day in a little while . . . Lockley's place . . . there's a small alley from where the tires were stacked in the back of the real estate office,—just a small alley crossing to the woodyard."

Then on cross-examination, this officer said: ". . . Lockley . . . when he first saw the tires, acted surprised that we should find the tires there . . . He acted surprised. I don't see any reason why he should put on. The first thing I knew that James Lancaster was connected with the theft was what Diz Lockley told me. And when I brought Diz to confront him that's when James Lancaster finally admitted to what he told me. The old truck that those tires were found on was a truck that was not in

operating condition. The truck was not in use . . . It has been sitting there in the yard as I noticed for quite a while."

Capt. Ed Belangia, as witness for the State, testified: That he was present when Diz told about Lancaster and Quinn coming to his house—substantially in accord with other testimony detailed above. Then on cross-examination this witness concluded by saying: "The only connection that Diz had was that this man went to his home at 2:30 in the morning. He told us that."

Defendant Lockley reserving exception to denial of his motion for judgment as of nonsuit when State first rested, testified, in substance, that he did not know anything about the tires being stolen; that he did not know the tires were on his wood lot; that he did not know how they got there; and that this truck that was on his woodyard didn't belong to him,—it was a truck that a boy brought there for him to fix.

Defendant Lockley renewed his motion for judgment as of nonsuit at the close of all the evidence. Motion overruled. Exception.

Verdict: As to Charlie Hoskins and James Lancaster: Guilty of breaking and entering and larceny as charged. As to Christopher Lockley: Guilty of receiving stolen property knowing it to have been stolen.

Judgment: Pronounced: As to Christopher Lockley: Confinement in prison.

Defendant Christopher Lockley appeals to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

Norris C. Reed, Jr., and Charles L. Abernethy, Jr., for defendant, appellant.

WINBORNE, J. The criminal offense of which defendant, appellant, stands convicted is creature of statute, G.S. 14-71, as amended by 1949 Session Laws, Chap. 145, Sec. 1, which declares in pertinent part that "if any person shall receive any . . . property . . . the stealing or taking whereof amounts to larceny . . . such person knowing the same to have been feloniously stolen or taken . . . he shall be guilty of a criminal offense . . ."

And it is the holding of this Court that the inference or presumption arising from the recent possession of stolen property, without more, does not extend to the above statutory charge (G.S. 14-71 as amended) of receiving such property knowing it to have been feloniously stolen or taken. *S. v. Adams,* 133 N.C. 667, 45 S.E. 553; *S. v. Best,* 202 N.C. 9, 161 S.E. 535; *S. v. Lowe,* 204 N.C. 572, 169 S.E. 180; *S. v. Oxendine,* 223 N.C. 659, 27 S.E. 2d 814; *S. v. Larkin,* 229 N.C. 126, 47 S.E. 2d 697.

Applying the provisions of the statute and this principle to the evidence offered upon the trial below, taken in the light most favorable to the State, it shows recent possession of the stolen automobile tires, and nothing more, and is insufficient to make out a case for the jury on the charge of receiving the automobile tires of Jake Hill, described by the officer, knowing that they had been feloniously stolen or taken.

Indeed, the testimony of the officers, offered by the State, as to statements of defendant in respect to the automobile tires, stolen from Jake Hill, tend to wholly exculpate defendant of the charge of receiving them. By offering such statements, the State thereby presents them as worthy of belief. See *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349, and cases there cited at page 456. "When the State offers evidence which tends to exculpate the defendant, he is entitled to whatever advantage the testimony affords, and so, when it is wholly exculpatory, he is entitled to his acquittal." *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740.

Hence the judgment from which this appeal is taken is hereby

Reversed.

MRS. EVA TOLBERT v. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(Filed 5 November, 1952.)

1. Insurance § 37—

Proof of the execution and delivery of the policy of life insurance sued on in consideration of premium paid, and of the subsequent death of insured, makes out a *prima facie* case, with the burden on insurer to prove its defense of false and material representations avoiding the policy, and therefore in such instance insurer's motion to nonsuit is properly denied.

2. Insurance § 31a (2)—

A policy of life insurance may be avoided by showing that insured made representations which were material and false.

3. Same—

A representation in an application for a policy of life insurance is deemed material if the knowledge or ignorance of it would naturally influence the judgment of insurer in making the contract, and written questions relating to health and their answers in an application are deemed material as a matter of law.

4. Insurance § 37—

Where insurer seeks to avoid a policy of life insurance on the ground of material and false representations made by insured in the written application for the policy, an instruction of the court which tends to leave the impression that it was not only necessary that insurer show that the repre-

sentations were false and material but also that they were fraudulently made with intent to deceive, must be held for prejudicial error.

APPEAL by defendant from *Sink, J.*, May Term, 1952, of CALDWELL. New trial.

This was a suit on a policy of insurance on the life of J. Ray Tolbert issued by the defendant.

The policy in the sum of $5,000 was issued 1 May, 1951, and the insured died 12 December, 1951. The defendant admitted the issuance of the policy and the death of the insured, but denied liability on the ground that in his application the insured had made certain false and material representations which caused the defendant to act favorably on the application and to issue the policy.

Issues arising on the pleadings were submitted to the jury and answered in favor of the plaintiff.

The determinative issue submitted was in these words: "2. Did the deceased make false or fraudulent representations in his application, as alleged in the answer?" To this the jury answered "No."

From judgment on the verdict for the amount of the policy the defendant appealed.

Folger L. Townsend and James R. Todd, Jr., for plaintiff, appellee.

Williams & Whisnant and Hal B. Adams for defendant, appellant.

DEVIN, C. J. The written application signed by the insured upon which the policy of insurance was issued contained the following questions and answers:

"29. Have you ever had electro-cardiographic or X-ray studies made? 29. No.

"31. A. Has a physician or other practitioner examined you within 2 months? 31. A. No.

"32. B. Have you had any reason, during the past six months, to think you might be physically impaired, temporarily or otherwise? 32. B. No.

"34. For what have you consulted, or been attended by a physician or surgeon or other practitioner during the past seven years? None."

There was evidence offered by the defendant that on 30 March, 1951, before the issuance of the policy 1 May, 1951, a physician had given the insured a thorough physical examination which included X-ray pictures and a stomach examination. The physician testified: "He (the insured) said he was tiring easily at his work, that his appetite was not as good as usual, and that he was generally not up to par. . . . During my examination I felt a lump over the liver area." The physician further testified that in June he saw the insured again and advised an exploratory opera-

tion. This was had in July, 1951, resulting in discovery that insured had cancer of the liver which in December following caused his death.

The defendant excepted to the denial of the motion for judgment of nonsuit, but evidence of the execution and delivery by the defendant of the policy of insurance on the life of the insured, in consideration of the premium, and the subsequent death of the insured made out a *prima facie* case and put the burden on the defendant to substantiate its affirmative defense of false and material representations in the application. Hence nonsuit was improper. *Davis v. Jenkins, ante,* 283, 72 S.E. 2d 673; *MacClure v. Casualty Co.,* 229 N.C. 305, 49 S.E. 2d 742.

The defendant, however, assigns error in the instructions given the jury in that the court repeatedly referred to the ground of defendant's defense as "false or fraudulent" representations by the deceased, whereas the allegation was "false and material." The court instructed the jury that the representations would not prevent recovery on the policy unless material or fraudulent, and thereupon charged as follows:

"Therefore, let us see for a moment what these words mean in the language and in the sense that we are considering. A fraudulent representation is a representation of a subsisting fact falsely made, with knowledge of its falsity, intended and calculated to deceive, and which does actually deceive, causing another to do what he would not have otherwise done. A false statement is an untrue or erroneous statement, intended and calculated to deceive and influence another. In law this word usually means something more than untrue. It means something designedly untrue and deceitful, and implies an intention to perpetrate some subterfuge or fraud."

The defendant did not allege fraud. To avoid liability on the policy it was only required to show that the representations were material and that they were untrue. *Bryant v. Ins. Co.,* 147 N.C. 181, 60 S.E. 983; *Gardner v. Ins. Co.,* 163 N.C. 367, 79 S.E. 806; *Schas v. Ins. Co.,* 166 N.C. 55, 81 S.E. 1014; *Inman v. Woodmen of the World,* 211 N.C. 179, 189 S.E. 496; *Wells v. Ins. Co.,* 211 N.C. 427, 190 S.E. 744; *Assurance Society v. Ashby,* 215 N.C. 280, 1 S.E. 2d 830.

We think the court inadvertently left the jury under the impression that the defendant's defense was bottomed on fraud, and that it was necessary for the defendant to show not only that the representations were false but that they were made designedly with intent to defraud. True the issue submitted contained the words false or fraudulent, but the court's references to and definition of the meaning of fraudulent representations as pertinent to this case may have had a prejudicial effect on the minds of the jury.

A representation in an application for an insurance policy is deemed material "if the knowledge or ignorance of it would naturally influence

the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium." *Wells v. Ins. Co., supra; Petty v. Ins. Co.*, 212 N.C. 157, 193 S.E. 228; *Ins. Co. v. Box Co.*, 185 N.C. 543, 117 S.E. 785; *Ins. Co. v. Woolen Mills*, 172 N.C. 534, 90 S.E. 574.

The statute provides that statements in an application for a policy of insurance "shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy." G.S. 58-30. Interpreting this statute, it is well settled that a material representation which is false will constitute sufficient ground upon which to avoid the policy.

In *Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E. 2d 830, *Justice Barnhill*, speaking for the Court, said: "The representations made were material to the risk. They are in the form of written answers to written questions. In such case the questions and answers are deemed to be material by the acts of the parties to the contract." And in *Petty v. Ins. Co.*, 212 N.C. 157, 193 S.E. 228, *Justice Winborne* used this language:

"It is settled law in North Carolina that answers to specific questions like the one asked in the instant case, where there had been medical examination, are material as a matter of law."

In the case at bar the credibility of the evidence to support the defendant's defense was a matter for the jury. There were no requests for instruction.

For the reasons herein stated we think there should be a new trial, and it is so ordered.

New trial.

JOHN G. KENNEDY AND MINA B. KENNEDY, HIS WIFE; RUBY K. BRINSON AND JESSE F. BRINSON, HER HUSBAND; LILA K. LANIER; SALLY JO KENNEDY, MINOR; GORDON BENNETT KENNEDY, JR., MINOR; GEORGE EDWARD KENNEDY, MINOR; REPRESENTED HEREIN BY THEIR NEXT FRIEND, CHRISTINE J. KENNEDY, PETITIONERS, v. HAZEL BROWN KENNEDY, DEFENDANT.

(Filed 5 November, 1952.)

1. Deeds § 13a—

Where the granting clause, the *habendum*, and the warranty are clear and unambiguous and are fully sufficient to pass immediately a fee simple estate, *held* a paragraph after the description which seeks to reserve a life estate in grantor will be rejected as being repugnant.

2. Dower § 2—

Where a clause in a deed seeking to reserve a life estate in grantor is ineffective, so that the grantee obtains the immediate fee simple title to the lands, upon the death of the grantee his widow's dower attaches

thereto notwithstanding his death prior to the death of the supposed life tenant.

3. Dower § 8a—

Where, in a proceeding to allot dower in certain lands, defendant widow successfully asserts her right to dower in other lands as well as those set out in the petition, the court is authorized to appoint jurors for the allotment of dower in such other lands.

APPEAL by petitioners from *Nimocks, J.*, March Term, 1952, DUPLIN.

Special proceeding for the allotment of dower.

Hobart A. Kennedy died intestate in Duplin County on 16 December, 1950. The petitioners are collateral relatives and heirs at law of the deceased and the defendant is the widow of the deceased.

The petitioners allege that deceased at the time of his death was the owner of the tracts of land fully described in the petition and amendment to petition, and ask that the dower of the defendant be assigned in said lands. It is conceded by all parties that the defendant is the owner of a dower and entitled to have the same allotted in the lands described in the petition and amendment to petition.

The defendant answered asserting that, in addition to the lands above referred to, her husband at the time of his death owned and was beneficially seized of three other parcels of land in which she was also entitled to dower. These parcels of land were acquired by deceased in the following manner:

(1) Deed, dated 30 October, 1935, from Josephine Grissom Kennedy and husband, G. W. Kennedy, to H. A. Kennedy, conveying 22.4 acres of land.

(2) Deed, dated 4 June, 1934, from G. W. Kennedy and wife, Josephine Kennedy, to Hobart Kennedy, conveying a lot in town of Beulaville.

(3) Deed, recorded 19 May, 1944, from Josephine Kennedy, widow, to Hobart A. Kennedy, conveying a lot in town of Beulaville.

The controversy arises over the form and substance of these three conveyances. The petitioners contend that the deceased owned a fee in remainder, subject to life estates, and that he was not so beneficially seized of these parcels of land during the coverture as to entitle his widow to dower in this property. The defendant takes the opposite view.

Each of the deeds is regular in form and contains full covenants and warranties. In each deed at the end of the description and in a separate paragraph, the following language appears:

First deed: "G. W. Kennedy and wife Josephine G. Kennedy hereby reserve their life estate in the above described tract of land."

Second deed: "The life estate of the grantors is excepted in the above mentioned land."

Third deed: "The life estate of the said Josephine Kennedy is reserved in the above described land."

With the exception of the above quoted language, each of the deeds is a regular fee simple deed, with no restrictions in the granting clause, in the *habendum* clause, nor in the warranty clause.

While the order of the clerk does not appear in the record, the judgment of the court below discloses that when the matter came on for hearing before the clerk, he sustained the position of the petitioners, and the defendant appealed. The trial court, after finding the necessary and appropriate facts, reversed the order of the clerk and held that the defendant is entitled to dower in all of the lands described in the pleadings, and appointed jurors with instructions to allot the widow's dower accordingly.

From this judgment, the petitioners appealed, assigning error.

Russell J. Lanier and Grady Mercer for petitioners, appellants.
Henry L. Stevens III, and E. Walker Stevens for defendant, appellee.

VALENTINE, J. Does the language appearing at the end of the description in each of the three deeds under which Hobart A. Kennedy took title to the lands in question have the effect of creating life estates in the grantors named in said deeds? This question must be answered in the negative.

The recent case of *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228, furnishes abundant authority for the position here taken.

In the deeds now under consideration, the words of the granting clause, the *habendum* clause, and the warranty are clear and unambiguous and are fully sufficient to pass immediately a fee simple title to Hobart A. Kennedy upon delivery of the deeds. Those operative clauses constitute an unrestricted conveyance of the land. *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *Artis v. Artis, supra.* It is well established that the granting clause, when clear, specific and unequivocal, will generally prevail over other recitals in the conveyance. 16 A.J. 575; *Mayberry v. Grimsley,* 208 N.C. 64, 179 S.E. 7. This is especially true when, as in the present case, all other operative provisions of the deed are consonant with the granting clause.

In the *Artis case, Winborne, J.,* speaking for the Court, said: "Ordinarily the premises and granting clauses designate the grantee and the thing granted,—while the *habendum* clause relates to the *quantum* of the estate. 'The granting clause is the very essence of the contract.' 16 Am. Jur., 567. *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157. And the *habendum,* in the present case, is in harmony with the granting clause. Therefore, the clause undertaking to divest or limit the fee simple title which had been conveyed unqualifiedly . . . is repugnant to both the

granting clause and the *habendum*. Hence the granting clause will prevail and the repugnant clause will be rejected." Citing *Blackwell v. Blackwell,* 124 N.C. 269, 32 S.E. 676; *Wilkins v. Norman,* 139 N.C. 40, 51 S.E. 797; *Bryant v. Shields, supra; McNeill v. Blevins,* 222 N.C. 170, 22 S.E. 2d 268.

It clearly appears, in the present case, that the language appearing immediately after the description in each deed attempts to cut down or limit the estate conveyed and is therefore inconsistent with and repugnant to all other provisions of the deed, including the granting clause. Consequently, the incompatible recital must yield to the more effective operative clauses, and must be rejected as repugnant.

We therefore conclude that a fee simple title to the lands in question passed to Hobart A. Kennedy immediately upon the delivery of the deeds, and that his widow is entitled to dower in all of the lands described in the pleadings. G.S. 30-5; *Trust Co. v. Watkins,* 215 N.C. 292, 1 S.E. 2d 853. The court below was fully authorized to proceed with the appointment of jurors for the allotment of the dower. *Campbell v. Murphy,* 55 N.C. 357; *Trust Co. v. Watkins, supra; Artis v. Artis, supra.*

For the reasons assigned, the judgment below is

Affirmed.

P. A. HAWKINS v. WARREN REYNOLDS.

(Filed 5 November, 1952.)

1. Malicious Prosecution § 2—

An action for malicious prosecution must be based upon a valid process, and where the warrant under which plaintiff was arrested fails to charge him with any crime, defendant's motion to nonsuit should be allowed.

2. Public Officers § 7b: Municipal Corporations § 11e—

The elements of the offense created by G.S. 14-247 and G.S. 14-252 are (1) the use of a vehicle belonging to the State or one of the political subdivisions named in the statute (2) by a public official or employee answering to the statutory description (3) for a private purpose, and a warrant which fails to charge that the use of a police car by a policeman of a municipality was for a private purpose, is insufficient to charge the offense.

3. Indictment and Warrant § 9—

A warrant for a statutory offense must charge the offense in the language of the statute or specifically set forth the facts constituting the offense as defined by the act.

APPEAL by defendant from *Clement, J.,* and a jury, July Term, 1952, of CLEVELAND.

Civil action to recover damages for an alleged malicious prosecution.

After the pleadings were read, the defendant demurred *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action for that the warrant declared on and set out in the complaint was void for failure to charge a crime. The demurrer was overruled and the defendant excepted.

The parties then proceeded to trial. Issues were submitted to and answered by the jury as follows:

"1. Did the defendant cause the arrest and prosecution of the plaintiff, as alleged: Answer: Yes.

"2. Was the arrest and prosecution without probable cause? Answer: Yes.

"3. Was the prosecution malicious? Answer: Yes.

"4. What amount of compensatory damages is the plaintiff entitled to recover? Answer: $500.00.

"5. What amount of punitive damages is the plaintiff entitled to recover? Answer: None."

From judgment on the verdict, the defendant appealed, assigning errors.

E. A. Harrill and A. A. Powell for defendant, appellant.

No counsel contra.

JOHNSON, J. It is established by authoritative decisions of this Court that an action for malicious prosecution may not be maintained by one arrested on a charge not amounting to a crime, or where the process was void. *Parrish v. Hewitt,* 220 N.C. 708, 18 S.E. 2d 141; *Rhodes v. Collins,* 198 N.C. 23, 150 S.E. 492; *Caudle v. Benbow,* 228 N.C. 282, 45 S.E. 2d 361. An action for malicious prosecution "presupposes valid process." *Allen v. Greenlee,* 13 N.C. 370. It is otherwise as to an action for false imprisonment. *Caudle v. Benbow, supra; Melton v. Rickman,* 225 N.C. 700, 36 S.E. 2d 276; *Rhodes v. Collins, supra.*

The warrant declared upon in the complaint charges: ". . . that . . . on or about the 12th day of October 1951, and other occasions before and thereafter, P. A. Hawkins did unlawfully and wilfully use his position as a police officer for the Town of Kings Mountain, North Carolina, by intentionally embarrassing and inquiring into the private affairs of Warren E. Reynolds, a citizen of said town and state, in that he went to the homes of certain tenants of the said Warren E. Reynolds in a uniform of the Kings Mountain Police, and in an automobile furnished him by the said town to be used in his duties as a policeman, and while on duty as a policeman, and inquired of the said tenants as to how much rent they were paying the said Warren E. Reynolds; and that said acts on the part of the said P. A. Hawkins were done by him not in the line of his

official duties, but were calculated to humiliate and embarrass the said tenants and Warren E. Reynolds, and that one of his tenants to wit: Lonnie Butler moved out of the house of the said Warren E. Reynolds; that such actions on the part of the said P. A. Hawkins amounted to a breach of his duties as a public officer, contrary to the form of statute and against the peace and dignity of the State."

This case was tried solely upon the theory of malicious prosecution. It seems to have been conceded in the trial below that the warrant falls short of alleging malfeasance in office in violation of G.S. 14-230. However, the trial court, in overruling the defendant's demurrer *ore tenus* and proceeding to trial, apparently did so on the theory that while the warrant fails to charge the offense of malfeasance in office, nevertheless it does charge the plaintiff with using a publicly owned police automobile of the Town of Kings Mountain for a private purpose in violation of G.S. 14-247 and G.S. 14-252, which provide in substance that it shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any institution or agency of the State, or of any County, City or incorporated town "to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State" or any of the enumerated political subdivisions thereof.

The essential elements of the crime created by G.S. 14-247 and G.S. 14-252 are (1) the use of a vehicle belonging to the State or one of the political subdivisions named in the statute (2) by a public official or employee answering to the statutory description (3) for a private purpose.

The warrant does not charge that the defendant therein (the plaintiff herein) used the police car belonging to the Town of Kings Mountain for a "private purpose." This omission renders the warrant fatally defective. *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149; *S. v. Ballangee,* 191 N.C. 700, 132 S.E. 795.

The rule is that no indictment or warrant, whether at common law or under a statute, can be good if it does not accurately and clearly allege all the constituent elements of the offense charged. *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

"The breach of a statutory offense must be so laid in the indictment as to bring the case within the description given in the statute and inform the accused of the elements of the offense." *S. v. Ballangee, supra* (191 N.C. 700, 701). True, the bill or warrant need not be in the exact language of the statute, but there must be averments of all the essential elements of the crime created by the act. *S. v. Miller, supra.*

In *S. v. Jackson, supra* (218 N.C. 373), the formula is stated this way: "An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either

charge the offense in the language of the act, or specifically set forth the facts constituting the same . . . 'Where the words of a statute are descriptive of the offense, an indictment should follow the language and expressly charge the described offense on the defendant so as to bring it within all the material words of the statute. Nothing can be taken by intendment.'" See also *S. v. Liles,* 78 N.C. 496; *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Tarlton,* 208 N.C. 734, 182 S.E. 481; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883.

It follows from what we have said that the judgment below will be vacated and reversed and the demurrer *ore tenus* sustained.

Reversed.

R. D. WILLIAMS v. VERA M. CODY.

(Filed 5 November, 1952.)

Appeal and Error § 39b—

Error in the charge on the issue of contributory negligence in omitting reference to proximate cause is rendered harmless when the jury answers the issue of negligence in the negative and thereby renders the question of contributory negligence immaterial.

APPEAL by plaintiff from *Burgwyn, Special Judge,* April Term, 1952, of WAKE. No error.

Plaintiff instituted action to recover damages for injury to person and property alleged to have resulted from being struck by the negligently driven automobile of defendant.

Defendant denied the allegations of negligence, pleaded plaintiff's contributory negligence, and set up a counterclaim for damage to her own automobile resulting from the collision which she alleged was caused by the negligence of the plaintiff.

The plaintiff testified in substance that on the morning of 29 December, 1950, he parked his automobile, pointed south, alongside the west curb of Salisbury Street in Raleigh, a one-way street, and that he opened the left door of his automobile and put his left foot on the ground; that he looked back and saw defendant's automobile approaching about 75 feet away traveling 35 to 40 miles per hour; that he turned his head to the front and was struck by defendant's automobile. The force of the impact was sufficient to turn plaintiff's automobile door inside out, and the plaintiff, caught between the inside of his door and the side of defendant's car, suffered injury to his person and his property.

The defendant on the other hand testified that on this occasion she was driving her automobile south on Salisbury Street at 10 or 15 miles per

hour; that there are three marked traffic lanes on this street at this place and she was in the right-hand lane; there were moving cars on all three lanes; that plaintiff's car was parked 3 feet from the curb, and when she was within 10 or 12 feet of plaintiff's automobile he opened the left door all the way out into the lane she was traveling and her automobile struck the door, the plaintiff still sitting in his car. She testified she did not turn to the left because of the other traffic on her left; that she applied her brakes and skidded and struck the door of plaintiff's car causing some injury to her own automobile.

Issues addressed to plaintiff's cause of action and defendant's counterclaim were submitted to the jury and answered in favor of the defendant. In plaintiff's action the jury found the plaintiff's injury was not caused by defendant's negligence, and in defendant's counter-action found plaintiff was negligent, that defendant did not by her own negligence contribute to her injury, and fixed her damage at $25.00.

From judgment on the verdict plaintiff appealed.

Douglass & McMillan for plaintiff, appellant.

Broughton, Teague & Johnson for defendant, appellee.

DEVIN, C. J. The plaintiff appellant assigns error in the ruling of the trial court with respect to the admission of evidence, to which timely exceptions were noted. We have examined each of these exceptions and find them without substantial merit.

The plaintiff also noted exception to the following charge to the jury: "If you find as a fact from the evidence and by its greater weight that the plaintiff opened his car door and attempted to alight from his car on the street side instead of the sidewalk side of his car without observing the proper lookout, then it would be your duty to answer the second issue YES."

While this instruction is open to criticism for omission of reference to proximate cause (*McIntyre v. Elevator Co.*, 230 N.C. 539, 54 S.E. 2d 45), we note it was addressed to the issue of plaintiff's contributory negligence, the second issue in plaintiff's action. As the jury answered the issue as to defendant's negligence, the first issue in that case, in favor of the defendant, the question of plaintiff's contributory negligence was no longer material.

Plaintiff noted exceptions to other portions of the judge's charge and to his failure to charge sufficiently in other respects, but an examination of these exceptions in connection with the entire charge and the setting of the case, leads us to the conclusion that no prejudicial error has been made to appear.

The conflicting recollections of the plaintiff and defendant as to what occurred on this occasion on a busy street in Raleigh seems to have been fairly submitted to the jury for their decision, and we find no sufficient reason to disturb the result.

No error.

NETTIE V. REMSEN AND JAMES D. REMSEN, HER HUSBAND; LUCY V. HARRELL AND ERNEST T. HARRELL, HER HUSBAND, AND JOHNNIE E. VINSON, A WIDOW, v. J. C. EDWARDS AND LOLLIE EDWARDS, HIS WIFE.

(Filed 5 November, 1952.)

Pleadings § 28—

In determining a motion for judgment on the pleadings, the court's decision must be based upon facts alleged on the one hand and admitted on the other, and it is error for the court to hear evidence and find facts in support of its judgment upon the motion, since if the pleadings raise any issues of fact they must be tried by a jury in the absence of waiver of jury trial and agreement that the court should find the facts. G.S. 1-172.

APPEAL by defendants from *Stevens, J.*, at March Term, 1952, of NORTHAMPTON.

Civil action to have a deed declared to be a mortgage, and to have been satisfied, and for an accounting, etc.

Plaintiffs filed a complaint in which is set out the facts constituting their cause of action as they contend them to be.

Defendants filed an answer to the complaint of plaintiffs in which they admit parts of the allegations of complaint, and deny other parts. And for further answer they set out facts constituting further defenses to plaintiffs' alleged cause of action, as they contend the facts to be.

And plaintiffs, in reply, admit parts of the averments so set out in defendants' answer, and deny other parts.

A pre-trial conference was held, at which certain stipulations were made in respect to matters which are not determinative of the controversy.

Then when the cause came on for hearing at the March Term, 1952, of Northampton Superior Court, and after a jury was selected and impaneled, and the plaintiffs had offered certain documentary evidence, they moved for judgment, reading as follows:

"That the allegations of the Answer, even though the same be all taken to be true for the purpose of this motion, do not constitute a valid and legal defense to the claim of the plaintiffs that the transaction complained of was one for the security of a debt of Joe B. Vinson and Johnnie

Vinson to J. C. Edwards, and for the security of money and supplies advanced by J. C. Edwards to Joe B. Vinson after November 21, 1934.

"Wherefore, the plaintiffs move for judgment:

"1. That the deed, deed of trust and agreement to reconvey referred to in paragraph 9 of the complaint were intended by the parties thereto as and constitute a mortgage securing the payment of the $4,181.67 note of Joe B. Vinson and Johnnie Vinson, and also securing the payment of money and supplies advanced by J. C. Edwards to Joe B. Vinson after November 21, 1934.

"2. That the plaintiffs are the owners in fee simple of the lands described in the complaint.

"3. That a Referee be appointed to take an account of the mortgage debt, of what has been paid thereon and of the amount, if any, which is due the plaintiffs by J. C. Edwards."

Thereupon the court entered a judgment in which after reciting that "It appears to the court and the court finds as facts from the stipulations and the admissions in the pleading" there are set out twenty-five paragraphs of findings of fact, upon which conclusions of law are made, and judgment rendered.

Defendants except to the judgment and appeal to the Supreme Court, and assign error.

Martin F. Papish and Gay & Midyette for plaintiffs, appellees.

Eric Norfleet, Allsbrook & Benton, and W. H. S. Burgwyn, Jr., for defendants, appellants.

WINBORNE, J. The subject of "judgment on the pleadings" has been fully discussed in opinion by *Ervin, J.*, in the recent case of *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384. The ruling there is applicable, and determinative here.

It is there held that "On a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else . . . He should not hear extrinsic evidence, or make findings of fact. If he concludes on his consideration of the pleadings that a material issue of fact has been joined between the parties, he should deny the motion in its entirety, and have the issue of fact tried and determined in the way appointed by law before undertaking to adjudicate the rights of the parties."

Issues of fact must be tried by a jury, unless trial by jury is waived. G.S. 1-172. See *Erickson v. Starling, supra.* And in the present case a jury trial was not waived, nor did the parties consent for the trial judge to find the facts.

Hence, in the light of these rules of practice applied to the pleadings and case in hand, we hold that error appears upon the face of the record

and judgment. And a detailed discussion of the pleadings will serve no useful purpose.

Error.

WILLIAM M. HENSON v. ESTELLE JONES HENSON.

(Filed 5 November, 1952.)

Partition § 4a—

In a suit for partition, a tenant in common may assert in her pleading that she has paid off an encumbrance on the property and ask that she be reimbursed for such sum in the adjustment of the rights of the parties, since the proceeding is equitable in nature and the court has jurisdiction to adjust all equities in respect to the property.

APPEAL by plaintiff from *Sharp, Special Judge,* June Term, 1952, of RANDOLPH. Affirmed.

Petition for sale of real property for partition.

The plaintiff and defendant, who were then husband and wife, obtained title to property, a house and lot, as tenants by the entireties. Since divorced, their relationship to the property has become that of tenants in common. The plaintiff now brings this proceeding to have the property (incapable of actual partition) sold for division.

The defendant filed an answer admitting these facts, but alleged (1) that she was entitled to support for the minor children of the marriage, and (2) that plaintiff and defendant during coverture had executed a mortgage on the property, and that defendant has paid this mortgage in whole or in part. Demurrer to the answer was sustained as to the claim for support of minor children. Defendant's appeal from this judgment was dismissed, and defendant allowed to file amended answer. Defendant's amended answer sets out that defendant has paid $2,500 on the mortgage on the property, and asks that she be reimbursed that sum in the adjustment of the rights of the parties.

Demurrer to the amended answer was overruled and plaintiff appealed.

Ottway Burton for plaintiff, appellant.

P. W. Glidewell, Sr., J. A. Webster, Jr., and Miller & Moser for defendant, appellee.

DEVIN, C. J. The single question presented is whether in answer to a petition for partition one tenant in common may set up claim for amounts expended to remove an encumbrance on the common property.

The court below overruled the plaintiff's demurrer to the answer on this point, and in this we concur.

Petitions for partition are equitable in their nature, and the court has jurisdiction to consider the rights of the parties under the principles of equity and to do justice between the parties. *Raymer v. McLelland,* 216 N.C. 443, 5 S.E. 2d 321; *Trust Co. v. Watkins,* 215 N.C. 292, 1 S.E. 2d 853; *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554; *Jenkins v. Strickland,* 214 N.C. 441, 199 S.E. 612; *McLamb v. McLamb,* 208 N.C. 72, 178 S.E. 847.

The rule is that in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property to be partitioned. 68 C.J.S. 208. "A tenant in common who has paid or assumed liens or encumbrances on the property ordinarily is entitled on partition to a proportionate reimbursement therefor from the other tenants." 68 C.J.S. 212.

In such case the sale may be ordered and the rights of the parties adjusted from the proceeds of sale. McIntosh, sec. 937. This was apparently the view of the court below in remanding the cause to the clerk for further proceedings as by law provided.

Affirmed.

ALDER MAE JERNIGAN v. COLONEL JERNIGAN AND RUFUS CAPPS.

(Filed 29 October, 1952.)

1. Husband and Wife § 11—

A wife may now maintain an action in tort against her husband.

2. Automobiles §§ 18g (5), 18h (2)—

While physical facts at the scene may speak louder than words, ordinarily the interpretation of the facts is the province of the jury, and therefore nonsuit may not be predicated upon the contention that the physical facts disclose that defendant was not traveling at excessive speed when there is testimony of witnesses that defendant was exceeding sixty miles per hour.

3. Automobiles §§ 8i, 13—

While ordinarily a motorist may assume and act on the assumption that the driver of a vehicle approaching from the opposite direction will comply with statutory requirements as to signaling before making a left turn across his path (G.S. 20-154), he is not entitled to indulge in this assumption after he sees or by the exercise of due care ought to see that the approaching driver is turning to his left across the highway to enter an intersecting road.

4. Automobiles §§ 18h (2), 19a—Evidence held not to compel single conclusion that sole proximate cause of collision was illegal left turn made by driver of other car.

Plaintiff was a passenger in a car driven by her husband, which collided with another car traveling in the opposite direction along the highway. Plaintiff's evidence was to the effect that such other car turned to its left across the highway in the path of the car in which she was riding, without giving the statutory signal, in attempting to make a left turn into an intersecting highway. Plaintiff's evidence further tended to show that her husband was driving his car at an excessive speed and that he saw or could have seen the other driver undertaking to make the left turn when the cars were separated by a space of some three hundred feet in time to have avoided the accident, but that he did not slacken speed or change course until the cars were in virtual contact. *Held:* The evidence does not compel the single conclusion that the negligence of the driver of the other car in making the illegal left turn was the sole proximate cause of the accident, but the evidence is sufficient to support a conclusion that the husband's negligence in driving at an unlawful speed and in failing to keep his car under reasonable control was the proximate cause or one of the proximate causes of the accident, and therefore the husband's motion to nonsuit should have been denied.

APPEAL by plaintiff from *Godwin, Special Judge,* at February Term, 1952, of JOHNSTON.

Civil action by automobile guest against her host and another motorist for personal injuries allegedly caused by the concurring negligence of both drivers when the other motorist attempted to make a left turn into an intersecting road in front of the host's automobile.

For ease of narration, the defendants Colonel Jernigan and Rufus Capps are called by their respective surnames. Jernigan is the husband of the plaintiff Alder Mae Jernigan.

State Highway No. 40 runs somewhat westerly from Benson in Johnston County to Coats in Harnett County. It is joined on the north by an unpaved road at a point four miles west of Benson. The juncture of State Highway No. 40 and the unpaved road is not within either a business or a residence district. On the afternoon of 25 June, 1950, a westbound automobile driven by Jernigan and an eastbound car operated by Capps traveled in opposite directions on State Highway No. 40. The two motor vehicles collided at the juncture of the highway and the unpaved road when Capps undertook to make a left turn from the highway into the unpaved road across the pathway of the oncoming automobile driven by Jernigan. As a result, the plaintiff, who was a guest in her husband's automobile, suffered injuries.

The plaintiff sued both Jernigan and Capps for damages for her personal injuries, alleging that such injuries were proximately caused by their concurring negligence. Each defendant answered, denying actionable negligence on his part.

The plaintiff testified in her own behalf at the trial. She also called seven witnesses to the stand. The plaintiff, Bobby Lee Jernigan, L. C. Jernigan, and Hubert H. McLamb testified to the circumstances attending the collision, and Mrs. Elgie Mae Allen, Dr. J. R. Johnson, Dr. A. E. Morgan, and Mrs. Addie Pearl Royall described the physical condition of the plaintiff subsequent to that event.

The plaintiff gave this testimony in person:

"Highway No. 40 . . . was a new hard-surfaced highway . . . The paved portion is about 18 or 20 feet (wide) . . . The shoulders were about 4 feet wide. The highway runs through a hilly section and there is the most roads coming into it, side roads, going to people's houses . . . I was traveling in a 1950 Ford with my husband. He was driving . . . He was running every bit of 60 . . . miles an hour . . . The highway was wet . . . We were about 100 yards away . . . when I first saw . . . the Capps car. . . . I did not see the Capps car before we got in 100 yards of it because the hill there on the side Mr. Capps was coming from is right smart steeper than the side we were on, and I did not see him until he came over . . . There was nothing in front of us to obstruct my husband's view the first time I saw the Capps car . . . The side road was visible to people traveling the highway . . . When I first saw the Capps car, I would say that the front wheel was probably already across the middle of the highway, pulling into this road. We were about 100 yards from the Capps car . . . The brakes on my husband's car were good. He could have stopped had he tried to when he first saw the (Capps) car. Running at the speed my husband was running the distance it would take to stop the car would be no more than 200 feet . . . He told me (afterwards) he thought he could get by without hitting Capps . . . My husband was right close to Capps, 15 or 20 yards, when he applied his brakes. When he hit the brakes, he hit the Capps car . . . The best I remember the front wheels . . . of the Capps car . . . was on the dirt . . . at that time . . . The car I was riding in got off of the hard surface highway on to the shoulder."

Other eyewitnesses stated that the left-hand front of the Jernigan automobile "struck" the left-hand front of the Capps car, and that the Jernigan automobile proceeded "two or three times its length," coming to rest in "the ditch against the bank."

There was no evidence as to whether or not Capps gave a left-turn signal.

When the plaintiff had produced her evidence and rested her case, each defendant moved for a compulsory nonsuit. The court allowed the motion of Jernigan, and the plaintiff excepted and appealed. The plaintiff thereupon advised the court that she did not desire to proceed further at

that time against Capps, and asked the court to dismiss the action as to him. This request was granted.

J. R. Barefoot and E. R. Temple for the plaintiff, appellant.
A. M. Noble for the defendant, Colonel Jernigan, appellee.

ERVIN, J. The common law disability of the wife to sue the husband at law has been removed by statute. In consequence, a married woman has a right of action against her husband for a tort causing personal injury. *King v. Gates,* 231 N.C. 537, 57 S.E. 2d 765; *Bogen v. Bogen,* 219 N.C. 51, 12 S.E. 2d 649; *Alberts v. Alberts,* 217 N.C. 443, 8 S.E. 2d 523; *York v. York,* 212 N.C. 695, 194 S.E. 486; *Roberts v. Roberts,* 185 N.C. 566, 118 S.E. 9, 20 A.L.R. 1479; *Crowell v. Crowell,* 180 N.C. 516, 105 S.E. 206; 181 N.C. 66, 106 S.E. 149; *Graves v. Howard,* 159 N.C. 594, 75 S.E. 998, Ann. Cas. 1914C, 565.

This being true, the appeal raises the solitary question whether the presiding judge erred in holding as a matter of law that the evidence introduced by the plaintiff at the trial was insufficient to establish actionable negligence on the part of her husband, the defendant Jernigan.

Jernigan contends that this question must be answered in the negative. He asserts initially that this is so because the testimony at the trial did not disclose any negligence whatever on his part. He concedes that under subsection (b) 4 of G.S. 20-141 the maximum permissible speed for a passenger car at the place described in the pleadings was fifty-five miles per hour, and that the witnesses testified that he drove his automobile at that place at a speed of not less than sixty miles an hour. He lays hold, however, on the celebrated declaration of that great jurist, the late *Chief Justice Stacy,* in *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88, that "there are a few physical facts which speak louder than some of the witnesses," and argues that the physical facts in the instant case demonstrate the incredibility of the testimony of the witnesses that his speed exceeded the maximum permissible limit. This argument is untenable. It flies in the face of the general rule that what the physical facts say when they speak is ordinarily a matter for the determination of the jury.

Jernigan insists secondarily that the evidence at the trial compelled the single conclusion that there was no causal connection between any act or omission of his and the collision, and that the compulsory nonsuit was proper on that ground even if the evidence did suffice to show that he was driving at an unlawful speed.

His counsel advances these arguments to support this position: That Jernigan and Capps were traveling in opposite directions on State Highway No. 40, each being on his own right-hand half of the highway; that Jernigan rightly assumed, and rightly acted on the assumption, that

Capps would observe the precautions prescribed by G.S. 20-154 with respect to seeing whether such movement could be made in safety and with respect to signaling his intended action before he undertook to make a left turn on the highway; that Capps violated this statute by suddenly making an unsignaled left turn across Jernigan's path when the two automobiles were so close to each other that the collision could not be avoided by any act on the part of Jernigan; that the collision would have happened regardless of whether Jernigan's automobile had been going faster or slower; and that consequently the sole proximate cause of the collision and the resultant injuries to the plaintiff was the improvident left turn made by Capps.

The secondary position of Jernigan is valid in law if, and only if, it is well grounded in fact. *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808. Hence, we are confronted at this point by the subsidiary inquiry whether the evidence at the trial compelled the single conclusion that the collision occurred in the manner depicted by the able counsel who represents Jernigan.

A motorist proceeding along the highway ordinarily has the right to assume, and to act on the assumption, that the driver of a vehicle coming from the opposite direction will comply with statutory requirements before making a left turn across his path. *Webb v. Hutchins,* 228 N.C. 1, 44 S.E. 2d 350; *Brown v. Products Co., Inc.,* 222 N.C. 626, 24 S.E. 2d 334; *James v. Coach Co.,* 207 N.C. 742, 178 S.E. 607. The motorist is not permitted by law to indulge in this assumption, however, after he sees or by the exercise of due care ought to see from the conduct of the approaching driver that the assumption is unwarranted. *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593; *Brown v. Products Co., Inc., supra; Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707.

We shall take it for granted without so adjudging for the purpose of this appeal that Capps violated G.S. 20-154 by undertaking to make a left turn from the highway into the unpaved road across the path of the oncoming automobile driven by Jernigan without first seeing that such movement could be made in safety and without first giving Jernigan any signal of his intention to make such movement.

When the evidence at the trial is interpreted in the light most favorable to plaintiff, it justifies these inferences: That Jernigan drove his automobile on his right side of the highway in a place outside a business or residential district at a speed of not less than sixty miles an hour; that Jernigan saw Capps undertake to make an unsignaled left turn across his path toward the entrance to the unpaved road when the two automobiles were separated by a space of 300 feet; that Jernigan did not thereafter have the right to assume or to act on the assumption that Capps would not make the left turn which he actually saw him making; that

Jernigan could have avoided any collision with the Capps car after he saw it making the left turn by reducing his speed, or by stopping his automobile, or by driving onto the left side of the highway to the rear of the turning Capps car; that instead of taking one of these courses of action, Jernigan proceeded straight ahead on his right side of the highway at unabated speed until he was in virtual contact with the Capps car in the vain hope that his excessive speed would enable him to clear the juncture of the highway and unpaved road in front of the Capps car; that Jernigan then swerved to his right, left the highway, and entered the dirt shoulder lying north of the pavement and south of the mouth of the unpaved road in a desperate effort to extricate his automobile and its occupants from the imminent peril of collision with the turning Capps car; and that this desperate effort on the part of Jernigan proved unsuccessful when the left-hand front of his automobile struck the left-hand front of the Capps car, whose front wheels had also entered the dirt shoulder lying north of the pavement and south of the mouth of the unpaved road.

It thus appears that the evidence at the trial did not compel the single conclusion that the sole proximate cause of the collision was the improvident left turn made by Capps. The evidence was ample to support the quite different conclusion that Jernigan drove his automobile at an unlawful speed and failed to keep it under reasonable control and that his negligence in these respects, either of itself or in combination with concurrent negligence on the part of Capps, proximately caused the collision and the resultant injuries to the plaintiff.

It follows that the presiding judge erred in allowing Jernigan's motion for a compulsory nonsuit, and that such nonsuit must be

Reversed.

LENA HOLLY GREENE, WIDOW; JOHN HOLLY, STEPSON; JAMES E. GREENE, SON; AND ISABELLA GREENE, DAUGHTER OF HENRY GREENE, DECEASED (EMPLOYEE), PLAINTIFFS, v. O. R. SPIVEY, NON-INSURER, AND/OR HALSEY HARDWOOD COMPANY, INSURED BY AMERICAN MUTUAL LIABILITY INSURANCE COMPANY; AND/OR MAJOR & LOOMIS LUMBER COMPANY, INSURED BY LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANTS.

(Filed 19 November, 1952.)

1. Master and Servant § 55d—

A general exception to the decision and award of the Industrial Commission, without any specific exception to any finding of fact, presents for review in the Superior Court only whether the facts found by the Commission support the decision and award.

2. Same—

Where, on appeal from the Industrial Commission, no finding of fact is presented for a ruling by the Superior Court, and only a general exception to the judgment of the Superior Court is entered, the sufficiency of the evidence to support any particular finding may not be raised for the first time upon further appeal to the Supreme Court.

3. Appeal and Error § 1—

The function of the Supreme Court is to review proceedings upon appeal for alleged errors, and where the trial court makes no ruling upon a particular question, the Supreme Court may not make any ruling thereon. Constitution of N. C., Art. IV, sec. 8.

4. Master and Servant § 39b—

G.S. 97-19 is applicable only to subcontractors as defined by the statute and was enacted for the purpose of protecting employees of irresponsible and uninsured subcontractors and to prevent an employer from evading the Workmen's Compensation Act by subdividing his regular operations, and the statute has no application to an independent contractor whose sole connection with the principal contractor is the sale of goods which the principal contractor purchases in the open market.

5. Same—Findings held to support conclusion that main contractor was agent of insurer in effecting compensation insurance for independent contractor.

The findings of the Industrial Commission were to the effect that the employer was engaged in logging operations, buying his own timber, owning his own equipment, and having sole control over his employees, that during a period when he was selling his entire output to the main contractor, the representative of the insurance carrier of the main contractor, with knowledge of all the facts, stated that the employer's compensation insurance could be included in the policy of the main contractor, and that thereafter the employer remitted to the main contractor the stipulated percentage of his total wages and the main contractor remitted same to the insurance carrier. The Commission further found that pursuant to this understanding the executive officer of the main contractor bound insurer as the employer's compensation carrier. Deceased employee was killed in an accident occurring during a period when the employer was selling logs to a person other than the main contractor, but before any cancellation or termination of the insuring agreement or stoppage of payment of premiums by the employer. *Held:* G.S. 97-19 is not applicable, and therefore the fact that the employer had ceased to sell logs to the main contractor prior to the injury could not in itself terminate the coverage, and the findings support the conclusion that coverage was still in effect at the time of the injury, and this result is not affected by the fact that insurer's agent mistakenly assumed that the employer was operating under a contractual relationship with the main contractor within the purview of G.S. 97-19.

6. Cancellation and Rescission of Instruments § 3—

A mistake of law, as distinguished from a mistake of fact, does not affect the validity of a contract.

7. Master and Servant § 42b—

Insurer admitted coverage and acknowledged receipt of premiums of the employer during the period the employer was selling his total output of logs to the main contractor and also for several weeks during which the employer was selling his logs to another. *Held:* Insurer may not deny liability for an accident occurring during a subsequent period when no logs were being sold or delivered to the main contractor, since a person may not ratify a portion of a contract and reject the rest.

8. Principal and Agent § 7d—

A principal may not ratify that part of a contract favorable to him and reject that part which is unfavorable, but by electing to retain the benefits, ratifies the entire transaction.

9. Master and Servant § 45—

The jurisdiction of the Industrial Commission to hear and determine all questions arising under the Compensation Act ordinarily includes the right and duty to hear and determine questions of law and fact respecting the existence of insurance coverage and the liability of the insurance carrier, G.S. 97-91, in furtherance of the legislative intent that the provisions of the Act be administered under summary and simple procedure to afford complete relief to parties bound by the Act. G.S. 97-77.

APPEAL by defendant American Mutual Liability Insurance Company from *Williams, J.*, at March Term, 1952, of CHOWAN.

Proceeding under Workmen's Compensation Act for compensation on account of the death of Henry Greene, who died as a result of an injury sustained while felling trees for the defendant O. R. Spivey, whose business was that of timbering and logging. Spivey at times sold logs to the defendant Halsey Hardwood Company, Inc. (hereinafter referred to as Halsey Hardwood), whose compensation insurance carrier was the defendant American Mutual Liability Insurance Company (hereinafter referred to as American Mutual).

This controversy revolves around the question whether American Mutual was also the compensation insurance carrier of Spivey and as such liable for the compensation due on account of the death of his employee, Henry Greene.

In addition to the noncontroversial jurisdictional determinations, these in substance are the pertinent facts found by the Industrial Commission:

1. Henry Greene died on 26 July, 1949, as a direct result of an injury by accident arising out of and in the course of his employment by O. R. Spivey. The accident occurred on 19 July, 1949.

2. Spivey's regular business was that of timbering and logging. He did not operate a sawmill. He purchased and worked standing timber and sold the logs in the open market wherever he could at the prevailing price. He owned his own equipment, hired, fired, and paid his own em-

ployees, worked or stopped when and as he saw fit, and kept his own records.

3. On 14 January, 1949, and for some time prior thereto, the defendant Spivey had been selling his entire output of logs to the defendant Halsey Hardwood. However, Halsey Hardwood had no voice in or control over the management of Spivey's operations in any way or manner, and Spivey was not an employee or subcontractor of Halsey Hardwood. Spivey continued to deliver his entire output of logs to Halsey Hardwood "until sometime in March" (1949) "when Halsey Hardwood, finding itself with so many logs on hand that there was danger of losing some by rotting, told Spivey that they would need no more logs from him until further notice." He then ceased delivering logs to Halsey Hardwood until May, 1949, when he sold it "several more loads of logs." In the interim he had been delivering his logs to Major & Loomis Lumber Company and others; that "after 7 May, 1949, he delivered no more logs to Halsey Hardwood until after September, 1949." At the time of Henry Greene's injury on 19 July, 1949, Spivey was selling his logs to Major & Loomis Lumber Company. This company had no voice in or control over Spivey's operations.

4. The relationship of employer and employee did not exist between the deceased Henry Greene and Halsey Hardwood or between the deceased employee Henry Greene and Major & Loomis Lumber Company. Henry Greene was the employee of O. R. Spivey only.

5. Prior to 14 January, 1949, Halsey Hardwood had been carrying workmen's compensation insurance with an insurance company not revealed by the record. Leroy A. Lanier, Branch Manager of American Mutual, had been soliciting Halsey Hardwood's coverage, and on 14 January, 1949, American Mutual issued to Halsey Hardwood a policy of workmen's compensation insurance on what is known as a "quarterly audit basis." Under this plan, the assured pays a deposit premium equal to 40% of the estimated annual premium at the time the policy is written and becomes effective. Quarterly thereafter, either the assured or a representative of the company audits the payroll records of the assured for such period, and the earned premium based upon such quarterly audit is paid quarterly by the assured. Upon completion of the fourth and final quarterly audit the actual earned premium for the year is paid. Any excess of earned premium not paid in quarterly premiums is either charged against the deposit premium or paid by the assured. The balance of the deposit premium, if any, is then either returned to the assured or credited on the next policy year, if the policy is renewed. The insurance carrier retains the 40% deposit premium throughout the policy year or until cancellation or rescission of the policy. Any of the audits herein mentioned may be made either by the assured or by the insurance carrier,

and this plan was followed by Halsey Hardwood and American Mutual under the policy issued 14 January, 1949.

6. When Branch Sales Manager Lanier negotiated the issuance of the insurance policy with R. P. Baer and C. T. Griffin, executive officers of Halsey Hardwood, Lanier was informed of these facts: that Halsey Hardwood was conducting its own logging operations by subcontractors who were cutting timber owned by the company; that it was also purchasing logs from an independent contractor (Spivey); that it was not known whether Spivey had his own workmen's compensation insurance, but if he did not have it Halsey Hardwood wanted him covered under its policy; that Lanier (after phoning the Atlanta office) advised the executive officers of Halsey Hardwood with whom he was dealing "that this could be done," and requested Mr. Baer, chief executive officer of Halsey Hardwood, to ascertain whether Spivey had his own insurance or not. Lanier further instructed Baer and Griffin (the latter being General Manager of Halsey Hardwood) "that in the event Spivey was to be covered under the Halsey policy, his payroll should be reported with that of Halsey Hardwood and premiums paid accordingly." As to this, the Commission found these specific facts: (1) "It was agreed between Mr. Baer and Mr. Lanier, agent for American Mutual, that if O. R. Spivey did not have insurance on his men they were to be covered by the policy issued to Halsey Hardwood. No reference was made as to whether or not Halsey Hardwood bought all of the logs produced by O. R. Spivey or only part of them." (2) "Mr. Baer, an official of Halsey Hardwood, was the agent of American Mutual for the purpose of ascertaining whether or not O. R. Spivey was carrying compensation insurance on his employees and, if not, to effect such insurance by causing the said Spivey to submit his payroll each Friday and pay the premium thereon to Halsey Hardwood Company, who in turn would include the same in its report and payment to American Mutual."

7. Thereafter Baer ascertained from Spivey that he did not have workmen's compensation insurance, but wished to carry it. Baer then informed Spivey he could come under the Halsey Hardwood policy by paying premiums based on 5.5% of his payroll, which should be reported to Halsey Hardwood weekly. Beginning the first week in February, 1949, Spivey reported his payroll to Miss Edna Snell, bookkeeper for Halsey Hardwood, each Friday afternoon and paid 5.5% of his payroll each week as a premium for the coverage of his employees, and Spivey continued to make such payments until after the death of Henry Greene on 26 July, 1949. As to this, the Industrial Commission specifically found as a fact that "premiums were paid by O. R. Spivey to Halsey Hardwood in accordance with the arrangement detailed until after the

death of Henry Greene. Halsey Hardwood remitted the said premiums along with his own premiums to American Mutual."

8. After the death of Henry Greene, J. C. Taylor, an adjuster for American Mutual, made an investigation, and as a result thereof instructed the representatives of Halsey Hardwood not to accept any further premiums from Spivey; and no further premium payments were accepted thereafter by Halsey Hardwood from Spivey.

9. The audit for the first quarter ending 14 April, 1949, was prepared by G. E. Wiles, a payroll auditor for American Mutual. By inadvertence on the part of Miss Edna Snell, bookkeeper for Halsey Hardwood, the payroll of O. R. Spivey was not reported in this quarterly audit. However, Spivey made his weekly reports and weekly payments to Miss Snell for Halsey Hardwood. The second quarterly audit was prepared by Miss Snell. This audit covered the period from 14 April to 14 July, 1949. This audit was made after the death of Henry Greene. The erroneous omission of Spivey's payroll from the first quarterly audit was later pointed out to Wiles by Miss Snell. Wiles separated Spivey's payroll from Halsey Hardwood's payroll on the audit made in October, 1949. He drew the audit to include Spivey's payroll through 7 May, 1949, the date of the last delivery of logs to Halsey Hardwood by Spivey prior to the death of Henry Greene. Wiles had been instructed by his principal, American Mutual, to so separate Spivey's payroll from Halsey Hardwood's payroll in making the audit.

Upon these findings, and others not pertinent to this appeal, the Industrial Commission concluded in substance (1) that on and prior to 19 July, 1949, Henry Greene was an employee of O. R. Spivey and that both of them were subject to and bound by the provisions of the Workmen's Compensation Act, and (2) that American Mutual was Spivey's compensation insurance carrier and was on the risk at the time of the injury and death of his employee, Henry Greene, and is liable for payment of the compensation due on account thereof. Thereupon an award was made in favor of the claimants, Lena Holly Greene, widow, and John Holly, her son, with direction that the award be paid by American Mutual as Spivey's insurance carrier. The proceeding was dismissed as against the defendants Halsey Hardwood and Major & Loomis Lumber Company and the latter's insurance carrier, Liberty Mutual Insurance Company.

From the decision and award of the Commission, American Mutual appealed to the Superior Court by giving notice of appeal as follows:

"Now comes the American Mutual Liability Insurance Company, one of the defendants in the above proceedings, and give this notice of appeal to the Superior Court of Chowan County, said County being the County in which the accident occurred, for errors of law in the review and award made by the Full Commission on the 24th day of July 1951. The appel-

lant prays the Commission that it certify and return to said court a certified transcript and record of this proceedings as provided by law."

However, no specific exceptions or assignments of error appear to have been filed with or included in the record on appeal to the Superior Court.

In the Superior Court, the presiding judge entered judgment adjudging "that the findings of fact and conclusions of law of Hearing Commissioner Scott and the Full North Carolina Industrial Commission and award made thereon are hereby in all respects ratified, approved and adopted by the court, and that the plaintiff recover the award as set out in the judgment of the said Industrial Commission."

From the judgment so entered, the defendant American Mutual excepted and appealed to this Court.

I. Weisner Farmer for American Mutual Liability Insurance Company, defendant, appellant.

Marvin Wilson for O. R. Spivey, defendant, appellee.

JOHNSON, J. American Mutual's appeal from the Industrial Commission to the Superior Court, being unsupported by any specific exception to any finding of fact of the Commission, amounted to nothing more than a general exception to the decision and award of the Commission, and was insufficient to challenge the sufficiency of the evidence to support the findings of fact of the Commission or any one of them. The appeal carried up for review in the Superior Court the single question whether the facts found by the Commission support the decision and award. *Parsons v. Swift & Co.*, 234 N.C. 580, 68 S.E. 2d 296; *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609. See also *In re Sams, ante,* 228, 72 S.E. 2d 421. And in turn, the general exception to the judgment signed by Judge Williams brings here for review the single question whether the facts found support the decision and award. *Rader v. Coach Co., supra; Brown v. Truck Lines,* 227 N.C. 65, 40 S.E. 2d 476; *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869. See also *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351, and cases there cited.

On the record as presented it has not been made to appear that Judge Williams either ruled upon, or was required to rule upon, any specific finding of fact of the Industrial Commission. This being so, it is too late for American Mutual to attempt to challenge for the first time in this Court (by assignments of error directed to specific findings of the Industrial Commission), the sufficiency of the evidence to support these crucial findings of the Commission: (1) that R. P. Baer, executive officer of Halsey Hardwood, was constituted the agent of American Mutual with power and direction to effect the insurance coverage of Spivey; (2) that Baer brought about the coverage of Spivey; (3) that the premiums were

paid by Spivey to Halsey Hardwood in accordance with the instructions given him; and (4) that Halsey Hardwood in turn remitted the premiums along with its own to American Mutual. This is an appellate court. Our function, under the Constitution, is to review alleged errors and rulings of the trial court, and unless and until it is shown that a trial court ruled on a particular question, it is not given for us to make specific rulings thereon. Article IV, Section 8, Constitution of North Carolina; *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807; *Leggett v. College,* 234 N.C. 595, 68 S.E. 2d 263; *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888.

It thus appears that the decisive question presented by this appeal is: Are the facts found by the Industrial Commission sufficient to support the adjudication that American Mutual Liability Insurance Company was the compensation carrier of O. R. Spivey, employer of the deceased Henry Greene, at the time of his fatal injury, and liable for payment of the compensation due on account of Greene's death.

As to this, the Commission found as a fact that R. P. Baer, an official of Halsey Hardwood, was the agent of American Mutual with power and direction to effect the compensation insurance coverage of Spivey. This is conceded by American Mutual. It is also conceded that Baer, acting on this authorization, effected Spivey's coverage on or about 1 February, 1949, and that for a time thereafter Spivey's operations were effectively covered.

However, American Mutual takes the position that its contract with Spivey furnished coverage of his workers only while and so long as he was selling and delivering logs to Halsey Hardwood.

Thus, American Mutual urges that when Spivey delivered his last load of logs to Halsey Hardwood on 7 May, 1949, his insurance coverage thereupon ceased and terminated, thus freeing this company from liability for the fatal accident suffered by Greene on 19 July, 1949.

This contention that Spivey's insurance coverage was conditional and terminable, as urged by American Mutual, is predicated upon the theory that the insuring agreement was made by the parties in contemplation of the provisions of G.S. 97-19 as amended. This statute provides in pertinent part as follows:

"Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with Sec. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than five employees in the same business within this State, to the same extent as such subcontractor would be if he had accepted the provisions of this article for the payment of compensation and other benefits under

this article on account of the injury or death of any employee of such subcontractor, due to an accident arising out of and in the course of the performance of the work covered by such subcontract. . . .

"The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor."

Here, American Mutual takes the position that Spivey's insurance coverage rested solely upon, and was dependent on the continued existence of, an insurable interest which it asserts Halsey Hardwood had in Spivey's operations by reason of the relation of principal contractor and subcontractor between Halsey Hardwood and Spivey within the meaning of G.S. 97-19. Therefore, American Mutual urges that the stoppage of Spivey's log deliveries to Halsey Hardwood, *ipso facto,* terminated Spivey's insurance coverage.

The manifest purpose of this statute, enacted as an amendment to the original Workmen's Compensation Act, is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who, presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers. It is also the obvious aim of the statute to forestall evasion of the Workmen's Compensation Act by those who might be tempted to subdivide their regular operations with the workers, thus relegating them for compensation protection to small subcontractors, who fail to carry, or if small enough, may not even be required to carry, compensation insurance. *Withers v. Black,* 230 N.C. 428, p. 434, 53 S.E. 2d 668. Larson, Workmen's Compensation Law, Vol. 1, Sec. 49.11, p. 724; 58 Am. Jur., Workmen's Compensation, Sec. 139. See also Annotations: 58 A.L.R. 872; 105 A.L.R. 581.

The statute at hand has no application to the relationship between Halsey Hardwood and Spivey as shown by this record. Here, there is neither evidence nor finding of fact that Halsey Hardwood at any time sublet any part of its logging operations or other work to Spivey, nor made any contract with him for the performance of work of any kind. All the evidence tends to show, and the facts are so found by the Commission, that Spivey was cutting timber which he owned absolutely under direct purchase from the owner of the stumpage. Halsey Hardwood had no contractual rights of any kind in the stumpage. Spivey owned his own logging equipment, conducted his own logging operations and sold his logs in the open market. The firms to whom he sold the logs had no

control or right of control over his mode of logging operations or disposal of logs. On this record Spivey at no time stood in the position of subcontractor to Halsey Hardwood or any other firm to whom he sold his logs, nor was Halsey Hardwood ever at any time liable, under G.S. 97-19 or any other section of the Workmen's Compensation Act, for any injuries that may have been sustained by Spivey's employees.

It must be kept in mind that G.S. 97-19 is not applicable to an independent contractor (*Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137), as distinguished from a subcontractor of the class designated by the statute. *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515; *Evans v. Lumber Co.,* 232 N.C. 111, 59 S.E. 2d 612. And all the more is it so that the statute does not apply to an independent employer who, as in the case of Spivey, produces or gets out raw materials of his own, like logs, and sells them in the open market to a processor-purchaser like Halsey Hardwood who has no control whatsoever over the operations of the independent employer.

It follows, then, that since the relationship of principal contractor and subcontractor never existed between Halsey Hardwood and Spivey within the meaning of G.S. 97-19, Spivey's insurance coverage may not be treated as having rested in its inception upon that relationship; and if this be so, it necessarily follows that proof of the nonexistence of that relationship at some subsequent time does not, *ipso facto,* show a termination of the insurance coverage.

This record discloses that Lanier, agent of American Mutual, was fully apprised of the true factual relationship between Halsey Hardwood and Spivey before Spivey's coverage was effected. Therefore, if it be conceded that Lanier was mistaken in assuming that Spivey was operating under a contractual relation with Halsey Hardwood which brought him within the purview of G.S. 97-19 (though this is not shown by the record), even so, such was nothing more than an erroneous conclusion as to the legal effect of known facts. And this is a mistake of law and not of fact, and the rule is that ordinarily a mistake of law, as distinguished from a mistake of fact, does not affect the validity of a contract. *Foulkes v. Foulkes,* 55 N.C. 260; *Bledsoe v. Nixon,* 68 N.C. 521. See also 12 Am. Jur., Contracts, Sec. 140, p. 634.

It is manifest, therefore, that the rights of American Mutual and Spivey must be determined without reference to G.S. 97-19, wholly and solely upon the basis of the contractual relation between them as established by the findings of fact of the Industrial Commission. The findings of the Commission show that Baer, acting as agent of American Mutual, effectively bound that company as Spivey's compensation insurance carrier, and no cancellation or termination of the insuring agreement or stoppage of the payment of premiums has been made to appear. On the

contrary, it affirmatively appears that the premiums were paid weekly by Spivey until after the deceased Henry Greene sustained his fatal injury. These findings support the conclusion and adjudication that American Mutual was Spivey's compensation insurance carrier and as such is liable for payment of the compensation due by reason of the death of Henry Greene.

Besides, it is noted that American Mutual admits its coverage of Spivey in the first instance. The period of admitted coverage extends from 1 February through 7 May, 1949. This includes a period of several weeks in March and April when no logs were being delivered to Halsey Hardwood. Following this stoppage there was a period of deliveries extending over a few days in May and ending 7 May. After this, Spivey again resumed deliveries in September, 1949. Meanwhile, Henry Greene was injured 19 July, 1949. Thus, by admitting coverage and acknowledging receipt of premiums and electing to keep them for the period of several weeks in March and April when no logs were being delivered to Halsey Hardwood, American Mutual attempts to ratify a portion of the insuring agreement and reject the rest. This, in no event, may it do. Ordinarily an insurance company may not ratify that part of an unauthorized contract made by an agent which is favorable to it and reject the rest. It must ratify or reject it as a whole. 44 C.J.S., Insurance, Sec. 273, p. 1090. The rule is that ratification extends to the entire transaction. 2 Am. Jur., Agency, Sec. 223, p. 177. Therefore, if it should be conceded *arguendo* that the contract as made by Mr. Baer as agent of American Mutual was ineffectual for any reason to cover Spivey's operations after he stopped selling and delivering logs to Halsey Hardwood on 7 May, 1949, even so, it would seem that upon the record as here presented American Mutual ratified the contract by its election to retain premiums paid by Spivey during an earlier period while he was not delivering logs to Halsey Hardwood.

We have not overlooked the appellant's challenge to the jurisdiction of the Industrial Commission. As to this, appellant urges that the court, and not the Industrial Commission, is the proper forum for the adjudication of the question of liability, if any, of American Mutual.

The appellant's position is untenable. The Commission is specifically vested by statute with jurisdiction to hear "all questions arising under" the Compensation Act. G.S. 97-91. This jurisdiction under the statute ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier. See 58 Am. Jur., Workmen's Compensation, Sec. 572; Annotation, 127 A.L.R. 476, 481; 71 C.J., p. 916.

It was the legislative intent that the Industrial Commission should administer the provisions of the Workmen's Compensation Act under

summary and simple procedure, distinctly its own, so as to furnish speedy, substantial, and complete relief to parties bound by the Act. G.S. 97-77 *et seq.* See also *Worley v. Pipes,* 229 N.C. 465, 50 S.E. 2d 504; *Lee v. Enka Corp.,* 212 N.C. 455, 193 S.E. 809; *Conrad v. Foundry Co.,* 198 N.C. 723, 153 S.E. 266.

This record impels the conclusion that the Industrial Commission had jurisdiction to hear and determine the question of insurance coverage.

It follows from what we have said that the judgment below will be Affirmed.

ALBERT W. BRITT v. CITY OF WILMINGTON, A MUNICIPAL CORPORATION, AND E. L. WHITE, MAYOR AND COUNCILMAN, AND J. E. L. WADE, W. RONALD LANE, E. S. CAPPS AND W. GORDON DORAN, AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF WILMINGTON.

(Filed 19 November, 1952.)

1. Actions § 3a—

An action to determine the right of a municipality to issue certain bonds will be treated as an adversary proceeding and will be decided irrespective of any stipulations of legal conclusions by the parties, since in no event could plaintiff taxpayer stipulate away the rights of all the taxpayers of the municipality.

2. Taxation § ½—

A municipality may pledge the revenues from a proper proprietary undertaking to the payment of bonds issued in connection therewith, since in such instance no debt is incurred within the meaning of the Constitution. G.S. 160, Art. 33.

3. Municipal Corporations § 5—

A municipal corporation exercises two classes of powers, one governmental as an agency of the State and the other proprietary as a private corporation.

4. Municipal Corporations § 7a—

Any activity of a municipality which is discretionary, political, or legislative and undertaken in behalf of the State in promoting or protecting the public health, safety, security, or general welfare, is a governmental function.

5. Municipal Corporations § 8a—

Any activity of a municipality which is commercial or chiefly for the private advantage of the compact community, is a proprietary function, but even a private or proprietary function of a municipality must be for a public purpose and at least incidentally promote the general health, safety, security, or general welfare of its residents.

6. Municipal Corporations § 38½—

A municipality has no authority to charge a fee or toll for the parking of vehicles upon its streets or to lease or let its system of on-street parking meters for operation by a private corporation or individual. It may not pledge revenue derived from on-street meters to the payment of proposed bonds for off-street parking arrangements, or consolidate into one project on-street and off-street parking. G.S. 160-414 (d) and G.S. 160-415 (g) as they relate to on-street parking are void.

7. Same—

On-street parking meters are maintained by a municipality in the exercise of its governmental powers in the regulation of traffic on its streets, and the requirement of the deposit of a coin is in the nature of a tax and is not a fee or toll but simply the method for putting the meter into operation, and the revenue therefrom must be set apart and used for expenses incurred in the regulation and limitation of vehicular traffic on its streets. G.S. 160-200(31).

8. Same—

The regulations of a municipality for off-street parking meters maintained by it in its proprietary capacity may not be enforced by criminal prosecutions.

9. Municipal Corporations § 36—

A municipality may not bind itself to enact or enforce on-street and off-street parking regulations by penal ordinance for the period during which bonds issued to provide off-street parking facilities should be outstanding, since it may not contract away or bind itself in regard to its freedom to enact governmental regulations.

APPEAL by plaintiff from *Burney, Resident Judge,* in Chambers, at Wilmington, N. C., 16 August, 1952, NEW HANOVER. Reversed.

Civil action to restrain the issuance of parking facilities revenue bonds and the appropriation of revenue derived from on-street parking meters for the payment thereof.

The City of Wilmington now maintains 631 parking meters located near the curbs of its streets in areas congested by traffic. At the time a motorist parks in a meter zone he is required to activate the meter set opposite the space in which he parks by depositing a coin therein. This system of traffic control will hereafter be referred to as on-street parking facilities or on-street parking meters.

It now plans to acquire private property to be converted into a parking area or lot for sixty automobiles. The plan contemplates a charge of five cents per half hour or ten cents per hour for a total of not more than eighteen consecutive hours. The "rates, fees, tolls, or charges for the . . . (parking) facilities" thus furnished by the city are to be collected through the medium of parking meters. This plan will hereafter be referred to as off-street parking facilities.

The city now collects from its on-street parking facilities an average of more than $46,400 per year. It estimates that it will collect through the off-street meters more than $11,200 per year which will be sufficient to pay the estimated cost of maintenance and repair, the installments of principal and interest maturing annully on the proposed revenue bonds, and leave a net balance of $3,640 per year.

The city proposes to issue revenue bonds in the sum of $110,000 as authorized by General Statutes Ch. 160, subchapter IV, Art. 33, the proceeds of which are to be used in acquiring the necessary land, materials, and other equipment and paying the expenses necessary to put the property in condition for operation as a parking lot. Under the terms of the resolution adopted in furtherance of this proposal "they propose to collect and set aside the revenues of the on-street parking meters in the City and of off-street parking facilities as provided in the Resolution . . ." (Answer) for the payment of said bonds and interest thereon. The resolution provides for a sinking fund and stipulates the conditions upon which on-street meter revenues are to be transferred from the general fund to the sinking fund and the amounts of such transfers. The details are not material here. The resolution declares that the traffic conditions in congested areas of the city caused by the parking of automobiles "endangers the health, safety and welfare of the general public" and has created "a public nuisance" that can be abated only by adequate off-street parking facilities which have become "a public necessity." It provides further that it is necessary and advisable to combine the on-street and the proposed off-street facilities "into a single undertaking for financing purposes and for the more adequate regulation of traffic and relief of congestion."

In the resolution the city makes certain covenants including covenants that it will (1) install parking meters in the parking lot including parking meters for any additional off-street parking facilities or enlargements, improvements, or extensions of off-street parking facilities for which revenue bonds may hereafter be issued, and (2) adopt and maintain in force an ordinance or ordinances making applicable to the off-street parking facilities the provisions of the ordinances of the city governing motor vehicles and traffic which relate to the regulation, control, operation, and use of on-street parking meters and penalties for the violation of such provisions.

Pursuant to said covenants the city board has adopted an ordinance which provides (1) that the parking meters installed on the parking lot shall be operated from 6:00 a.m. to 12 midnight every day including Sundays and holidays, and (2) each person parking a vehicle in a space within said parking lot be required to deposit five cents for each half hour or ten cents for each hour such vehicle is parked, not to exceed eighteen

consecutive hours. In section 2 of the ordinance it is made unlawful for "any person to cause, allow or permit any vehicle registered in his name or which vehicle is under his control to be or remain parked in any off-street parking space for which a parking meter has been provided for any period of time for which any required deposit in the parking meter shall not have been made."

The court below concluded that the proposed plan for issuing revenue bonds is in all respects regular and valid and entered judgment denying injunctive relief. Plaintiff excepted and appealed.

McClelland & Burney for plaintiff appellant.

Wm. B. Campbell for defendant appellees.

BARNHILL, J. The record before us generates some doubt as to whether this action is a *bona fide* adversary proceeding. While plaintiff alleges that the parking facilities the defendant proposes to furnish motorists are not "for a proper public purpose or for the general welfare and benefit of the City and its inhabitants, but are for the private benefit of the users of such facilities," he stipulates in part that traffic congestion on the streets of Wilmington has reached the point that it creates a public nuisance and "this traffic congestion is not capable of being adequately abated except by provision for sufficient off-street parking facilities; adequate off-street parking facilities have not been provided and parking spaces now existing must be forthwith supplemented by off-street parking facilities provided by public undertaking; and the provision of such off-street parking facilities is a public necessity."

Thus it would seem that the parties to the action are seeking the same end—the approval by this Court of the proposed bond issue. If such is the case—and we do not so assert—we could not permit a single resident of defendant city to stipulate away the rights of all the taxpayers of the municipality. Instead, we shall decide the questions of law posed for decision upon the assumption they are presented in good faith upon the essential facts appearing of record, unhampered by stipulations of legal conclusions.

The authority of the defendant city to issue and market the proposed off-street parking facilities revenue bonds under the terms of the resolution adopted by its governing board rests upon the validity of certain stipulations and covenants contained in the bond resolution and of the enforcement ordinance adopted pursuant thereto. The plaintiff in his complaint attacks the right of the defendant city to (1) pledge the revenue derived from the off-street parking facilities to the payment of said bonds, (2) pledge revenue derived from the on-street meters to the payment of the proposed bonds, (3) consolidate into one project the on-street and

off-street parking arrangements, and (4) maintain, and enforce by criminal prosecution, the ordinance adopted by the governing body of defendant regulating the operation of the off-street parking facilities.

We may concede, without deciding, that the proposed off-street parking undertaking is for a public purpose and is a proper municipal objective within the defendant's proprietary powers. If that be true, then, of course, the defendant has the power to pledge the revenues derived from the off-street parking facilities to the payment of the proposed revenue bonds. The very purpose of the Revenue Bond Act, General Statutes Ch. 160, Art. 33, is to permit municipalities to engage in nongovernmental activities of a public nature by pledging the revenue derived from such undertakings to the payment of bonds issued in connection therewith. Thus it avoids pledging the credit of the municipality to the payment of a debt, for by such arrangements no debt is incurred within the meaning of the Constitution.

We deem it necessary therefore to discuss only two questions raised by plaintiff: The right of defendant (1) to pledge revenue derived from the on-street parking facilities to the payment of the proposed revenue bonds, and (2) to enforce by criminal prosecution the provisions of its ordinance regulating parking in the off-street parking lot.

A municipal corporation is dual in character and exercises two classes of powers—governmental and proprietary. It has a twofold existence—one as a governmental agency, the other as a private corporation.

Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary. *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42.

A municipal corporation cannot, even with express legislative sanction, engage in any private enterprise or assume any function which is not in a legal sense public in nature, the word "private" as used in opinions discussing the powers of a municipality being used to designate proprietary, as distinguished from governmental, functions. *Brown v. Comrs. of Richmond County,* 223 N.C. 744, 28 S.E. 2d 104; *Kennerly v. Dallas,* 215 N.C. 532, 2 S.E. 2d 538; *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90; *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209; 5 McQuillin Mun. Corp., Rev. Ed. 1278; 37 A.J. 734.

When a municipality is acting "in behalf of the State" in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within

its proprietary powers. In either event it must be for a public purpose or public use.

So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security or general welfare of the residents of the municipality. *Nash v. Tarboro, supra.*

It follows that the mere fact the off-street parking facilities defendant proposes to install tend to promote the safety, convenience, or general welfare of its citizens is not determinative.

The defendant is proceeding under the provisions of the statute known as the Revenue Bond Act of 1938, now General Statutes, Ch. 160, Art. 34. This Act was amended in 1951, Ch. 703, S.L. 1951, so as to include "parking facilities" as one of the "undertakings" a city is authorized to finance by the issuance of revenue bonds, that is, bonds which are to be paid, both as to principal and interest, solely out of the revenue derived from the operation of the enterprise.

An examination of this Act makes it clearly appear that the parking facilities undertaking therein authorized is commercial in nature. The city is empowered to charge rates, fees, tolls, or charges for the facilities furnished—to "impose such charges in connection with any such parking meters . . . as it may deem advisable . . ." The off-street parking facilities are to be "open to public use for a fee." The property and parking facilities may, in the discretion of the governing board, be leased to individuals. The revenue derived from the imposition of the charges, rates, fees, and tolls is to be used to pay the principal and interest on the revenue bonds issued to finance the project.

The facts appearing of record fortify this conclusion. It is contemplated that the off-street parking project will produce revenue sufficient to pay all expenses of operation, maintenance, and repair, the installments of principal and interest on the bonds as they mature and still leave a net annual profit of over $3,000. The bonds are to be paid in full over a period of twenty-five years. Thus the city will have accumulated at the end of twenty-five years an additional profit of $110,000.

Moreover, the "undertaking" is an enterprise or business in which any corporation or individual is privileged to engage. Indeed, off-street parking facilities provided for the motoring public by private enterprise were a well-known feature of the American scene long before the idea of municipally owned and operated parking lots was conceived.

The Act, G.S. 160-414 (d) and 415 (g), as it relates to on-street parking is void. Streets of a municipality are provided for public use. A city board has no valid authority to rent, lease or let a parking space on the streets to an individual motorist "for a fee" or to charge a rate or toll therefor. Much less may it lease or let the whole system of on-street parking meters for operation by a private corporation or individual. *S. v. Scoggin,* 236 N.C. 1. Nor can G.S. Ch. 160, Art. 39, offer defendant any comfort, for the provisions of that Act are to like effect.

If the defendant installed its on-street parking meters, as we assume, under the provisions and pursuant to the authority contained in G.S. 160-200 (31), then it was acting within its authority as a governmental agency. The deposit of a coin by a motorist at the time of parking, to activate the meter, is not a fee or charge or toll for using the parking space. It is simply the method adopted by the governing authorities of the city for putting the meter in operation. *S. v. Scoggin, supra.* The revenue derived therefrom is expressly set apart and dedicated to a particular use by the Legislature in the Act granting authority to municipalities to regulate parking in areas congested by motor traffic by the use of parking meters. G.S. 160-200 (31). "The proceeds derived from the use of such parking meters shall be used exclusively for the purpose of making such (parking) regulation effective and for the expenses incurred by the city or town in the regulation and limitation of vehicular parking, and traffic relating to such parking, *on the streets and highways of said cities and towns.*" (Italics supplied.)

In this connection it is interesting to note that the Legislature in the same section authorizes the acquisition and operation of off-street parking lots and a charge for the use thereof. Thus it appears the Legislature had clearly in mind the difference between governmental and proprietary functions of a municipality.

The revenue derived from the on-street parking facilities is exacted in the performance of a governmental function. It must be set apart and used for a specific purpose. By whatever name called, it is in the nature of a tax. *Unemployment Compensation Com. v. Trust Co.,* 215 N.C. 491, 2 S.E. 2d 592.

> "What's in a name? That which we call a rose
> By any other name would smell as sweet."

It follows that the on-street and off-street parking facilities may not be combined and operated as one undertaking. Nor may the "deposits" made in the on-street meters be pledged to secure, or be applied to, the payment of the revenue parking facilities bonds the defendant proposes to issue.

The ordinance adopted by the governing board of defendant city in compliance with the covenant contained in the resolution authorizing the issuance of the proposed bonds provides that the meters to be installed in the off-street parking lot shall be operated each day from 6:00 a.m. to 12 midnight and that: "Each person parking a vehicle in space for which a parking meter has been provided during the period of time mentioned is hereby required to deposit in such parking meter five cents for each half hour or ten cents for each hour such vehicle is so parked; provided, that no vehicle shall be parked in the same space for more than eighteen consecutive hours." It further provides that it shall be unlawful for any person to allow or permit a vehicle registered in his name or under his control to "remain parked in any off-street parking space . . . for any period of time for which any required deposit in the parking meter shall not have been made." It expressly recites that it is adopted pursuant to the bond resolution which provides for "the fixing and collecting of rents, fees and charges for the use of such facilities . . ." A penalty is provided for the violation of any section of the ordinance.

Thus the length of time a motorist may park in a space set apart for that purpose in the off-street parking lot depends upon the amount of money deposited in the meter. The ordinance is not uniform in its application. One person may be prosecuted for leaving his vehicle parked for more than thirty minutes while another may lawfully park for eighteen consecutive hours, and there are thirty-four "periods of lawful parking" intervening between the half-hour and the eighteen hour periods. Uniformity of burden and of privilege is completely lacking. *S. v. Scoggin, supra.*

The criminal processes of the State are available to a city or town only for the better enforcement of the criminal law and police regulations adopted in furtherance of its functions as a governmental agency of the State. A regulation adopted in connection with and in furthance of an undertaking which is purely proprietary in nature may not be enforced by criminal prosecution. Furthermore, the governing board of a municipality may not bind itself to enact, and the municipality to maintain for twenty-five years, a regulatory ordinance pertaining to the governmental functions of the city. It cannot thus farm out its legislative functions or delegate to private individuals the right to determine whether and to what extent one of its police regulations may be amended.

Even if we pass without notice the absence of any declaration that public convenience demands the regulation therein contained, it is quite apparent that public convenience was not the dominant motivating reason for its adoption. It cannot reasonably be said that it tends to promote the rapid turnover of parking in congested areas. Sixty persons could lawfully monopolize the whole lot for a period of eighteen hours. Hence

the proposed undertaking is little more than a provision for the storage of motor vehicles. Therefore, the penal provisions of the ordinance may not be sustained as a proper exercise of the police power of the city.

We have reached our conclusions after a careful examination of the authorities cited by defendant. Most, if not all, of them are distinguishable by reason of the local statutes or the contents of the bond resolutions and ordinances or the factual situations. Off-street parking facilities financed and maintained by the public are of modern origin. The law pertaining to the establishment of such facilities by cities and towns is in a state of flux. The courts of a state must decide questions relating thereto in accord with local statutes and the facts in the particular case. It is natural, therefore, that there should be, at this time, a conflict of opinion. Anno. 8 A.L.R. 2d 375. No doubt, as has so often happened in the past in respect to other questions, there will be a gradual drift of judicial opinion and legislative enactment towards uniformity until the law will become substantially the same in all American jurisdictions. Such is the history of the growth of the law.

It must not be understood that we are presently holding that off-street parking facilities established in accord with our statutes are not for a public purpose or that parking facilities revenue bonds may not be issued to finance the same. We are deciding the questions presented on the record before us without undertaking to anticipate somewhat similar questions which may be presented in the future. See Anno. 8 A.L.R. 2d 375.

For the reasons stated the judgment entered in the court below is

Reversed.

STATE v. RANSOM THOMAS.

(Filed 19 November, 1952.)

1. Indictment and Warrant § 7—

An indictment is a written accusation of crime drawn up by the public prosecuting attorney and submitted to a grand jury, and by them found and presented on oath or affirmation as a true bill.

2. Same—

A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others, without any bill of indictment, but since the enactment of G.S. 15-137 trials upon presentments have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment.

3. Constitutional Law § 32—

A person charged with the commission of a capital felony can be prosecuted only on an indictment found by a grand jury. Art. I, sec. 12, of the Constitution of N. C.

4. Same—

A person charged with a noncapital felony or with a misdemeanor may be tried initially in the Superior Court only upon an indictment, except when represented by counsel he may be tried upon information signed by the solicitor when written waiver of indictment by defendant and his counsel appears on the face of the information. Art. I, sec. 12, of the Constitution of N. C. G.S. 15-140.1.

5. Same—

Where a person has been convicted in a justice's court of a misdemeanor the punishment for which does not exceed a fine of fifty dollars or imprisonment for thirty days, he may be tried in the Superior Court upon appeal upon the original warrant without an indictment. Constitution of N. C., Art. IV, sec. 27.

6. Same—Defendant may be tried in Superior Court for petty misdemeanor on original warrant only when there has been trial and appeal from conviction in inferior court having jurisdiction.

Where the General Assembly declares an offense below the grade of felony to be a petty misdemeanor and provides for prosecution of such offense in an inferior court upon accusation other than indictment, and confers upon such inferior court final jurisdiction of such prosecutions subject to the right of appeal to the Superior Court, the defendant on appeal from conviction in the inferior court may be tried in the Superior Court upon the original accusation without an indictment; but when there has been no trial in the inferior court and the prosecution has been merely transferred to the Superior Court upon defendant's demand for jury trial, trial in the Superior Court upon the original warrant is a nullity. Chap. 435, Session Laws of 1951, declared void as being unconstitutional. Constitution of N. C., Art. I, sec. 12; Art. I, sec. 13.

APPEAL by defendant from *Burney, J.*, and a jury, at June Term, 1952, of GREENE.

Criminal prosecution upon warrant charging violations of statutes relating to intoxicating liquor in a county coming under the provisions of the Alcoholic Beverage Control Act of 1937.

The chief question presented by the appeal arises out of the events and statutory provisions mentioned in the numbered paragraphs set forth below.

1. The County Court of Greene County is an inferior court of both civil and criminal jurisdiction, which was created by Chapter 406 of the Public-Local Laws of 1915. This Act declares general misdemeanors to be petty misdemeanors; gives the court "concurrent and original jurisdiction with the Superior Court, and all Mayor's Courts and Courts of

Justices of the Peace of Greene County, and all special courts of towns and cities for the trial of all persons charged with the commission of misdemeanors in Greene County"; provides for the trial of misdemeanor cases upon warrants; and grants to persons convicted and sentenced in misdemeanor cases the right to appeal to the Superior Court.

2. Section 14 of the original Act specifies that "either the plaintiff or defendant in actions to be tried in said court may demand and have a jury, which shall be twelve in number." The General Assembly of 1951 enacted Chapter 435 of the 1951 Session Laws, which provides that "whenever a demand shall be made for a jury trial in any criminal case in the County Court of Greene County, North Carolina, the judge of the said court shall transfer the said case to the Superior Court of said county to be heard in the Superior Court upon the warrant in such case, and the Superior Court is given jurisdiction to hear and determine such case upon transfer."

3. The defendant Ransom Thomas was charged by warrant in the County Court of Greene County with unlawfully possessing intoxicating liquor "upon which the taxes imposed by the Congress of the United States or the laws of . . . North Carolina had not been paid"; unlawfully keeping intoxicating liquor for the purpose of sale; unlawfully having property designed for the manufacture of intoxicating liquor intended for use in violation of law; and unlawfully manufacturing intoxicating liquor.

4. The defendant demanded trial by jury in the County Court of Greene County, and the Judge of the County Court of Greene County thereupon transferred the case to the Superior Court of Greene County for initial trial.

5. No indictment was returned against the defendant by a grand jury in the Superior Court.

6. The case was tried in the Superior Court upon the original warrant over the exception of the defendant. After hearing the evidence and the charge, the petit jury returned this verdict: "Guilty on the count of having in possession intoxicating liquors on which the taxes imposed by the Laws of Congress and the State of North Carolina had not been paid, and not guilty of the other counts in the warrant." The trial judge sentenced the defendant to imprisonment as a misdemeanant, and the defendant excepted and appealed to the Supreme Court, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Robert L. Emanuel, Member of Staff, for the State.

C. W. Beaman for defendant, appellant.

ERVIN, J. The defendant asserts that his conviction and sentence in the Superior Court are invalid because he was tried upon the original warrant rather than upon an indictment found by a grand jury.

When the representatives of the freemen of North Carolina met in convention at Halifax in 1776 to frame a constitution for the newly born state, they knew how grossly the English Crown had abused its legal power to prosecute its subjects upon informations preferred by its prosecuting attorneys without the intervention of a grand jury. *S. v. Ledford,* 203 N.C. 724, 166 S.E. 917; *S. v. Guilford,* 49 N.C. 83. To forestall like abuses of criminal accusations in the infant commonwealth, they placed the emphatic prohibition "that no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment" in Section 8 of the Declaration of Rights, which constituted an integral part of the original Constitution of North Carolina. When it rewrote the State Constitution, the Convention of 1868 designated this constitutional provision as Section 12 of Article I, and recast it in less absolute diction by substituting the term "person" for the term "freeman," and by interposing the phrase "except as hereinafter allowed" between the words "charge" and "but." Eighty-two years later, to wit, at the general election of 7 November, 1950, the voters of North Carolina amended Section 12 of Article I of the State Constitution by adding to it an additional clause providing that "any person, when represented by counsel, may, under such regulations as the legislature shall prescribe, waive indictment in all except capital cases." As a result of these mutations, the constitutional provision prescribing the mode of prosecution in criminal cases is now couched in this language: "No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment, but any person, when represented by counsel, may, under such regulations as the Legislature shall prescribe, waive indictment in all except capital cases."

The term "indictment" is used in this constitutional provision to signify a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. *S. v. Morris,* 104 N.C. 837, 10 S.E. 454; *S. v. Walker,* 32 N.C. 234; *S. v. Tomlinson,* 25 N.C. 32; *S. v. Christmas,* 20 N.C. 545; 42 C.J.S., Indictments and Informations, section 7. The term "presentment" is used in this constitutional provision to denote an accusation made, *ex mero motu,* by a grand jury of an offense upon their own knowledge or observation, or upon information from others, without any bill of indictment having been submitted to them by the public prosecuting attorney. *S. v. Morris, supra; Lewis v. Commissioners,* 74 N.C. 194; *S. v. Guilford, supra;* 42 C.J.S., Indictments and Informations, section 7.

The experience of early days proved the practice of trying criminal cases upon the presentments of grand jurors to be wholly impracticable. As a consequence, the General Assembly of 1797 outlawed the practice by a statute, which has been retained to this day in slightly changed phraseology, and which now appears in this provision of the General Statutes: "No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law." G.S. 15-137. Since the adoption of the Act of 1797, a presentment is regarded as nothing more than an instruction by the grand jury to the public prosecuting attorney for framing a bill of indictment for submission to them. *S. v. Cain,* 8 N.C. 352; 42 C.J.S., Indictments and Informations, section 7.

The reasons which motivated the General Assembly to abolish the practice of trying criminal cases upon presentments were summarized in this fashion in *S. v. Guilford, supra:* "Prior to the Act of 1797, it was found that the presentments made by the grand juries were frequently so informal that a trial could not be had upon them, and very frequently the presentment would set out a matter which was not a criminal offense; so that sometimes the citizen was arrested and greatly oppressed when he had committed no violation of the public law, and oftentimes he was put to the trouble and expense of a trial, when, if the public law had been violated, the charge was made without the averments necessary to insure certainty in judicial proceedings, and it was necessary to enter a *nol. pros.* and send a bill of indictment. To remedy these evils, the Act of 1797 was passed, but it made no change in the distinction between an indictment and a presentment."

With prosecutions on presentments outlawed by legislative fiat, Section 12 of Article I of the North Carolina Constitution, either of itself or in combination with other constitutional provisions, requires criminal cases to be prosecuted in the Superior Court in the modes specified in the six numbered paragraphs set out below.

1. A person charged with the commission of a capital felony can be prosecuted only on an indictment found by a grand jury. N. C. Const., Art. I, Sec. 12.

2. A person charged with the commission of a non-capital felony must be prosecuted on an indictment found by a grand jury (*S. v. Sanderson,* 213 N.C. 381, 196 S.E. 324), unless he waives his right to be proceeded against by indictment in conformity to regulations prescribed by the Legislature. N. C. Const., Art. I, Sec. 12. These regulations are as follows: "In any criminal action in the superior courts where the offense charged is a felony, but not one for which the punishment may be death, the defendant may waive the finding and return into court of a bill of indictment when represented by counsel and when both the defendant and

his counsel sign a written waiver of indictment. Where the finding and return into court of a bill of indictment charging the commission of a felony is waived by the defendant, the prosecution shall be on an information signed by the solicitor. The information shall contain as full and complete a statement of the accusation as would be required in an indictment. The written waiver by the defendant and his counsel shall appear on the face of the information. Such counsel shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court." 1951 Session Laws, Ch. 726, Sec. 2, and 1951 Cumulative Supplement to the General Statutes, Sec. 15-140.1.

3. Where he appeals to the Superior Court from the judgment of a justice of the peace on his conviction in a prosecution for a misdemeanor of which the justice has final jurisdiction under Article IV, Section 27, of the State Constitution, an accused may be tried for such misdemeanor in the Superior Court upon the original warrant of the justice of the peace and without an indictment by a grand jury. N. C. Const., Art. I, Secs. 12, 13; *S. v. Myrick,* 202 N.C. 688, 163 S.E. 803; *S. v. Thornton,* 136 N.C. 610, 48 S.E. 602; *S. v. Barker,* 107 N.C. 913, 12 S.E. 115, 10 L.R.A. 50; *S. v. Crook,* 91 N.C. 536; *S. v. Quick,* 72 N.C. 241; *S. v. Simons,* 68 N.C. 378; *S. v. Moss,* 47 N.C. 66. A justice of the peace has final jurisdiction of a misdemeanor under Article IV, Section 27, of the State Constitution when the prescribed punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days.

4. As a general rule, a person charged with the commission of a misdemeanor in any case other than that specified in the preceding paragraph must be prosecuted in the Superior Court on an indictment found by a grand jury. *S. v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267; *S. v. Clegg,* 214 N.C. 675, 200 S.E. 371; *S. v. Johnson,* 214 N.C. 319, 199 S.E. 96; *S. v. Rawls,* 203 N.C. 436, 166 S.E. 332; *S. v. Myrick, supra; S. v. McAden,* 162 N.C. 575, 77 S.E. 298; *S. v. Barker, supra.* This general rule is subject to two, and only two, exceptions. The first exception arose when the Convention of 1868 rephrased the constitutional provision prescribing the mode of prosecution in criminal actions, applies by its own terms only to cases heard in the Superior Court on appeals from inferior courts, and is discussed in detail in the next paragraph; and the second exception came into being when the voters of the State amended the constitutional provision prescribing the mode of prosecution in criminal actions at the general election of 1950, is restricted by statute to cases heard in the Superior Court otherwise than on appeals from inferior courts, and is considered in paragraph 6 set forth below.

5. The exceptive phrase in the provision of Section 12 of Article I of the State Constitution that "no person shall be put to answer any criminal

charge *except as hereinafter allowed,* but by indictment, presentment, or impeachment," and the provision of Section 13 of Article I of the State Constitution that "no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court" must be read and interpreted with the second sentence of Section 13 of Article I of the State Constitution, which specifies that "the Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal." When this is done, these constitutional provisions empower the Legislature to do these two things: (1) To provide *means other* than indictments by grand juries for the trial of *petty misdemeanors,* with *the right of appeal;* and (2) to provide *means other* than petit juries for the trial of *petty misdemeanors,* with *the right of appeal.* Since such question is not before us, we do not discuss how the Legislature may exercise the authority conferred upon it by these constitutional provisions to provide means other than petit juries for the trial of petty misdemeanors. That matter has been considered in many cases. *S. v. Pulliam,* 184 N.C. 681, 114 S.E. 394; *S. v. Pasley,* 180 N.C. 695, 104 S.E. 533; *S. v. Tate,* 169 N.C. 373, 85 S.E. 383; *S. v. Hyman,* 164 N.C. 411, 79 S.E. 284; *S. v. Lytle,* 138 N.C. 738, 51 S.E. 66; *S. v. Whitaker,* 114 N.C. 818, 19 S.E. 376; *S. v. Crook, supra.* The Legislature exercises the power vested in it by these constitutional provisions to provide *means other* than indictments by grand juries for the trial of *petty misdemeanors* with *the right of appeal* when it declares offenses below the grade of felony, *i.e.,* misdemeanors, to be petty misdemeanors; provides for the prosecution of such petty misdemeanors in an inferior court upon accusations other than indictments by grand juries; and confers upon such inferior court final jurisdiction of such prosecutions, subject to the right of the defendants to appeal from the inferior court to the Superior Court. *S. v. Shine,* 222 N.C. 237, 22 S.E. 2d 447; *S. v. Boykin,* 211 N.C. 407, 191 S.E. 18; *S. v. Rawls, supra; S. v. Myrick, supra; S. v. Hyman, supra; S. v. Crook, supra.* When the Legislature employs its constitutional authority in this way, and the defendant appeals to the Superior Court from the judgment of the inferior court on his conviction in a prosecution for a misdemeanor of which the inferior court has final jurisdiction, the first exception to the general rule stated in paragraph 4 comes into play, and the defendant may be tried for such misdemeanor in the Superior Court upon the original accusation of the inferior court and without an indictment by a grand jury. *S. v. Shine, supra; S. v. Turner,* 220 N.C. 437, 17 S.E. 2d 501; *S. v. Boykin, supra; S. v. Beam,* 184 N.C. 730, 115 S.E. 176; *S. v. Jones,* 181 N.C. 543, 106 S.E. 827; *S. v. Shine,* 149 N.C. 480, 62 S.E. 1080; *S. v. Jones,* 145 N.C. 460, 59 S.E. 117; *S. v. Lytle, supra.*

6. The second exception to the general rule stated in paragraph 4, *i.e.,* that ordinarily a person charged with the commission of a misdemeanor

must be prosecuted in the Superior Court on an indictment found by a grand jury, becomes operative when, and only when, the accused waives his right to be proceeded against by an indictment in accordance with regulations prescribed by the Legislature. These regulations are as follows: "In any criminal action in the superior courts where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel in such action who shall be one either employed by the defendant to defend him in the action or one appointed by the court to examine into the defendant's case and report as to the same to the court. The provisions of this section shall not apply to any case heard in the superior court on an appeal from an inferior court." G.S. 15-140 as amended by 1951 Session Laws, Ch. 726, Sec. 1.

The defendant was charged by the warrant of the inferior court in the instant case with the commission of four general misdemeanors, *i.e.*, misdemeanors punishable by a fine exceeding fifty dollars or imprisonment exceeding thirty days. The exceptive phrase of Section 12 and the second sentence of Section 13 of Article I of the State Constitution did not sanction the trial of the defendant in the Superior Court upon the warrant of the inferior court because there had been no trial upon the warrant in the inferior court and no appeal from that court to the Superior Court. Moreover, the defendant did not waive his right to be proceeded against in the Superior Court by indictment in accordance with the regulations prescribed by the Legislature. In fact, he refused to do so. These things being true, the trial judge violated Section 12 of Article I of the State Constitution when he put the defendant on trial in the Superior Court for general misdemeanors without an indictment for such offenses having been returned by a grand jury. As a consequence, the conviction and sentence of the defendant are absolute nullities. *S. v. Sanderson, supra.*

It is necessary to make these observations: (1) That the action of the trial judge in the instant case was in complete harmony with Chapter 435 of the 1951 Session Laws; and (2) that the decisions of this Court in *S. v. Samia,* 218 N.C. 307, 10 S.E. 2d 916; *S. v. Saleeby,* 183 N.C. 740, 110 S.E. 844, and *S. v. Publishing Co.,* 179 N.C. 720, 102 S.E. 318, either expressly or impliedly uphold similar statutes purporting to authorize the transfer of untried misdemeanor cases from an inferior court to the Superior Court and the initial trial of such transferred cases in the Superior Court upon the warrant of the inferior court. We are compelled to

adjudge Chapter 435 of the 1951 Session Laws unconstitutional and to repudiate these prior holdings because this statute and these holdings are repugnant to the declaration plainly inherent in the second sentence of Section 13 of Article I of the North Carolina Constitution that a person charged with the commission of a misdemeanor cannot be put on trial in the Superior Court upon the warrant of an inferior court unless he has been tried upon such warrant in the inferior court and has appealed from that court to the Superior Court.

Since it appears on the face of the record proper that the conviction and sentence are void, the judgment is arrested.

Judgment arrested.

DERWOOD B. BROWN AND WIFE, GLADYS S. BROWN, TRADING AND DOING BUSINESS AS ROCK WOOL INSULATING COMPANY OF ASHEVILLE, NORTH CAROLINA, v. BOWERS CONSTRUCTION COMPANY, A CORPORATION, AND G. E. CROUCH, INDIVIDUALLY.

(Filed 19 November, 1952.)

1. **Master and Servant § 18½—Contract between lessor and Highway Commission for protection of tenant held competent in tenant's action against contractor.**

In an action by a tenant against the contractor for the State Highway Commission to recover for the loss of his goods by fire during the moving of the leased buildings incident to highway construction, *held* the contract between lessors and the Highway Commission which stipulated that the buildings should be moved without prejudice to occupancy and rights of the tenants and at the expense of the Commission as a part of the consideration for the right of way, is competent to show protection of the rights of the tenants by lessors, it further appearing that the Highway Commission inserted special provisions of like character for the protection of the tenants in its contract with defendant contractor for the moving of the buildings.

2. **Contracts § 19—**

A third party may sue on a contract made for his benefit.

3. **Contracts § 8—**

The legal effect of the language of a written agreement is a question of law for the court.

4. **Master and Servant § 18½—Under terms of contract, main contractor held liable to third persons for negligence of subcontractor in performance of the work.**

The contract with the State Highway Commission for the construction of a bridge stipulated that the contractor should move certain buildings on the right of way to a new location and that the contents of the buildings should be undisturbed or replaced in the relocated buildings and that such

precautions should be taken as should be necessary to prevent damage or loss of any kind to the contents, with further provision that the subletting or assignment of the contract should not relieve the contractor of any responsibility for the fulfillment of the contract. The contractor subcontracted the moving of the buildings to an independent contractor. The goods of the tenants of the buildings were destroyed by fire during the performance of the contract, and they brought suit for the loss against the main contractor and the subcontractor. *Held:* The main contractor cannot escape liability for any negligence on the part of the subcontractor, resulting in damages to or destruction of the contents of the buildings, since as a matter of law under its contract the obligations assumed by it in respect to the contents of the buildings could not be avoided by subletting or assignment, and *held further*, provisions of the subcontract imposing like duties upon the subcontractor do not release the main contractor, since such obligations are supplemental to and not in substitution for the obligations of the main contractor.

APPEAL by plaintiff from *Bobbitt, J.*, at Regular May Term, 1952, of BUNCOMBE.

Civil action to recover damages for loss of personal property destroyed by fire on night of 13 September, 1948.

Plaintiffs allege in their complaint substantially the following facts as of the dates of matters involved in this action:

1. That they, the plaintiffs, Derwood B. Brown and his wife, Gladys S. Brown, are partners trading as a partnership under the firm name of Rock Wool Insulating Company of Asheville, N. C., engaged in business of insulating houses, in connection with which they had under lease from J. M. Westall and the J. M. Westall Trust, owners, and were using as warehouses two certain buildings, together with certain adjacent premises, rights of way and private roads leading thereto, located between the main line of the Southern Railway Company's track and the French Broad River at the place where the Great Smoky Mountains Park Bridge is now constructed over the waters of the river at Asheville, North Carolina, and were using said buildings as warehouses for valuable goods, wares and merchandise, and same were well protected by fence and locks and keys.

2. That defendant Bowers Construction Company is a corporation, existing under the laws of North Carolina, and is engaged in the general contracting business in building bridges, roads and highways and in the removal and relocation of buildings.

3. That defendant G. E. Crouch is engaged in the removal of houses and other buildings from one site to another.

4. That on 24 April, 1948, defendant Bowers Construction Company entered into a written contract with the State Highway and Public Works Commission of North Carolina, by the terms of which, and on the conditions therein set forth, it was agreed, among other things, that the Con-

struction Company should construct a concrete bridge across the waters of the French Broad River, in the city of Asheville.

5. That at the time of making of said contract for the construction of said bridge it was ascertained and determined by the State Highway and Public Works Commission, and by defendant Bowers Construction Company that the two buildings leased by the plaintiffs from J. M. Westall and the J. M. Westall Trust were located on the proposed right of way where said new bridge was to be constructed, and that it was determined that said two buildings occupied by plaintiffs should be removed.

6. That in the contract between State Highway and Public Works Commission and defendant Bowers Construction Company, dated as aforesaid, among other things, it was provided that the Bowers Construction Company should remove the said two buildings to a location approximately 75 feet south of their then location; and it was provided, and designated as a special provision thereof: "That the buildings or structures shall be prepared for, removed and be placed in their new locations, as shown on the plans or designated by the Engineer, left plumb and level and in as good condition in all respects as they were in before moving"; and that the contract had this further special provision: "The contents of all buildings or structures shall be moved and relocated, along with the building and structure, to its new site," and that "in the event it is not feasible or possible to move the building or structure, together with the contents therein, the contents shall be removed from the building or structure," and that "such precaution as necessary shall be taken to prevent damage or loss of any kind to the contents thereof."

7. That on 19 May, 1948, the State Highway and Public Works Commission entered into a written contract with the J. M. Westall Trust and the Trustees thereof, owners of the two buildings as aforesaid, by which the owners agreed, among other things, that the State Highway and Public Works Commission might remove the buildings from the right of way where the new bridge was to be built, and that said buildings were to be relocated on property belonging to the J. M. Westall Trust, without prejudice to the occupancy and rights of the tenants, these plaintiffs, under the general contract which it had entered into with the Bowers Construction Company for the removal of said buildings.

8. That soon thereafter "the defendant Bowers Construction Company and its agent, representative and co-defendant, G. E. Crouch, entered in and upon the premises under lease by the J. M. Westall Trust to these plaintiffs, and proceeded to wrongfully, unlawfully, negligently and without plaintiff's permission, tear down and demolish the high fence with protective barbed wire thereon surrounding plaintiffs' premises and protecting the same from trespassers and others, removing the gates and all locks therefrom, and leaving plaintiffs' property . . . totally and com-

pletely unprotected and exposed to fire, trespassers, the public generally, and any one desiring to enter said property. And . . . thereupon wrongfully and unlawfully proceeded to remove said two buildings with plaintiffs' possessions and property therein from their then location to an adjacent lot and location. At the time . . . plaintiffs had stored in said buildings their stock of goods, wares and merchandise of the approximate value of $10,000.00."

9. That on 13 September, 1948, "by reason of the gross and wanton, careless and negligent conduct of the defendants as hereinabove set forth," said buildings and plaintiffs' personal property therein, of the value of $9,214.37, were completely destroyed by fire.

Pursuant to these and similar allegations plaintiffs pray judgment, etc.

Defendant Bowers Construction Company, answering the complaint, admits, or does not deny, its corporate identity, and that plaintiffs were lessees, under the J. M. Westall Trust, as lessor, of two certain structures located approximately as alleged; that it entered into a contract with the State Highway and Public Works Commission of North Carolina on or about 24 April, 1948, for the construction of a concrete bridge across the waters of the French Broad River in the city of Asheville,—it being averred that the contract is in writing and speaks for itself; that the State Highway and Public Works Commission of the State of North Carolina entered into a written contract with the J. M. Westall Trust for removing of the two buildings then occupied by the plaintiffs, "and in this connection this defendant says that said contract is in writing and speaks for itself"; and that a fire occurred which destroyed the buildings and such contents as were therein. It denies in material aspect remaining allegations of the complaint, and avers: "that its co-defendant G. E. Crouch entered into a certain contract for the moving of certain buildings with contents in the manner as called for and provided for in the aforesaid contract between the State Highway and Public Works Commission and this answering defendant; that defendant G. E. Crouch agreed to remove said buildings, with contents, for a lump sum payment; that the individual defendant G. E. Crouch, with respect to all the work and the performance of all his duties in connection with the moving of said buildings, the relocating of the same, with the contents thereof, and the handling thereof, was, in so far as this answering defendant is concerned, in sole control thereof and that the sole right to control the work and all parts thereof in connection therewith; that this answering defendant did not have the right to control the same, did not in fact control the same, and that so far as this answering defendant is concerned, the individual defendant G. E. Crouch was an independent contractor, and not the agent or employee of this answering defendant, with respect to the doing of said work and performance of his contract with regard thereto; that the de-

fendant G. E. Crouch, as this answering defendant is advised and believes, was and is a thoroughly experienced and competent contractor in the trade and business of moving buildings, with contents, from one place to another and that the said defendant G. E. Crouch lawfully and carefully entered upon the premises of the J. M. Westall Trust referred to in the complaint and did in a careful and prudent manner move said buildings, with such contents thereof as were not removed from time to time by the plaintiffs themselves."

The defendant Bowers Construction Company for further answer and defense, sets up four separate matters,—the details of which are not essential to proper consideration of this appeal.

Plaintiffs, replying to the further answer and defense of defendant Bowers Construction Company, deny that defendant G. E. Crouch was an independent contractor, and allege that defendant Bowers Construction Company is answerable and responsible to them for the loss of their property as set forth in the original complaint, etc.

The defendant G. E. Crouch, answering the complaint, admits or does not deny that the plaintiffs had certain stock carried in trade; that certain buildings were to be moved, and that a fire destroyed buildings and whatever was in them. This defendant, however, denies in material aspect all other allegations of the complaint.

And this defendant Crouch, by way of further answer and amendment to answer and defense, sets up matters not material to proper consideration of this appeal.

Upon the trial in Superior Court plaintiff offered in evidence material admissions of the defendants, as set out in their respective answers, pretrial stipulations, and the contract dated 24 April, 1948, between Bowers Construction Company and the State Highway and Public Works Commission,—the material portions of which relate to matters in controversy, are set forth in Exhibit P-1.

Reference to this exhibit reveals that the two buildings of the J. M. Westall Trust involved in the present action are specifically described. And in respect to the subject "Special Provisions" as to "Removal and Relocation of Buildings and Miscellaneous Structures," provisions "Pertinent to Determination of this Litigation" are set out in opinion hereinafter, and need not be quoted here.

Plaintiffs offered in evidence the instrument, dated 19 May, 1948, signed by the Trustees of the J. M. Westall Trust, entitled "Option" to State Highway and Public Works Commission, marked Exhibit P-2. But objection thereto by defendants was sustained. Plaintiffs excepted. Exception 1. Pertinent portions of this exhibit are set forth in opinion hereinafter, and need not be stated here.

Plaintiffs also offered in evidence paper writing signed by G. E. Crouch dated 20 July, 1948, in the form of a letter addressed to and accepted by Bowers Construction Company, marked Exhibit P-3, reading in pertinent part:

"I agree to furnish all tools, labor, materials, supervision, compensation and liability insurance to move three (3) buildings on Project U 661 (3) N. C. 9075—Buncombe County.

"I also agree to carry out all the provisions in doing the work that are set forth in your contract with the State Highway and Public Works Commission, for the sum of Eleven Thousand and Five Hundred ($11,500.00) Dollars, itemized as follows: . . .

"You are to pay me for this work as the State pays you and to pay me the retainage in sixty (60) days after the work is completed . . ."

And plaintiffs also offered evidence tending to show, in other respects, the facts to be as alleged in their complaint.

Upon close of plaintiffs' evidence motion of defendant Bowers Construction Company for judgment as of nonsuit was allowed, and that of defendant G. E. Crouch was overruled. Whereupon plaintiffs excepted to the court's ruling, submitted to voluntary nonsuit as to defendant Crouch, and appeals to Supreme Court, and assigns error.

Ward & Bennett and Williams & Williams for plaintiffs, appellants.

Smathers & Meekins for defendant, appellee.

WINBORNE, J. The questions involved on this appeal as stated in plaintiffs', appellants, brief are these:

"1. Did the court err in sustaining objections of defendant Bowers Construction Company to certain evidence?

"2. Did the court err in nonsuiting the case as to defendant Bowers Construction Company?"

We are of opinion that upon consideration of the record and case on appeal both questions merit an affirmative answer.

I. The two assignments of error based upon exceptions (1) to the refusal of the court, upon objection by defendants, to admit in evidence, when offered by plaintiffs, the option and contract, Exhibit P-2, executed by the Trustees of the J. M. Westall Trust to and with the State Highway and Public Works Commission in respect to purchase of right of way for highway purposes over the Westall Trust property at the point where the bridge over the river was later constructed, and on which plaintiffs' property, here involved, was located, and (2) to the exclusion of oral testimony tending to show that the State Highway and Public Works Commission had exercised the option as provided in the contract.

This evidence is pertinent and material to the controversy at issue. It is seen by reference to the contract that "This option also includes the purchase of a frame garage," but that "other buildings on the right of way to be removed therefrom and reconstructed on property belonging to the Trust, without prejudice to occupancy and rights of tenants, under the general contract and at the expense of the State Highway Commission." And the matter of the removal and reconstruction of the buildings is made a part of the consideration to be paid by the State Highway and Public Works Commission.

The language of these provisions is plain, and, by fair interpretation, clearly shows an intent upon the part of the Trustees of the J. M. Westall Trust to act in the interest, and for the benefit of their tenants—these plaintiffs.

And, by reference to the contract between the State Highway and Public Works Commission and Bowers Construction Company it clearly appears that the State Highway and Public Works Commission projected therein special provisions, of like character, intended to be in the interest, and for the benefit of the Westall tenants, who are the plaintiffs.

And it is a well settled principle of law in this State that where a contract between two parties is made for the benefit of a third person, or party, the latter is entitled to maintain an action for its breach. *Gorrell v. Water Supply Co.*, 124 N.C. 328, 32 S.E. 720; *Parlier v. Miller*, 186 N.C. 501, 119 S.E. 898; *Thayer v. Thayer*, 189 N.C. 502, 127 S.E. 553; *Boone v. Boone*, 217 N.C. 722, 9 S.E. 2d 383; *Chipley v. Morrell*, 228 N.C. 240, 45 S.E. 2d 129; *Coleman v. Mercer*, 229 N.C. 245, 49 S.E. 2d 405; *Canestrino v. Powell*, 231 N.C. 190, 56 S.E. 2d 566, and cases there cited.

II. Now as to assignment of error based upon exceptions to the ruling of the trial court in granting at close of plaintiffs' evidence motion of defendant Bowers Construction Company for judgment as of nonsuit as to it.

The parties do not debate in this Court the question as to sufficiency of the evidence, offered on the trial below, to take the case to the jury as to the defendant G. E. Crouch. Hence the sole question here for decision is whether or not there is evidence tending to show obligation on the part of Bowers Construction Company to observe the special provisions of the general contract with the State Highway and Public Works Commission assumed by it in respect to removal and relocation of the buildings and contents of buildings, after it had sublet to defendant G. E. Crouch the performance of the work of removing and relocating the buildings. This is a matter of law to be determined upon proper interpretation of the special provisions of the general contract.

By referring to the "Special Provisions" of the general contract it appears under heading "3-1. Construction Methods" that "Buildings or structures shall be prepared for, removed, and be placed in their new locations, . . . left plumb and level and in as good condition in all respects as they were before moving . . ."; and that "the contents of all buildings or structures shall be moved and relocated along with the building or structure to its new site"; and that "in the event that it is not feasible or possible to move the building or structure together with the contents therein, the contents shall be removed from the building or structure at its original location and same replaced in the relocated building or structure"; and that "such precautions as necessary shall be taken to prevent damage or loss of any kind to the contents thereof."

A further special provision under heading "5-1. Basis of Payment" is that "Payment will not be made for this item until an owner's release is secured from the property owner or owners, certifying that the work has been performed to the property owner's satisfaction and that the State Highway and Public Works Commission and the contractor are released from all responsibility in connection with this work . . ."

And it is further provided under heading "Required Contract Provisions for Federal Aid Projects" that "no portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer or his authorized representative . . ."; and that "consent to sublet, assign or otherwise dispose of any portion of the contract shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract."

In the light of these provisions a legal duty is assumed by, and, by operation of law, imposed upon Bowers Construction Company which it cannot escape by assignment. And this is true whether the performance required is a personal performance or not. Corbin on Contracts, Vol. 4, Sec. 865. See also *R. R. v. R. R.*, 147 N.C. 368, 61 S.E. 185; *Trust Co. v. Williams*, 201 N.C. 464, 160 S.E. 484; *Trust Co. v. Webb*, 206 N.C. 247, 173 S.E. 598.

Appellees, however, point to the allegations of the complaint of plaintiffs purporting, as they contend, to allege another and special contract between G. E. Crouch and plaintiffs by which he agreed "that the said property would be moved in said buildings to the new location in as good condition as if the same had never been moved," and that the buildings, after removal, would be "left plumb and level, and in as good condition in all respects as they were before moving."

True there are such allegations in the complaint. But the complaint also sets forth the special provisions of the general contract. And, in view of the fact that the special agreement attributed to Crouch is in effect a repetition of the special provisions of the general contract, it may be

fairly taken as supplemental thereto and not in substitution for the special provisions of the general contract.

The assumption of the assignor's duty by the assignee merely gives to the other party a new and added security. Corbin on Contracts, Vol. 4, Sec. 866.

Since there must be another trial, it is not deemed necessary to expressly consider other assignments of error. The matters to which they relate may not then recur.

For reasons stated above the judgment from which this appeal is taken, is

Reversed.

CITIZENS NATIONAL BANK, ADMINISTRATOR OF THE ESTATE OF H. T. HELMS, v. WALTER EVERETTE PHILLIPS, JR.

(Filed 19 November, 1952.)

1. Automobiles § 16—

A pedestrian crossing a street between intersections where no traffic control signals are maintained and at a place where there is no marked cross-walk is under duty to yield the right of way to vehicles. G.S. 20-174 (a).

2. Same—

A motorist is under duty to exercise due care to avoid colliding with a pedestrian notwithstanding the failure of such pedestrian to yield the right of way as required by statute. G.S. 20-174 (e).

3. Same—

The failure of a pedestrian to yield the right of way as required by G.S. 20-174 (a) is not contributory negligence *per se*, but is evidence to be considered with other evidence in the case upon the issue.

4. Automobiles § 18h (2)—

The evidence tended to show that defendant driver attempted to pass a car preceding him in the same direction, and that as he was drawing abreast of the car he saw a pedestrian walking away from him diagonally across the street, that he put on his brakes, but hit the pedestrian at a point ten feet from the left curb. *Held:* The evidence was sufficient to be submitted to the jury upon the issue of defendant's negligence.

5. Automobiles § 18h (3)—Evidence held not to show contributory negligence as matter of law on part of pedestrian in failing to yield right of way.

The evidence tended to show that deceased was walking diagonally across a street between intersections not having traffic control signals, at a place where there was no marked cross-walk; that deceased had passed the center of the highway and was at a point ten feet from the curb when he was struck from behind by a car traveling on its left of the thirty-five foot wide street to pass another vehicle traveling in the same direction.

There was evidence that deceased did not look in the direction from which the car approached. *Held:* Nonsuit on the ground of contributory negligence was properly denied, since deceased's failure to yield the right of way was not contributory negligence *per se* and the question of proximate cause is for the determination of the jury.

6. Trial § 31b—

The trial judge is required to declare and explain the law as it relates to the various aspects of the evidence offered bearing on all substantive phases of the case. G.S. 1-180.

7. Same—

Ordinarily, general definitions and abstract explanations of the principles of law involved together with the summation of the evidence and a statement of the contentions on each side is not sufficient, but the trial court must declare the law of the case and apply it to the different phases of the evidence.

8. Automobiles § 18i—

Ordinarily, and except in cases of manifest factual simplicity, the rule is that it is not sufficient for the court merely to read a highway safety statute and leave the jury unaided to apply the law to the facts.

9. Trial § 31b—

An instruction about a material matter not based on sufficient evidence is erroneous.

APPEAL by defendant from *Clement, J.*, and a jury, June Term, 1952, of CABARRUS.

Civil action by plaintiff to recover damages for the alleged wrongful death of its intestate, who as a pedestrian on S. Union Street in the City of Concord was struck by an automobile driven by the defendant.

The defendant's motion for judgment as of nonsuit, first made when plaintiff rested its case and renewed at the conclusion of all the evidence, was overruled, after which issues of negligence, contributory negligence, and damages were submitted to the jury. The issues of negligence and contributory negligence were answered in favor of the plaintiff, and the jury awarded the plaintiff damages in the amount of $12,900. Judgment in that amount was entered in favor of the plaintiff.

From judgment so entered, the defendant appealed, assigning errors.

John Hugh Williams for plaintiff, appellee.

Smathers & Carpenter, Lewis B. Carpenter, and Hartsell & Hartsell for defendant, appellant.

JOHNSON, J. The defendant's exceptions relate (1) to the refusal of the trial court to allow the motion for judgment as of nonsuit and (2) to the charge of the court.

1. *The refusal to nonsuit.*—These in substance are the material facts developed by the evidence: Plaintiff's intestate, H. T. Helms, age 62, was struck on the morning of 6 December, 1950, at about 6:30 o'clock, while it was still dark. He was in the act of crossing from the east side of S. Union Street to the west side at a point a short distance north of the intersection of Hillcrest Drive with S. Union Street. Hillcrest Drive exists only on one side of S. Union Street and joins it on the south side. S. Union Street is a link in U. S. 29-A and N. C. 601 and 151, and is one of the more heavily traveled streets and arterial highways in the City of Concord. The street runs generally north and south. It is straight for two-fifths of a mile north of the scene of the collision and for over a block to the south. It is 35 feet and 7 inches wide from curb to curb, and is paved with black asphalt. The center of the street is marked with a broken, intermittent, white painted line.

Immediately prior to the impact three automobiles were traveling in a northerly direction on the east side of S. Union Street. The first was operated by A. L. Mauney, the second by J. A. Bangle, and the third by the defendant Phillips. The headlights on all three cars were burning. There was no oncoming traffic in sight on the west side of S. Union Street. It was in a residential district, and no cars were parked on the east side of this street. There was no marked cross-walk at or near the place where the intestate was crossing the street.

Bangle overtook and passed the Mauney car at or near the intersection of Hillcrest Drive. Then the defendant Phillips, after passing the intersection of Hillcrest Drive, undertook to pass the Mauney car. In doing so, the defendant pulled widely to the left, speeded up to a position about abreast the Mauney car, and then it was that the intestate was struck by the front of the defendant's car.

The point of impact, pointed out to the officers by the defendant—also indicated by blood stains on the pavement and broken headlight glass—was 94½ feet from the intersection of Hillcrest Drive and within the two lines of skid marks made by the defendant's car. The east mark, made by the right set of the defendant's car wheels, was 5 feet west of the center line of the street. The west mark, made by the left set of the defendant's car wheels, was about 8 feet from the west curb. The west mark was 46 feet long and the east mark 40 feet long. The point of impact, within these skid marks, was about 10 feet south of the north ends thereof. The body of intestate came to rest on the west side of S. Union Street, with his head against the curb at a driveway approximately 24 feet from the point of impact and 118½ feet from the intersection of Hillcrest Drive. The defendant's automobile came to a stop a short distance from the body (exact distance not given) and 9 feet and 7 inches from the west curb.

A street light was over the intersection of S. Union Street and Hillcrest Drive. There was also a street light on the west side of S. Union Street about 50 feet north of the point of impact. However, there is no evidence as to the extent of illumination which these lights afforded.

J. A. Bangle, who was driving the second car, testified that as he approached Hillcrest Drive he started to pass the Mauney car. "I started around Mauney right about the intersection. . . . It was at that time that I saw Helms. . . . he was not quite in the center of the road. He was about 2 feet from the white line, and I slowed down to give him time enough to get across the white line. . . . He continued across the street at a 45 degree angle at just a moderate gait. He was looking the other way, in more or less a 45 degree angle. . . . I'd say he was probably about 50 feet north of Hillcrest Drive; . . . I didn't see him come out from in front of the Mauney car. When I saw him he was about 2 feet on the right side of the white line; at that time I had started around Mauney; at that time I'd say I was about 30 feet, . . . away from the Mauney car. . . . I slowed up, I pulled to the right a little to miss Helms. Then after I passed him, I passed the Mauney car. I passed Helms about the same time I passed Mauney." Then after traveling 50 or 75 feet, "that's when I heard the brakes" (of the Phillips car in the collision). Bangle testified he was traveling about 30 or 35 miles per hour, and that he "never did cross the center line," though he got pretty close to the center line when passing and pulling to the right to keep from hitting Helms. He also said he pulled to the right to keep from riding the center line.

A. L. Mauney, who was driving the front car, testified: "Just after I passed Hillcrest, somewhere along there, Bangle's car passed me. . . . It pulled off to my left on the west side of the street to pass. . . . He passed just before the wreck. . . . It seemed like it pulled back to the right half of the street pretty quick after it passed me. . . . The Phillips car was behind the Bangle car. . . . Phillips was even with me when he hit Helms. . . . I do not have an opinion as to how fast he was driving. I do not think he was driving fast. . . . I was going I would say 20 or 25. I could have been making 30, he was not going fast. . . . I heard a racket. I didn't know what. I thought somebody hit another car and I pulled over and stopped and went back. I didn't see Helms before he was hit. . . . The Phillips car was 3 or 4 car lengths behind the Bangle car."

J. B. Eudy, a passenger in the Mauney car, who was sitting on the left side of the back seat, said the Mauney car was going not over 20 or 30 miles an hour; that he did not see Helms before he was hit; that the Phillips car was just back of the Bangle car. This witness further testified: "I didn't see the Phillips car when it struck Helms. . . . I heard the bump and looked and just saw a flurr. . . . When I heard the bump

it was . . . about even with where Mauney was sitting in the driver's seat. I hadn't seen Helms at all."

Other occupants of the Mauney car also testified they did not see Helms before he was hit.

The defendant, testifying as a witness in his own behalf, said in substance that he was driving about 30 miles per hour behind the Bangle car which pulled out and passed the Mauney car, and after the Bangle car got back in line, he (the defendant) then pulled out to pass and, as he put it: "just as I got up, I guess even with the door of Mauney's car, I saw Helms. At that time Helms was right close to the white line on the west side of S. Union Street. . . . It looked to me as if he was walking straight up the street, going north, parallel with the white line. . . . At the time I first saw Mr. Helms I was driving around 30 miles an hour. I put on brakes as soon as I saw him. I did not change the direction of my car either to the east or the west. I was not able to stop my car before my car and Mr. Helms collided. . . . I would say my car traveled about 15 or 20 feet after the collision. . . . The Mauney car was in the center of the east side of the highway . . . As to how far to the left the Bangle car had to turn to pass the Mauney car, he had all four wheels across the white line on the west side of S. Union Street. . . . He (Bangle) pulled back sharp to the right. . . . At the time the Bangle car passed the Mauney car I was driving on the east side of the street. After the Bangle car passed the Mauney car I pulled up to the left to pass the Mauney car. . . . I crossed the center line. . . . The Mauney car was in the middle of the right lane." Cross-examination: "There probably was better than a car's width between me and the Mauney car. As to why it was necessary that I swing over that far, it was because I always pass like that. It is not a fact that I was just behind the Bangle car and started to pass both of them at the same time. I said the Bangle car was in front of Mauney. I would say he was four car lengths ahead of him when I started to pass. . . . It took me a little while to swing out. . . . I was not going considerably faster than the Mauney car. . . . I imagine he was going between 25 and 30. . . . I had to be going faster to pass him. It took me some little distance to begin to pass him, to get up even with him. . . . I didn't see Mr. Helms some 50 feet or more before I hit him. I said the brake marks were some 46 feet, one of them. I believe it measured 24 feet that Mr. Helms was knocked from where this occurred. My car was behind the body. . . . It was knocked beyond where I stopped. Those marks (skid marks) were straight, and I did not change the course of my direction. There was not anything as I know of to prevent me from turning to the left or to the right at the point to avoid Mr. Helms. . . . Those marks extended . . . 15 or 20 feet north of the point of impact."

The defendant contends that judgment as of nonsuit should have been entered below either upon the ground (1) that the plaintiff failed to make out a *prima facie* case of actionable negligence against the defendant, or (2) for that the plaintiff's evidence reveals the intestate was contributorily negligent as a matter of law.

For the purpose of this appeal both phases of the defendant's contention may be resolved by testing the evidence by the rule of the reasonably prudent man (*Meacham v. Railroad,* 213 N.C. 609, p. 612, 197 S.E. 189), as applied in the light of the correlative duties imposed upon both the defendant and the intestate by the provisions of these portions of G.S. 20-174: "(a) Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way to all vehicles upon the roadway. . . . (e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, . . ."

Here, the evidence discloses that the intestate was crossing the street diagonally within the block, at a point which was neither at an intersection nor within a marked cross-walk, and the evidence discloses no traffic control signals at the adjacent intersections. Therefore, under the provisions of G.S. 20-174 (a) it was intestate's duty to "yield the right-of-way to all vehicles upon the roadway."

If it be conceded that the intestate failed to yield the right of way as required by this statute, even so, it was the duty of the defendant, both at common law and under the express provisions of G.S. 20-174 (e), to "exercise due care to avoid colliding with" the intestate. And the evidence adduced below was sufficient, we think, to justify, though not necessarily to impel, a jury-finding of actionable negligence against the defendant.

Nor may the evidence tending to show that intestate failed to yield the right of way as required by G.S. 20-174 (a) be treated on this record as amounting to contributory negligence as a matter of law, particularly so in view of the testimony to the effect that intestate at the time he was struck had reached a point about 10 feet from the west curb of the street. Our decisions hold that a failure so to yield the right of way is not contributory negligence *per se,* but rather that it is evidence of negligence to be considered with other evidence in the case in determining whether the actor is chargeable with negligence which proximately caused or contributed to his injury. *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484. See also *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539; *Marsh v. Byrd,* 214 N.C. 669, 200 S.E. 389; *Stephens v. Johnson,* 215 N.C. 133, 1 S.E. 2d 367; Annotations: 14 A.L.R. 1176, p. 1197 *et seq.;* 67 A.L.R. 313, p. 333 *et seq.*

Here, upon consideration of the entire record, we think the evidence tending to show that intestate failed to yield the right of way as required by statute, together with the evidence relating to the question of proximate cause, was for the jury. *Marsh v. Byrd, supra.*

It is not perceived that the conclusion here reached is at variance with the decision in *Gaskins v. Kelly,* 228 N.C. 697, 47 S.E. 2d 34, cited and relied on by the defendant.

It follows from what we have said that the motion for judgment as of nonsuit was properly overruled.

2. *The charge of the court.*—The defendant urges that the court committed prejudicial errors in failing to comply with G.S. 1-180 as rewritten, Chapter 107, Session Laws of 1949, which provides in part that the trial court shall "declare and explain the law arising on the evidence given in the case." This statute further provides that the trial judge "shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; . . ."

Implicit in the meaning of this statute as interpreted by numerous decisions of this Court is the requirement that the judge must declare and explain the law as it relates to the various aspects of the evidence offered bearing on all substantive phases of the case. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Lewis v. Watson, supra; Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375; *Ryals v. Contracting Co.,* 219 N.C. 479, 14 S.E. 2d 531; *Mack v. Marshall Field & Co.,* 218 N.C. 697, 12 S.E. 2d 235. The requirement is that the judge must declare and explain the law and apply it to the various aspects of the evidence offered. *Smith v. Kappas, supra.* The statute requires the judge to point out the essentials to be proved on the one side or the other, and to bring into focus the relations of the different phases of the evidence to the particular issues involved. *Lewis v. Watson, supra.*

In *Bowen v. Schnibben,* 184 N.C. 248, 114 S.E. 170, it is stated: ". . . where a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent upon the judge to apply to the various aspects of the evidence such principles of the law of negligence as may be prescribed by statute, as well as those which are established by the common law. *Orvis v. Holt,* 173 N.C. 233; *Matthews v. Myatt,* 172 N.C. 232."

Ordinarily, and except in cases of manifest factual simplicity, the rule is that it is not sufficient for the court merely to read a highway safety statute and leave the jury unaided to apply the law to the facts. *Chambers v. Allen, supra; Lewis v. Watson, supra.*

In this case it is noted that the court, before directing the jury's attention to any of the highway safety statutes, completed its preliminary charge covering all three issues. This included (1) general definitions

and abstract explanations of the essential elements of actionable negligence; (2) summation of the evidence; (3) reading of each issue, after which (4) followed a statement of contentions of each side. But nowhere in connection with the summation of the evidence or statement of contentions did the court attempt to declare the law of the case and apply it to the different phases of the evidence.

Then, after finishing this preliminary charge on all three issues, the court adverted to the first two issues—those dealing with negligence and contributory negligence—and read *verbatim,* without comment or explanation between them, G.S. 20-149 (a) and G.S. 20-150 (a), after which the court gave only the contentions of the parties with respect to the application of these two statutes. The court then read G.S. 20-174 (a), (c), and (d). This was followed by a summation of contentions of the parties respecting the application of these statutory provisions, without explanation or attempt on the part of the court to apply or correlate the different sections of the statute to the different phases of the evidence.

It thus appears that the court failed to comply with the mandatory provisions of G.S. 1-180 as rewritten, *Chambers v. Allen, supra,* and a study of the record impels the view that the failure so to comply was prejudicial error entitling the defendant to another hearing.

Since the case goes back for retrial, we deem it proper to refrain from further elaboration. Suffice it to say, that upon the record as here presented it would seem that G.S. 20-174 (c) was inapplicable to the evidence in the case, and as to G.S. 20-149 (a) and G.S. 20-150 (a), each was applicable only in a limited manner. It also appears that the theory of the case excludes the application of G.S. 20-174 (d). See pleadings of both parties. It is an established rule of trial procedure with us that an instruction about a material matter not based on sufficient evidence is erroneous. *Childress v. Motor Lines,* 235 N.C. 522, top p. 530, 70 S.E. 2d 558, and cases there cited.

New trial.

ALBERT NEWTON MORGAN v. ERNEST ELI COOK AND SOUTHERN OIL TRANSPORTATION COMPANY.

(Filed 19 November, 1952.)

Automobiles §§ 8d, 18h (3)—Evidence held to disclose contributory negligence as matter of law on part of motorist hitting tractor across his lane of travel.

Plaintiff driver's evidence tended to show that as he approached the scene on a three lane highway he was blinded by the lights of a tractor in the middle lane some 1,400 feet away, that notwithstanding he continued

in his right-hand lane at 30 or 35 miles per hour and did not see the trailer which was across his lane of travel until he was within twelve or fifteen feet thereof, that he immediately put on his brakes but was unable to stop before his windshield crashed into the side of the trailer. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law.

ERVIN and JOHNSON, JJ., dissent.

VALENTINE, J., dissenting.

APPEAL by plaintiff from *Sharp, Special Judge,* June Term, 1952, of RANDOLPH.

Civil action to recover for damages to plaintiff's automobile and for personal injuries sustained on Highway No. 220 in Randolph County, when he ran his automobile into the side of a tank tractor-trailer owned by the Southern Oil Transportation Company, and operated at the time by an employee, Ernest Eli Cook. It is alleged the damages were caused by the negligence or default of the defendants.

The plaintiff who at the time of the collision lived in North Asheboro and was employed as a foreman in the mill of Carthage Fabrics in Carthage, testified as follows: "On December 21, 1950 I had started to work. I work on the third shift, night-time. I have to be there quarter of twelve. Lewis Cockman, my brother-in-law, was with me. He worked down there with me at the time. I left the house ten minutes 'til 10; . . . The overpass, 49 crosses 220, which is about 2800 feet from where the wreck happened; there is a rise in the road; after I went over the high place in the road, 220, I saw bright lights, two bright lights up in the middle lane. There are three lanes in 220. They are marked; broken lines, white lines, all the way through. The center lane is reserved for lefthand turn and through traffic. There are two outside lanes. The traffic with lights were passing on the right coming north. I dimmed my lights on dim three or four times. This light was sitting in the center lane; meeting me; it was awful bright; almost like a locomotive. I tapped my brakes a few times, slowed down pretty slow, to see what he was doing. He was in the center lane, and two headlights. . . . As I got up even with the truck, the truck was sitting up, I didn't see anything at all. I tapped the gas to go on through, . . . I got up 12 or 15 feet of the trailer I saw a bulk. It was a grayish color. . . . I hit the brakes for all it was worth; ran up under there, hit in the center of the windshield, knocked the glass out, crashed glass on the side. . . . The width of the asphalt top of 220 is 35 feet. The tank was way over the entire righthand lane, covered the shoulder and all. The tractor part was up in the middle lane, headed north. . . . After I passed the bright light, my light being on dim, it seemed it was shining under the pass (tank), and the lights

on the trailer, . . . There could have been lights on the back and front, but they were shining the other way, and the lights on the tractor, clearance lights, were shining back this way. . . . I was 12 or 15 feet from the tank when I was first able to see it. The tanker is about four and a half feet from the ground. My automobile went underneath it. It hit the windshield, right in the center. I applied my brakes after I saw the tanker. I skidded my wheels five or six feet. The collision busted the body of my automobile all to pieces on it; all the glass, knocked it out, windshield all out. There were no flares or lights stationed anywhere . . . to indicate that this tank was across the road. Not anything at all. . . . I saw these lights in the center lane for about 1400 feet. They didn't move. The traffic was heavy in the other lane. . . . I called on him three or four times with the dimmers trying to make him lower his lights. I wanted him to do that so I could see. They blinded me until I got by the glare; 12 or 15 feet before I saw it. I was just as good as blinded from the time I first saw the lights until I got 12 or 15 feet. No, I was not as good as blinded for 1385 feet. Not that much. Yes, I want the jury to believe that I was blinded until I got within 15 feet of the trailer part of the truck. . . . I was going around 35 when I collided with the truck. When I first saw the headlight I tapped my brakes three or four times, slowed down 'til I got by the flare of the truck, the lights, and it looked clear to me 'til I looked under the trailer. I don't know how many miles per hour I slowed down from the time I first observed the headlights until I had the collision. I had slowed down 30 or maybe 25. I will say I didn't hit my brakes hard until 12 or 15 feet, of him, . . . I knew the oil tanks were down in that part of town. I didn't know they used the highway for a trucking turn. I knew several other oil companies have terminals there. I know that is a 35 mile per hour speed zone. . . . There wasn't anything I could see in the way; the truck was making a left turn. The road was open as far as I could see."

Lewis Cockman testified, "We were going down 220, and after we passed the overpass, a truck was sitting in the middle lane. We were making speed in the neighborhood of 35 miles per hour. I can't say definitely that we at any time exceeded 35 miles per hour. . . . for a distance of 1400 feet I would say that the bright lights were staring me right in the face; it didn't exactly blind me; you couldn't see anything between you and that (truck). . . . the tanker was across the path. The bright lights on the truck prevented him from seeing the truck as he cut his lights from dim to bright. You still couldn't see the tanker. He drove 1400 feet with that condition. He never brought his car to a stop. He never reduced his speed more than 10 miles per hour. When he got within 12 feet of the tanker he jammed on his brakes. He didn't have time to stop. . . . I was watching these lights all the time in the center

lane. They never moved. I thought he would pull up into another lane. I didn't know he was backing up."

Both occupants of the plaintiff's car received painful and serious injuries, and the plaintiff's car was damaged to the extent of approximately $900.00.

Defendants moved for judgment as of nonsuit at the close of plaintiff's evidence. The motion was overruled. It was renewed at the close of all the evidence and allowed. Plaintiff appeals and assigns error.

Ottway Burton for plaintiff, appellant.

Smith & Walker for defendants, appellees.

DENNY, J. The plaintiff drove his automobile more than 1,300 feet while he was blinded by the lights of the defendants' oil truck. According to his evidence, while he was traveling this distance he was so "blinded" he could see nothing in his lane of traffic. Yet he proceeded until he got even with the truck, "tapped the gas to go on through," and was within 12 or 15 feet of the tractor-trailer which was across his lane of traffic, before he "was first able to see it." He says he was going about 35 miles an hour when the collision occurred.

Conceding the negligence of the defendants in the respects alleged, nevertheless the contributory negligence of the plaintiff is manifest from his own testimony. *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845; *McKinnon v. Motor Lines*, 228 N.C. 132, 44 S.E. 2d 735; *Riggs v. Gulf Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884; *Austin v. Overton*, 222 N.C. 89, 21 S.E. 2d 887; *Dillon v. Winston-Salem*, 221 N.C. 512, 20 S.E. 2d 845; *Sibbitt v. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203; *Beck v. Hooks*, 218 N.C. 105, 10 S.E. 2d 608; *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88; *Lee v. R. R.*, 212 N.C. 340, 193 S.E. 395; *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237.

In *McKinnon v. Motor Lines, supra*, Robert H. McKinnon testified that he ran in a "blinded area" for two or three seconds, at a speed of 35 miles an hour and for a distance of 100 feet—other witnesses put it at 100 yards or 400 feet—when he was completely blinded and could see nothing in front of him except the right-hand edge of the road. While he was so blinded he ran into the rear of a slowly moving or stalled truck which was being operated without rear lamps as required by G.S. 20-129. On this evidence, *Stacy, C. J.*, speaking for the Court, said: "Both his vision and his prevision seem to have failed him at one and the same time. Such is the stuff of which wrecks are made. The conclusion seems inescapable that the driver of the McKinnon car omitted to exercise rea-

sonable care for his own and his companion's safety, which perforce contributed to the catastrophe. This defeats recovery . . ."

It is clear that the plaintiff in this action failed to exercise reasonable care for his own and his brother-in-law's safety under the existing circumstances, and that such failure contributed to their personal injuries and the damage to plaintiff's automobile. This defeats the plaintiff's right to recover.

The ruling below in sustaining defendants' motion for judgment as of nonsuit will be upheld.

Affirmed.

ERVIN and JOHNSON, JJ., dissent.

VALENTINE, J., dissenting: I feel compelled to register my vote against the conclusion reached in the majority opinion. In my judgment, the plaintiff has made out a case which entitles him to have a jury pass upon the issues of negligence, contributory negligence and damages, and my vote is to reverse the judgment of nonsuit and allow the jury to pass upon the issues of fact.

In addition to the evidence of the plaintiff quoted in the majority opinion, I find that in speaking of the tractor, tank-trailer and its environs at the time and immediately before the wreck, the plaintiff also said: "There were no flares or lights stationed anywhere along here to indicate that this tank was across the road. Not anything at all. There was no person there with any flashlights to indicate that; there wasn't anything; those two bright headlights in the middle lane." And again, "No, sir, I didn't see a flashlight. There wasn't any light there of any kind. If there had been a light I could have seen it. If there had been any lights on the truck I could have seen these lights. . . . There were no flares or anything else to warn me that the truck was parked. . . . I called on him (the truck driver) three or four times with the dimmers trying to make him lower his lights. . . . The truck was a grayish color. It was a little dirty, nearly the color of the highway."

From the testimony of a passenger in plaintiff's car, this appears: "The trailer was high enough Morgan's light was shining under it. . . . Mr. Morgan was gradually slowing down all the time. . . . The tractor part of the truck trailer was parked straight up in the middle lane, facing this way. It was a five wheel proposition, three axle proposition. I did not see any clearance lights or red lights at all on the tanker and none were burning on the tanker whatsoever. All I could see was two glaring headlights on the truck. . . . There wasn't any light at all on the tanker to warn me that this tanker was in the way."

Thus, from the plaintiff's evidence, viewed in the light most favorable to him as we are required to do upon a motion for judgment as of nonsuit, *Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664, these logical inferences may be drawn: The plaintiff and his brother-in-law were en route on Highway 220 to the place of their employment at about 10 or 10:30 o'clock at night. Highway 220 is a three-lane highway paved to a width of 35 feet. As the plaintiff approached the point of collision, he encountered bright lights, resembling those of a locomotive, in the center lane. It developed that these bright lights were on the tractor part of the tractor-trailer combination belonging to the defendant, Southern Oil Transportation Company, and operated by its agent, Ernest Eli Cook. Plaintiff dimmed his lights several times in an effort to obtain the same courtesy from the driver of the other vehicle. The location was within a 35 mile zone and at no time did the plaintiff exceed 35 miles per hour. When his vision was interfered with by the tractor lights, he slackened his speed to from 25 to 30 miles per hour. He had passed the glare of the lights and was within 12 or 15 feet of the tank-trailer, when he discovered that the tank-trailer extended and formed a bridge entirely across plaintiff's right side of the highway and the adjacent shoulder. The tank, suspended bridge-like over the road, was about 4½ feet above the surface of the highway, so that the plaintiff's dimmed lights cast their rays along the surface of the highway beneath the tank. The grayish colored tank blended with the surface of the highway and formed an obstruction that was difficult to see in the darkness. Plaintiff, upon seeing the tank, applied his brakes with full force, but was unable to stop and ran under the tank so that it hit the windshield of his automobile, resulting in great damage to the car and personal injury to the occupants of the car. There were no lights of any kind on or around the tank-trailer to indicate its presence across the road, and no person there to warn motorists of impending danger. There is no question in my mind but that the plaintiff's evidence makes out a case of negligence against the defendants. Whether upon this record the court was justified in concluding that contributory negligence appears from the plaintiff's evidence as a matter of law is the problem involved in this appeal.

In my opinion, that question is settled by the case, *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190, where the doctrine is fully stated as follows: "The test for determining whether the question of contributory negligence is one of law for the court or one of fact for the jury is restated in the recent case of *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307, where this is said: 'Contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. . . . A judgment of involuntary nonsuit cannot be rendered on the theory that the plea of contributory negligence has been established by the plaintiff's evidence unless

the testimony tending to prove contributory negligence is so clear that no other conclusion can be reasonably drawn therefrom. . . . If the controlling or pertinent facts are in dispute, or more than one inference may reasonably be drawn from the evidence, the question of contributory negligence must be submitted to the jury.'" Measuring the plaintiff's testimony by this standard, the question of contributory negligence becomes a matter of fact for the jury and not one of law for the court.

The plaintiff's conduct is to be measured by the rule of the prudent man and whether his conduct at the time and immediately prior to the collision was that of a reasonably prudent man under the same or similar circumstances was a question of fact for determination by the jury. *Moore v. Iron Works,* 183 N.C. 438, 111 S.E. 776.

In discussing the rule of the prudent man, *Barnhill, J.,* in *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871, had this to say: "Hence the quantity of care required to meet the standard must be determined by the circumstances in which plaintiff and defendant were placed with respect to each other, and whether defendant exercised or failed to exercise ordinary care as understood and defined in our law of negligence is to be judged by the jury in the light of the attendant facts and circumstances." Citing *Perkins v. Wood & Coal Co.,* 189 N.C. 602, 127 S.E. 677. The same rule applies to the plaintiff when contributory negligence is relied upon as a defense.

My philosophy of life includes an abiding faith in the good judgment and common sense of the men and women who constitute the juries in our courts. To me, the right of a trial by jury is one of the brightest jewels in the diadem of democratic processes. "In my mind, he was guilty of no error, . . . who once said that all we see about us, kings, lords, and Commons, the whole machinery of the State, . . . end in simply bringing twelve good men into a box."

In conclusion, as my tenure of office draws to a close, I beg leave to say that I shall always carry in my heart a deep sense of gratitude for the opportunity of having served the people of my State as a member of this Tribunal. I say now and certify to succeeding generations that the fellowship and co-operation of my colleagues constitute a priceless treasure which I shall carry with me on the journey westward toward life's sunset with its restful radiant glow.

"Let Fate do her worse, there are relics of joy,
Bright dreams of the past, which she cannot destroy;
Which come, in the night-time of sorrow and care,
And bring back the features which joy used to wear.
Long, long be my heart with such memories filled!
Like a vase in which roses have once been distilled—
You may break it, you may shatter the vase, if you will,
But the scent of the roses will hang round it still."

L. M. MACON v. MISS E. M. MURRAY, JOHN AND SAM MURRAY.

(Filed 19 November, 1952.)

1. **Judgments § 33c—Dismissal on ground that action was prematurely instituted does not bar subsequent action after cause has matured.**

An action to recover for cutting and stacking lumber was dismissed on the ground that although plaintiff was entitled to a stipulated sum therefor, such amount was not recoverable under the contract until the lumber had been sold, and that defendant had not arbitrarily neglected or refused to sell the lumber, and that plaintiff was not entitled to a lien on the lumber. The judgment directed that defendants were under legal duty to use due diligence to sell the remaining lumber. *Held:* The judgment does not estop plaintiff from maintaining a subsequent action for the balance due him upon his contentions that subsequent to the judgment defendant failed to use due diligence to sell the lumber but had arbitrarily and unreasonably neglected to sell same.

2. **Appeal and Error § 39f—**

Exceptions to the charge will not be sustained when the charge construed contextually is without prejudicial error.

APPEAL by defendants from *Clement, J.*, at March Civil Term, 1952, of RANDOLPH.

Civil action to recover on contract for services in cutting, logging and manufacturing timber into lumber, and in stacking lumber thus manufactured.

Plaintiff alleges in his complaint substantially the following: That on or about 20 December, 1947, he entered into a contract with defendants by the terms of which he agreed to move his sawmill onto the lands of defendants and to cut, log and saw into lumber certain timber trees on the lands of defendants; that he was to be paid at the rate of $25.00 per thousand board feet for his services in cutting, logging and sawing the timber trees into lumber; that if he stacked any of the lumber he was to be paid therefor an additional $2.00 per thousand board feet; that pursuant to this agreement, he moved his sawmill on the land of the defendants and cut, logged and manufactured into lumber 307,740 board feet of lumber, and stacked 212,029 board feet of lumber for the defendants; that he completed his work for defendants on or about 26 May, 1948,—having fully complied with the terms of his contract and agreement with defendants; that during the period between 20 December, 1947, and 26 May, 1948, defendants paid him the sum of $3,796.54; and that there is now due him the full sum of $4,321.02, plus interest from 26 May, 1948, after demand upon defendants, and payment thereof refused by them.

On the other hand, defendants, repleading by way of answer by permission of the court, deny in material aspect the allegations of plaintiff's

complaint, except as to the amount paid by them to plaintiff, which they admit.

And for a further answer, and new matter in defense, defendants aver in substance: That in an action instituted by plaintiff, on 26 June, 1948, against these defendants in same court, upon same cause of action, and for similar relief, judgment was rendered dismissing the action; the judgment roll in which is pleaded in bar of this action; and that a claim of lien filed was dismissed; and that the judgment in such former action has not been vacated, nor has it been reversed.

And further answering the complaint, and as a counterclaim, aver and say: That plaintiff and defendants made and entered into an express contract as set out in the judgment specially pleaded above; that they, the defendants, performed their part of the contract,—going to considerable trouble, and spending considerable time and money; that plaintiff violated his part of the contract in that he made demands for immediate payment for his services, instituted the former action, filed a claim of lien in office of Clerk of Superior Court of Randolph County, and posted copies of same on the lumber and on the lands of defendants, thereby adversely and materially impairing defendants' ability to sell the lumber; that they were at all times ready, willing, and able to comply with the terms of said contract, and negotiations were carried on in good faith by them looking to the sale of the lumber, and completed sales would have been made of all the lumber in a reasonable time, and at reasonable prices, had not the aforesaid acts and violations of plaintiff prevented the same; that lumber left in the woods sustained material damages from the ravages of the elements; that the element of time in the contract, and in selling the lumber was essential, and was so contemplated by the parties; and that "by reason of the reckless and willful material breach of the said contract by the plaintiff, defendants have suffered loss and damage." While no specific amount of damages is alleged, defendants pray that plaintiff take nothing by this action, and that they recover of plaintiff $12,822.98, etc.

When the case came on for hearing in Superior Court at March Term the parties entered into stipulations, pertinent parts of which are as follows: "That a suit was instituted on June 25, 1948 in the Superior Court of Randolph County, and was referred to a referee. The referee made his report, the defendants filed exceptions to the report, the exceptions came on to be heard before Crisp, Judge, who approved the findings of fact and conclusions of law of the referee, the defendants appealed to the Supreme Court from the judgment of Crisp, and the Supreme Court remanded the action for a new hearing" (*Macon v. Murray,* 231 N.C. 61, 55 S.E. 2d 807); that when "The matter came on to be heard at the March 20 Term, 1950, before his Honor William H. Bobbitt, Judge Pre-

siding, and Judge Bobbitt entered judgment bearing date of March 29, 1950, as appears on the judgment docket of this county," in which the Judge made findings of fact as follows: "That the agreement was that the defendants were to pay the plaintiff the amount due him upon the sale of the lumber by the defendants . . . that it was contemplated and agreed that the defendants would sell the lumber as soon as this could reasonably be done, taking into consideration winter weather, difficulties of hauling, illness in the family of the defendants, and all attendant circumstances"; that "Between December 20, 1947, and May 26, 1948, as weather conditions permitted, the plaintiff cut, logged and sawed the timber. The plaintiff completed the sawing and stacking operations on the defendants' lands about the 25th day of May, 1948. Under the terms of the above contract the plaintiff cut and sawed 307,740 board feet of the defendants' timber and stacked 212,029 board feet."

That "the plaintiff is an experienced lumber and saw mill man and the lumber cut by him on the Murray place was well processed and was good lumber, and when available for sale, and when hauling facilities could be provided, there was a market for such lumber from time to time at reasonable prices."

"It is further agreed between the parties that the facts found by Judge Bobbitt in paragraph 6 are admitted, which paragraph reads as follows: 'Weather conditions in the early part of 1948, January, February and March, were bad, and the roads on the Murray lands over which the lumber had to be hauled were muddy, rough and in bad shape; that conditions improved somewhat during April, May and June; that during part of this period the roads were impassable and during the greater portion thereof hauling would have been difficult although not impossible. During the period and until June 26, 1948, the defendants made reasonable efforts to sell the lumber that was available from time to time at reasonable prices and in fact sold a substantial portion thereof. The defendants did not arbitrarily refuse to sell the lumber at reasonable prices when such was available and hauling could reasonably be arranged, and did not arbitrarily and unreasonably prolong negotiations so as to delay sales. Negotiations were carried on in good faith by the defendants looking to the sale of the remaining lumber within a reasonable time until on or about June 26, 1948, when the action was commenced, notice of lien filed against the defendants' lands and notices of claim of lien posted on the stacked and unsold portion of the lumber. Since then the outstanding lien notices and the pending litigation have substantially impaired the defendants' ability to sell the remaining lumber at reasonable prices. Since then certain amounts of lumber, not disclosed by the evidence, have been sold by the defendants. The evidence fails to show what amounts of

lumber were available for sale during the different months or periods between December 20, 1947 and May 26, 1948.'

"It is agreed by the parties that the facts stated in paragraph 7 of said findings of fact as set forth in said judgment are true, and are as follows: 'The total amount due and to become due by the defendants to the plaintiff for his services under the contract is $8,117.56, of which $3,806.34 has been paid, leaving $4,311.22 due or to become due. The evidence fails to disclose the amount of lumber sold by the defendants up to now. The payments made by the defendants to the plaintiff were not made strictly in proportion to the amount of lumber actually sold, but certain payments were made to enable the plaintiff to meet his day labor payroll.' "

" 'Upon the foregoing findings of fact, the court is of the opinion and so holds: (1) That the plaintiff has no lien on the defendants' lands or any of the unsold stacked lumber; (2) that the evidence fails to show that the defendants have sold lumber for which the amounts due plaintiff for logging and stacking have not been paid; (3) that the defendants' ability to sell the unsold and stacked lumber has been adversely and materially impaired by the lien notices and under such circumstances since June 26, 1948, the defendants' obligation to sell has been suspended; and (4) that from the final judicial determination of this action the defendants are under legal duty to use due diligence to sell the remaining lumber without arbitrary and unreasonable delay, and thereupon to pay the plaintiff the amounts due under the above contract as well as the amount, if any, due by the defendants to the plaintiff on account of lumber heretofore sold by the defendants for which plaintiff has not received compensation in accordance with the terms of the contract.'

"That Judge Bobbitt further set forth in said judgment the following: 'Accordingly, it is now ordered, adjudged and decreed that the plaintiff have and recover nothing in this action on account of the matters alleged in the complaint and that this action be, and the same is hereby dismissed.'

"It is further agreed between the parties that after Bobbitt, Judge, signed the judgment above referred to, dated March 29, 1950, that the defendants gave notice of appeal to the Supreme Court of North Carolina, but did not perfect their appeal. That on January 15, 1951, the plaintiff started the present action."

Upon the trial of the present action in Superior Court these stipulations were read in evidence to the jury, and plaintiff offered evidence tending to show that since the last of March, 1950, there has been a market for lumber; that the lumber business has been good, and that defendants have refused to sell lumber at the prevailing market prices; that they have failed to exercise due diligence to sell this lumber; that their conduct in respect thereto has been arbitrary and unreasonable.

Defendants, on the other hand, offered evidence tending to show that they have made reasonable effort to sell the lumber, but have been unable to do so; that their failure to sell the lumber is due to violations by plaintiff as alleged in their answer, to their damage.

And the trial judge, in his charge to the jury, submitted the case on the basis of these contentions.

These issues were submitted, and answered by the jury as shown:

"1. Did the plaintiff and the defendants enter into a contract on December 20, 1947, that the plaintiff would cut certain lumber of the defendants and receive therefor the sum of $25.00 per thousand feet and $2.00 per thousand feet for stacking? Answer: Yes.

"2. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $4,311.22. No interest.

"3. Did the plaintiff breach the contract as alleged in the answer? Answer: No.

"4. What amount, if any is the defendant entitled to recover of the plaintiff on account of the breach of the contract by the plaintiff? Answer: ....."

To the signing of judgment thereon, and in accordance therewith, defendants excepted and appealed to the Supreme Court, and assign error.

L. T. Hammond and Prevette & Coltrane for plaintiff, appellee.
John L. Murray for defendants, appellants.

WINBORNE, J. While defendants, appellants, bring forward and discuss in their brief filed on this appeal numerous assignments of error, we are of opinion and hold that prejudicial error is not made to appear.

First: Appellants contend that the trial court erred in denying defendants' motion to dismiss this action "for that the judgment and record in the former action constitute *res judicata,* and the plaintiff is thereby estopped from maintaining this action."

Though the judgment referred to dismissed the former action, the findings of fact and the conclusions of law based thereon as set out in the judgment, clearly show that the door was left open for the plaintiff to enforce his rights as to balance "due or to become due." The effect of the judgment is that the action was prematurely instituted, that is, before the debt was due. And it is significant that the court concludes "that from the final judicial determination of this action the defendants are under legal duty to use due diligence to sell the remaining lumber without arbitrary and unreasonable delay, and thereupon to pay the plaintiff the amounts due under the above contract as well as the amount, if any, due by the defendants to the plaintiff on account of lumber heretofore sold by the defendants for which plaintiff has not received compensation in

accordance with the terms of the contract." Manifestly, the judgment does not estop plaintiff from prosecuting the present action.

Second: The charge as given by the court is subjected to varied criticism—both as to statement of contentions and as to declarations of applicable principles of law. Nevertheless, when the charge is read contextually in the light of stipulated facts, and evidence offered by plaintiff and by defendants, any error there may be is deemed harmless.

Third: The assignments of error based upon alleged failure of the court to charge as required by G.S. 1-180 in respect to numerous matters appear to be without merit.

The case appears to have been fairly presented to the jury, and the jury has accepted plaintiff's view.

Hence, after consideration of all assignments of error presented, we find in the judgment from which this appeal is taken

No error.

ROSCOE SHERMAN POWELL v. ERVIN DANIEL, AN INFANT, BY HIS GUARDIAN AD LITEM, J. M. DANIEL.

(Filed 19 November, 1952.)

1. **Automobiles §§ 8i, 18h (2)—Evidence held for jury on question of negligence in failing to stop and maintain lookout before entering through street intersection.**

Defendant's evidence on his counterclaim which tends to show that defendant was traveling twenty-five to thirty miles per hour on a through highway and was first in the intersection when his car was struck on its right side after its front had cleared the intersection by plaintiff's car which approached the intersection from defendant's right at a high rate of speed and failed to stop in obedience to a stop sign on the servient highway, and failed to slacken speed or change course, although plaintiff could have seen defendant's car in the intersection, *is held* sufficient to overrule plaintiff's motion to nonsuit the counterclaim, the evidence being considered in the light most favorable to defendant on that issue. G.S. 20-158.

2. **Appeal and Error § 39e—**

The exclusion of competent evidence is not prejudicial when the evidence thereafter is properly admitted.

3. **Evidence § 42c: Infants § 14—**

Admissions of a guardian *ad litem* or next friend are not competent against the infant.

4. **Evidence § 42g—**

Plaintiff must show that defendant was in fact silent in the face of a damaging statement before such statement can be held competent as an admission by silence.

5. Appeal and Error § 39e—

The admission of evidence over objection cannot be held prejudicial when substantially the same evidence is thereafter admitted without objection.

6. Appeal and Error § 6c (5)—

An exception to a portion of the charge containing statements of a number of propositions, without specifying any particular statement in the charge as erroneous, cannot be sustained if any one of the statements is correct.

7. Automobiles § 18i—

A charge that, except as otherwise provided, a speed in excess of thirty-five miles an hour in a residential district is unlawful, will not be held for error when the court thereafter explains the relevant speed restrictions applicable to the evidence.

8. Appeal and Error § 6c (6)—

While error in the statement of the law or the contentions of the parties in respect to the law need not be called to the trial court's attention at the time, misstatement of the contentions of the parties in respect to the evidence must be called to the court's attention in apt time in order to be considered on appeal.

APPEAL by plaintiff from *Clement, J.*, and a jury, at March Term, 1952, of RANDOLPH.

Civil action arising out of a collision between two motor vehicles at a highway intersection, where traffic was controlled by stop signs.

The accident culminating in this lawsuit occurred between five and six o'clock p.m. on 7 January, 1951, upon the intersection of two paved highways in the Town of Mocksville, and resulted in harm to both of the vehicles involved in it. The plaintiff sued the defendant for the damage to his automobile, and the defendant counterclaimed for the injury to his car.

These issues arose on the pleadings, and were submitted to the jury:

1. Was the plaintiff Roscoe Powell damaged by the negligence of the defendant, as alleged in the complaint?

2. Did the plaintiff by his negligence contribute to his damage, as alleged in the answer?

3. What damage, if any, is the plaintiff entitled to recover of the defendant?

4. Was the property of the defendant Ervin Daniel injured by the negligence of the plaintiff, as alleged in the counterclaim?

5. What damages, if any, is Ervin Daniel entitled to recover of the plaintiff?

The jury answered the first issue "No," the fourth issue "Yes," and the fifth issue "$200.00." The court entered judgment "that the plaintiff recover nothing by his action and that the defendant . . . recover of the

plaintiff . . . the sum of $200.00" upon his counterclaim, and the plaintiff appealed, assigning errors.

Ottway Burton for plaintiff, appellant.
Miller & Moser for defendant, appellee.

ERVIN, J. The plaintiff makes these assertions by his assignments of error:

1. That the court erred in refusing to dismiss the counterclaim upon a compulsory nonsuit.

2. That the court erred in the exclusion of testimony offered by plaintiff.

3. That the court erred in the admission of testimony offered by defendants.

4. That the court erred in its instructions to the jury.

These questions are considered in their numerical order.

There was sharp conflict in the testimony presented by the parties at the trial. The evidence adduced by the plaintiff would have supported a verdict in his favor if it had been accepted by the jury. We omit specific reference to his evidence, however, because it is not necessary to an understanding of the questions arising on the appeal.

When the testimony offered by the defendant is interpreted most favorably for him, it makes out this case:

1. Highway 601, which runs north and south, and Highway 64, which runs east and west, pass over each other at right angles in a residential district in the Town of Mocksville.

2. Before the event producing this litigation, the road governing authorities designated Highway 601 a main traveled or through highway under the provisions of G.S. 20-158 by erecting at the entrances to it from Highway 64 signs notifying drivers of vehicles on Highway 64 to come to a full stop before entering or crossing Highway 601.

3. The defendant Ervin Daniel, a minor, drove his Chevrolet automobile southward along Highway 601, reached its intersection with Highway 64 substantially in advance of the plaintiff, and observed that the intersection was free from vehicular traffic. He thereupon entered the intersection, and undertook to proceed straight through it at a speed of between 25 and 30 miles an hour.

4. Although the prior entry and occupancy of the intersection by the defendant's Chevrolet automobile was clearly visible to him for an appreciable time as he approached the intersection from the west, the plaintiff drove his Plymouth car eastwardly along Highway 64 "at a high rate of speed," failed to stop before entering the intersection in obedience to the stop sign confronting him, proceeded directly onto the intersection with-

out changing the course of his car or reducing its speed, and struck the right rear fender of the defendant's Chevrolet, which had already cleared the northern half of the intersection. As a result of the impact, both vehicles suffered substantial damage, and the defendant lost control of his Chevrolet automobile, which left the highway and razed a portion of a wire fence enclosing a poultry-yard on abutting premises.

This evidence suffices to show that the plaintiff was negligent in the operation of his automobile in these respects: (1) That he failed to keep a reasonably careful lookout, *Register v. Gibbs,* 233 N.C. 456, 64 S.E. 2d 280; (2) that he failed to keep his automobile under reasonable control, *Hansley v. Tilton,* 234 N.C. 3, 65 S.E. 2d 300; and (3) that he drove his automobile onto a main traveled or through highway from an intersecting road without first stopping in obedience to a duly erected stop sign when he knew, or by the exercise of reasonable care would have known, that his failure to stop in obedience to the stop sign was likely to cause a collision between his automobile and the defendant's car, which was already within the intersection. G.S. 20-158; *Johnson v. Bell,* 234 N.C. 522, 67 S.E. 2d 658; *Lee v. Chemical Corp.,* 229 N.C. 447, 50 S.E. 2d 181; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539. This evidence likewise suffices to show that the negligence of the plaintiff in one or more of these respects was the proximate cause of the collision and the resultant damage to defendant's car. These things being true, the court rightly refused to dismiss the counterclaim upon a compulsory nonsuit.

The assignments of error based on rulings upon evidential matters are reviewed in the numbered paragraphs set forth below.

1. The plaintiff's witness Monroe Draughn testified that he repaired the Plymouth car subsequent to the collision, and identified plaintiff's Exhibit A as a bill prepared by him correctly listing the various items of repair. The plaintiff thereupon offered the repair bill in evidence. The court excluded it on objection of the defendant, and the plaintiff noted an exception to its exclusion. The court afterwards reversed its ruling on this point, and received the repair bill in evidence. By so doing, the court cured any error in its original rejection of the repair bill. This is necessarily so because a litigant is not harmed by the exclusion of testimony, when the same, or substantially the same, testimony is subsequently admitted. *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179; *Fanelty v. Jewelers,* 230 N.C. 694, 55 S.E. 2d 493; *Shipping Lines v. Young,* 230 N.C. 80, 52 S.E. 2d 12; *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464; *Metcalf v. Ratcliff,* 216 N.C. 216, 4 S.E. 2d 515; *Bryant v. Reedy,* 214 N.C. 748, 200 S.E. 896; *Keith v. Kennedy,* 194 N.C. 784, 140 S.E. 721.

2. J. M. Daniel, the father and guardian *ad litem* of the defendant, a seventeen year old boy, was not a witness in the case. At some undis-

closed time between the occurrence of the collision and the commencement of the action, the plaintiff, the defendant, and J. M. Daniel were in a courtroom at Mocksville. The plaintiff undertook to testify that on this occasion "the woman came up that owned the (poultry-yard) fence and said that she wanted damage to her fence or her fence put up," and J. M. Daniel replied: "My boy tore it down; I will put it up." The court excluded this testimony on objection of the defendant, and the plaintiff assigns its rejection as error. This assignment of error is untenable. The statement of the defendant's father is not admissible as the admission of a party to the record because "the admissions of a guardian *ad litem* or next friend are not competent to affect the interest of the person whom declarant represents in the action." *Cook v. Edwards,* 198 N.C. 738, 153 S.E. 323; 31 C.J.S., Evidence, section 319. There is no solid basis for any contention that the statement of the defendant's father ought to have been received as an admission by silence on the part of the defendant. This is true for the very simple reason that there was no preliminary showing by the plaintiff that the defendant remained silent when the statement was made. *City of Indianapolis v. Barthel,* 194 Ind. 273, 141 N.E. 339; *Ray v. Ray,* 196 Ky. 579, 245 S.W. 287; *McCarty v. Bishop,* 231 Mo. App. 604, 102 S.W. 2d 126; Stansbury on North Carolina Evidence, section 179; Wigmore on Evidence (2d Ed.), section 1071.

3. The plaintiff noted two exceptions to the admission of the defendant's evidence that the plaintiff's automobile struck the defendant's car. These exceptions are not subject to review in this court because the defendant gave substantially the same testimony without objection in other portions of his examination. *Spivey v. Newman,* 232 N.C. 281, 59 S.E. 2d 844; *White v. Disher,* 232 N.C. 260, 59 S.E. 2d 798; *Davis v. Davis,* 228 N.C. 48, 44 S.E. 2d 478; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217; *McKay v. Bullard,* 219 N.C. 589, 14 S.E. 2d 657.

The tenth, eleventh, twelfth, and thirteenth exceptions are addressed to the charge.

The tenth exception is a general exception to a lengthy portion of the charge which contains a number of propositions, including the following: "When a person comes to an intersection where there is a stop sign . . ., it is incumbent on him . . . to act as a reasonably prudent man would act at the time and place in question." This exception falls under the condemnation of the necessary rule of appellate practice that an exception must point out some specific part of the charge as erroneous, and that an exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct. *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608; *Arnold v. Trust Co.,* 218 N.C. 433, 11 S.E. 2d

307; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175; *Lanier v. Pullman Co.,* 180 N.C. 406, 105 S.E. 21; *S. v. Bryant,* 178 N.C. 702, 100 S.E. 430; *Bank v. Pack,* 178 N.C. 388, 100 S.E. 615; *Barefoot v. Lee,* 168 N.C. 89, 83 S.E. 247; *Sigmon v. Shell,* 165 N.C. 582, 81 S.E. 739; *Buie v. Kennedy,* 164 N.C. 290, 80 S.E. 445; *Lumber Co. v. Moffitt,* 157 N.C. 568, 73 S.E. 212; *S. v. Bowman,* 152 N.C. 817, 67 S.E. 1058; *Gwaltney v. Assurance Society,* 132 N.C. 925, 44 S.E. 659; *Bost v. Bost,* 87 N.C. 477.

The eleventh exception questions the validity of a brief portion of the charge in which the court undertook to instruct the jury with respect to this statutory provision: "Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of . . . thirty-five miles per hour in any residential district." G.S. 20-141. This particular instruction, standing alone, may merit criticism. But when the charge is read as a whole, it is obvious that the court explained the relevant speed restrictions to the jury in accurate and simple language.

The twelfth and thirteenth exceptions cover portions of the charge constituting mere statements by the trial judge of contentions of the parties arising upon evidence. They were noted for the first time in the case on appeal, and are without value to plaintiff for the reasons stated below.

"Under the appellate practice which obtains in this jurisdiction, it is not incumbent upon a litigant to except at the trial to errors in the instructions of the judge as to applicable law, or in instructions of the judge as to the contentions of the parties with respect to such law. It is sufficient if he sets out his exceptions to errors in such instructions for the first time in his case on appeal. . . . The rule is otherwise, however, where the judge misstates the evidence, or the contentions of the parties arising on the evidence. When that occurs, the litigant must call the attention of the judge to the misstatement at the time it is made, and thus afford the judge an opportunity to correct it before the case is given to the jury. Furthermore, he must note an immediate exception to the ruling of the judge in case his request for a correction of the misstatement is refused. If this course is not pursued, the misstatement of the evidence or of the contentions based thereon is not subject to attack or review on appeal." *S. v. Lambe, supra.* See, also, in this connection: *In re Will of McGowan,* 235 N.C. 404, 70 S.E. 2d 189; *Dickson v. Coach Co.,* 233 N.C. 167, 63 S.E. 2d 297; *Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909; *Steele v. Coxe,* 225 N.C. 726, 36 S.E. 2d 288; *Ward v. R. R.,* 224 N.C. 696, 32 S.E. 2d 221; *Manufacturing Co. v. R. R.,* 222 N.C. 330, 23 S.E. 2d 32; *Rooks v. Bruce,* 213 N.C. 58, 195 S.E. 26; *Winborne v. McMahan,* 206 N.C. 30, 173 S.E. 278.

There is in law

No error.

CLELLAND SUTTON AND WIFE, PAULINE S. SUTTON, PRENTICE SUTTON AND WIFE, BRUCE S. SUTTON, NORMAN SUTTON AND WIFE, MARY SUTTON, HERMAN SUTTON, JR., AND WIFE, CATHERINE SUTTON, GLADYS S. SUTTON AND HUSBAND, SHERWOOD SUTTON, ANNIE S. SUTTON AND HUSBAND, PARROTT SUTTON; CLELLAND SUTTON, EXECUTOR OF THOMAS N. SUTTON, DECEASED; AND HELEN S. SUTTON (WIDOW), AND EVELYN SUTTON v. LEROY SUTTON AND HERMAN SUTTON AND WIFE, LOLA SUTTON.

(Filed 19 November, 1952.)

1. Wills § 33c—

Where there is a devise to testator's sons with proviso that should any son die "without lawful heirs" his share should go to the surviving sons, the words "without lawful heirs" will be construed "without lawful issue."

2. Wills § 46: Partition § 8—

Where each tenant in common owns a defeasible fee with limitation over to his cotenants in the event of his death without issue, and such tenants voluntarily partition the property by the exchange of deeds conveying all their right, title, and interest in the lands allotted to the others, their deeds defeat the limitation over and each holds the fee simple absolute in his share. The distinction is pointed out where the deeds in voluntary partition do not purport to convey all the right, title, and interest of the grantors, and in partition proceedings where title is not put in issue and the parties do not petition the court to allow each to hold in fee simple free from any limitations over.

APPEAL by defendants from *Williams, J.*, August Term, 1952, of LENOIR.

This is a controversy without action upon an agreed statement of facts. Such of the facts as are essential to an understanding of the legal question presented for determination are set out in the numered paragraphs below:

1. Julius E. Sutton, late of Lenoir County, died in January, 1925, leaving a last will and testament which was duly probated by the Clerk of the Superior Court of Lenoir County 26 January, 1925. In Item 5 of this will, the devisor devised to his four sons, Thomas, LeRoy, Herman, and Julian Sutton, 257.6 acres of land of which he died seized, to be equally divided among them, with the proviso that, "Should either of the above die without lawful heirs then his or their part of the real estate shall go to the surviving, as named above, share and share alike."

2. In December, 1925, the above devisees agreed upon a division of the tract of land devised to them under Item 5 of the aforesaid will; and on 30 December, 1925, deeds were executed to each one for his respective share by each other brother and his wife (if any) and duly recorded.

3. The conveying clause in each of said deeds is as follows:

"That the said parties of the first part, in consideration of one dollar, the receipt of which is hereby acknowledged, have bargained, sold, quit-

claimed and conveyed, and by these presents do bargain, sell, quitclaim and convey unto said party of the second part, his heirs and assigns, all the right, title, interest and estate of said parties of the first part in and to the following described tract or parcel of land situate in Moseley Hall Township, Lenoir County, State of North Carolina, described and bounded as follows: . . ."

And the *habendum* clause in each of said deeds, with the addition of the name of the grantee in each respective deed, is as follows:

"To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, or in anywise appertaining, to him, the said . . ., party of the second part, his heirs and assigns, in fee simple."

4. That said Julian Sutton immediately following said division went into possession of the 66.35 acre tract of land allotted to him in said division and remained in possession thereof so long as he lived; that he died intestate on 31 December, 1943, leaving him surviving one daughter, Evelyn Sutton, as his sole heir at law, and his widow, Helen S. Sutton, mother of Evelyn.

5. That the said Thomas Sutton immediately following said division went into possession of the two parcels of land aggregating 62.45 acres allotted to him and remained in possession thereof so long as he lived. He was never married and died 22 October, 1951, leaving a last will and testament in which he devised the 62.45 acres of land allotted to him in the division of his father's estate, to Clelland Sutton, Prentice Sutton, Norman Sutton, Herman Sutton, Jr., Gladys S. Sutton, and Annie S. Sutton (the children of the defendants, Herman and Lola Sutton).

6. That the said LeRoy Sutton, who was allotted 64.4 acres of land and Herman Sutton, who was also allotted 64.4 acres of land in the division thereof, are both still living and are parties defendant herein; that the said LeRoy Sutton is now a widower and has no child or children; that the said Herman Sutton is married, he and his wife, Lola Sutton, being parties defendant herein, and they have six children.

The court below heard this matter at the request of all parties, upon the agreed statement of facts and the briefs submitted by the respective counsel, and held that the plaintiff, Evelyn Sutton, is the owner in fee, subject to the dower rights therein of her mother, Helen S. Sutton, of the 64.35 acre tract of land described in the deed dated 30 December, 1925, from Herman Sutton and others to Julian Sutton; and that the plaintiffs, Clelland Sutton, Prentice Sutton, Norman Sutton, Herman Sutton, Jr., Gladys S. Sutton, and Annie S. Sutton, are the owners in fee as tenants in common of the two tracts of land which together contain 62.45 acres, described in the deed dated 30 December, 1925, from Herman Sutton and

others to Thomas Sutton, and entered judgment accordingly. From the judgment entered, the defendants appeal and assign error.

Sutton & Greene for plaintiffs, appellees.

Jones, Reed & Griffin for defendants, appellants.

DENNY, J. The words "without lawful heirs" as used by Julius E. Sutton in Item 5 in his last will and testament will be construed to mean "without lawful issue." *Massengill v. Abell,* 192 N.C. 240, 134 S.E. 641; *Hudson v. Hudson,* 208 N.C. 338, 180 S.E. 597; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662.

The determinative question on this appeal is whether the deeds executed by the devisees named in the last will and testament of Julius E. Sutton constituted a mere partition of the devised land, or were they sufficient to convey the contingent as well as the vested interest therein of the several grantors to the respective grantees.

Ordinarily, a voluntary partition of land between or among tenants in common, even when accompanied by deeds, has in law, only the effect of an assignment to each of the several tenants of his share or part of the common property. Such partition creates no new estate and conveys no title but merely severs the unity of possession and ascertains and fixes the physical boundaries of the several parts of the common property to be allotted and held in severalty by the respective tenants. *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474; *Valentine v. Granite Corp.,* 193 N.C. 578, 137 S.E. 668; *Power Co. v. Taylor,* 191 N.C. 329, 131 S.E. 646; *Beacom v. Amos,* 161 N.C. 357, 77 S.E. 407; *Jones v. Myatt,* 153 N.C. 225, 69 S.E. 135; *Harrington v. Rawls,* 136 N.C. 65, 48 S.E. 571; *Carson v. Carson,* 122 N.C. 645, 30 S.E. 4; *Harrison v. Ray,* 108 N.C. 215, 12 S.E. 993, 11 L.R.A. 722; *Williams v. Lewis,* 100 N.C. 142, 5 S.E. 435, 6 Am. St. Rep. 574; 40 Am. Jur., Partition Section 126, page 106.

Likewise, a proceeding to partition land, unless the title has been put in issue, has the effect only of allotting to each tenant his share in severalty but does not create any title that the tenants did not formerly hold. *Weston v. Lumber Co.,* 162 N.C. 165, 77 S.E. 430; *Stallings v. Walker,* 176 N.C. 321, 97 S.E. 25; *Nobles v. Nobles,* 177 N.C. 243, 98 S.E. 715; *Bailey v. Mitchell,* 179 N.C. 99, 101 S.E. 511; *Baugham v. Trust Co.,* 181 N.C. 406, 107 S.E. 431; *Valentine v. Granite Corp., supra; Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440.

On the other hand, where devisees who are tenants in common join in a partition proceeding and petition the court to allot to each of them their share of the lands devised, in severalty, in fee simple, free from the limitation over to them, respectively, in the event any of them should die without issue surviving, such petition will constitute a surrender and

release of the right of survivorship. *Baugham v. Trust Co., supra. Cf. Wallace v. Phillips,* 195 N.C. 665, 143 S.E. 244.

It was also held in *Beacom v. Amos, supra,* that a similar condition could be eliminated by deed, in which case the partition was by deed. The lands in question were devised subject to contingent interests. The devisees agreed upon a division of the lands and by deed conveyed to each other certain parts of the devised property "so that they might hold the same in severalty, absolutely and in fee simple, free from any claims therein of the one party against the other, . . ." The Court said: "They have conveyed to each other all the interest and estate in the land they acquired under said will, both vested and contingent. . . . It is perfectly clear that the intention, as evidenced by the deeds, was that each should have and enjoy her several portion as the absolute and unconditional owner thereof in fee, so that the right of survivorship created by the limitation in the will should cease and determine and an indefeasible estate should vest instead thereof."

We hold that where deeds are exchanged in a voluntary partition of land, and such deeds do not purport to convey the land described therein, but merely to release and quitclaim the interest of the grantors in and to the described premises, that such deeds will not create new estates or change the character of the title held by the partitioners prior to the execution of the deeds. But, on the other hand, where partition deeds purport to bargain, sell, quitclaim, and convey all the right, title, interest, and estate of the grantors in the described premises, in fee simple, such deeds do more than merely set apart each to the other the respective parcels of land. *Beacom v. Amos, supra; Weil v. Davis,* 168 N.C. 298, 84 S.E. 395; *Williams v. Williams,* 175 N.C. 160, 95 S.E. 157.

In the case of *Bourne v. Farrar,* 180 N.C. 135, 104 S.E. 170, it was said: "The conveyance of 'All the grantor's right, title and interest in certain described property is a conveyance of all his estate in such property.' 13 Cyc. 655. In construing the word 'interest' in a statute, it was held to include a contingent remainder, *Young v. Young,* 89 Va. 675; 23 L.R.A. 642; and includes also every right, legal and equitable. . . . we have been unable to find any case holding that a conveyance of 'all my interest' does not include a contingent remainder."

And in the case of *Hobgood v. Hobgood,* 169 N.C. 485, 86 S.E. 189, *Hoke, J.,* in speaking for the Court, said: ". . . our decisions on the subject being to the effect that when the holders of a contingent estate are specified and known, they may assign and convey it, and, in the absence of fraud or imposition, when such a deed is made, it will conclude all who must claim under the grantors, even though the conveyance is without warranty or any valuable consideration moving between the parties." *Bodenhamer v. Welch,* 89 N.C. 78; *Kornegay v. Miller,* 137 N.C. 659,

50 S.E. 315, 107 Am. St. Rep. 505; *Grace v. Johnson,* 192 N.C. 734, 135 S.E. 849; *Croom v. Cornelius,* 219 N.C. 761, 14 S.E. 2d 799; *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625.

In light of our decisions, we hold that the entire estate, both vested and contingent, was conveyed by the grantors in the respective deeds involved in this appeal, and that the judgment entered below must be upheld.

Affirmed.

STATE v. CORA GASTON AND DOWNEY CUNNINGHAM.

(Filed 19 November, 1952.)

1. Criminal Law §§ 52a (8), 56, 57c—

Objection that the evidence is not sufficient to carry the case to the jury must be raised by motion to nonsuit, G.S. 15-173, or by prayer for instructions to the jury, and may not be raised after verdict by motion for new trial or motion in arrest of judgment.

2. Criminal Law § 56—

Motion in arrest of judgment can be based only on matters which appear on the face of the record proper or on matters which should appear but do not, and therefore defects which appear only by aid of evidence cannot be the subject of motion in arrest of judgment, since the evidence is not a part of the record proper.

3. Criminal Law §§ 77c, 78d (1)—

A search warrant is no part of the record proper in a prosecution based on evidence obtained in the course of a search made under it, and therefore the absence of a search warrant in the record proper does not show that search was made without a warrant, but to the contrary, it will be presumed that the search was legally made under a proper warrant, and such record does not support defendants' contention, made for the first time on appeal, that their conviction was based on evidence rendered incompetent by positive legislative enactment. G.S. 15-27.

4. Public Officers § 9—

In the absence of evidence to the contrary, it will be presumed that the acts of public officers are in all respects regular.

APPEAL by defendants from *Sharp, Special Judge,* and a jury, at April Term, 1952, of MECKLENBURG.

Criminal prosecution for alleged violations of the statutes relating to alcoholic beverages in county coming under the provisions of the Alcoholic Beverage Control Act of 1937.

The facts are summarized in the numbered paragraphs set forth below.

1. Each defendant was charged by warrant in an inferior court of final jurisdiction, to wit, the Recorder's Court of Mecklenburg County, with

violating this provision of the Alcoholic Beverage Control Act: "It shall be unlawful for any . . . person . . . to have in his . . . possession any alcoholic beverages . . . upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State have not been paid." G.S. 18-48. Each defendant was convicted and sentenced by the Recorder, and appealed to the Superior Court of Mecklenburg County.

2. The charges against the defendants were consolidated in the Superior Court for the purpose of trial. The State offered testimony at the trial in that court tending to show that the defendants resided together in the City of Charlotte, and that on 22 March, 1952, law enforcement officers searched the common residence of the defendants and "found . . . two pints of non-tax-paid whiskey" in it. There was no evidence whatever at the trial indicating whether or not the law enforcement officers were armed with a legal search warrant when they searched the dwelling of the defendants. The petit jury found "that the defendants are guilty as charged."

3. The defendants did not move for a compulsory nonsuit under G.S. 15-173, or tender to the court any requests for instructions to the jury, or object in any way to any of the proceedings of the Superior Court preceding the return of the verdict.

4. Upon the return of the verdict, the defendants moved successively for a new trial and in arrest of judgment on the ground that the verdict was based on insufficient evidence. The court overruled these motions, and the defendants preserved exceptions to these rulings. The court sentenced the defendants to imprisonment as misdemeanants, and they appealed to the Supreme Court, assigning the rulings on the motions for a new trial and in arrest of judgment as error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Charles V. Bell and P. H. Bell for defendants, appellants.

ERVIN, J. Under the rules regulating practice and procedure in criminal actions, the objection that the evidence is not sufficient to carry the case to the jury or to sustain a verdict against the accused must be raised during the trial by a motion for a compulsory nonsuit under the statute now embodied in G.S. 15-173, or by a prayer for instruction to the jury. *S. v. Brady,* 177 N.C. 587, 99 S.E. 7; *S. v. Holder,* 133 N.C. 709, 45 S.E. 862; *S. v. Staton,* 133 N.C. 642, 45 S.E. 362; *S. v. Secrest,* 80 N.C. 450. It cannot be raised for the first time after verdict. *S. v. Jackson,* 190 N.C. 862, 129 S.E. 582; *S. v. Leak,* 156 N.C. 643, 72 S.E. 567; *S. v. Holder, supra; S. v. Staton, supra; S. v. Jarvis,* 129 N.C. 698, 40 S.E. 220; *S. v. Williams,* 129 N.C. 581, 40 S.E. 84; *S. v. Huggins,* 126 N.C.

1055, 35 S.E. 606; *S. v. Wilson,* 121 N.C. 650, 28 S.E. 416; *S. v. Harris,* 120 N.C. 577, 26 S.E. 774; *S. v. Hart,* 116 N.C. 976, 20 S.E. 1014; *S. v. Kiger,* 115 N.C. 746, 20 S.E. 456; *S. v. Varner,* 115 N.C. 744, 20 S.E. 518; *S. v. Braddy,* 104 N.C. 737, 10 S.E. 261; *S. v. Glisson,* 93 N.C. 506; *S. v. Keath,* 83 N.C. 626; *S. v. Hinson,* 82 N.C. 597; *S. v. Secrest, supra; S. v. Jones,* 69 N.C. 16. Hence it cannot be raised by a motion for a new trial (*S. v. White,* 162 N.C. 615, 77 S.E. 999), or by a motion in arrest of judgment. *S. v. Brady, supra; S. v. Francis,* 157 N.C. 612, 72 S.E. 1041; *S. v. Hawkins,* 155 N.C. 466, 71 S.E. 326; *S. v. Jarvis, supra; S. v. Wilson, supra; S. v. Furr,* 121 N.C. 606, 28 S.E. 552; *S. v. Thompson,* 97 N.C. 496, 1 S.E. 921.

The objection that the evidence is not sufficient to carry the case to the jury or to sustain a verdict against the accused cannot be urged in arrest of judgment for an additional reason. A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. *S. v. Sawyer,* 233 N.C. 76, 62 S.E. 2d 515; *S. v. Mitchem,* 188 N.C. 608, 125 S.E. 190; *S. v. Shemwell,* 180 N.C. 718, 104 S.E. 885. The record proper in any action includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. *Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910; *State ex rel. May Department Stores v. Haid,* 327 Mo. 567, 38 S.W. 2d 44; 23 C.J.S., Criminal Law, section 1515. The evidence in a case is no part of the record proper. *S. v. Matthews,* 142 N.C. 621, 55 S.E. 342. In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment. *S. v. Sawyer, supra; S. v. Robertson,* 210 N.C. 266, 186 S.E. 247; *S. v. McKnight,* 196 N.C. 259, 145 S.E. 281; 23 C.J.S., Criminal Law, section 1526.

When these rules of criminal practice and procedure are applied to the transcript of the record on this appeal, it is obvious that the question of the sufficiency of the evidence to carry the consolidated cases to the jury and to support the verdict against the defendants is not before us. This is true because the defendants did not challenge the legal sufficiency of the evidence during the trial in the Superior Court by a motion for a compulsory nonsuit or by a prayer for instruction to the jury.

The defendants take the position for the first time in this Court that the State's testimony is made incompetent by a positive legislative enactment, and that their convictions and sentences must be reversed on this ground even though they did not object to the admission of the testimony. They advance these successive and interdependent arguments to support this position: That where evidence is obtained in the course of a search under a search warrant, the search warrant forms a part of the record proper in any criminal prosecution based on such evidence; that the

absence of a search warrant in the record proper certified to this Court as "the complete record" in the consolidated cases shows that the search of the dwelling of the defendants was made without a search warrant; that the search of the dwelling of the defendants was made under conditions requiring the issuance of a search warrant; and that for these reasons the State's evidence in the consolidated cases falls under the condemnation of the statutory provision that "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." G.S. 15-27 as amended by Ch. 644 of the 1951 Session Laws.

The position of the defendants is untenable because its underlying premise is unsound. A search warrant is no part of the record proper in a prosecution based on evidence obtained in the course of a search made under it. This being true, the absence of a search warrant in the record proper certified to this Court as "the complete record" in the consolidated cases does not show that the search of the habitation of the defendants was made without a search warrant.

If an appellant is to secure a ruling by this Court adjudging facts discovered or evidence obtained in the course of a search to be incompetent, he must incorporate in his case on appeal circumstances disclosing that such facts were discovered or such evidence was obtained by a search made in violation of the statute. Since the case on appeal in the consolidated cases reveals that there was no evidence at the trial indicating whether or not the law enforcement officers were armed with a legal search warrant when they searched the dwelling of the defendants, we necessarily indulge the assumption that the search of the habitation of the defendants was made by the law enforcement officers under a legal search warrant. *S. v. Rhodes,* 233 N.C. 453, 64 S.E. 2d 287; *S. v. Gross,* 230 N.C. 734, 55 S.E. 2d 517; *S. v. Shermer,* 216 N.C. 719, 6 S.E. 2d 529; *Alexander v. State,* 131 Tex. Cr. R. 366, 99 S.W. 2d 305. In so doing, we merely apply the presumption that in the absence of evidence to the contrary, courts are bound to presume that the acts of public officers are in all respects regular. *S. v. Wood,* 175 N.C. 809, 95 S.E. 1050; *S. v. Bridgers,* 87 N.C. 562; Stansbury: North Carolina Evidence, section 235; 22 C.J.S., Criminal Law, section 589.

No error.

DOROTHY MAE HUDSON v. DRIVE IT YOURSELF, INC., AND J. B. FREEMAN,

AND

H. N. HUDSON v. DRIVE IT YOURSELF, INC., AND J. B. FREEMAN.

(Filed 19 November, 1952.)

1. Automobiles § 27—

It is the duty of a bailor for hire of an automobile to see that the automobile is in good condition, and while he is not an insurer, he is liable for injury to the bailee or to third persons proximately resulting from a defective condition of the car of which he had knowledge or which by reasonable care and inspection he could have discovered.

2. Same—Evidence held insufficient to show that bailor knew or should have known of defective condition of automobile.

Plaintiffs' evidence was to the effect that an employer of the bailor drove its car from its garage and stopped and delivered it to the bailee in the customary manner, with nothing to suggest in the manner of operation that the brakes were defective, and that the bailee drove the car a distance of five and one-half miles during a period of forty-five minutes without detecting anything wrong with the brakes until just before the collision with plaintiffs' car. *Held:* The evidence is insufficient to show that the bailor knew or should have known by reasonable inspection of the defective condition of the brakes, and therefore bailor's motion to nonsuit should have been allowed.

APPEAL by defendant Drive It Yourself, Inc., from *Clement, J.*, June Term, 1952, of CABARRUS. Reversed.

Separate suits were instituted by Dorothy Mae Hudson and H. N. Hudson against the defendants to recover damages to person and property resulting from the operation of an automobile by defendant Freeman, for which it was alleged his codefendant was also liable.

On the occasion alleged both plaintiffs were in an automobile stopped at a street intersection in Charlotte when their automobile was struck from the rear by an automobile belonging to Drive It Yourself, Inc., and driven by defendant Freeman as bailee. It was alleged that Freeman was negligent in the operation of the automobile, and that Drive It Yourself, Inc., was negligent in renting to Freeman for operation on the highway an automobile with defective brakes. It was alleged that as result of the collision plaintiff Dorothy Mae Hudson suffered injury which caused a miscarriage, and that plaintiff H. N. Hudson sustained injury to his automobile.

Before trial plaintiffs submitted to voluntary nonsuit as to defendant Freeman, and Freeman was offered as a witness against Drive It Yourself, Inc., hereinafter referred to as the defendant.

J. B. Freeman testified that he was an experienced truck driver; that 5 November, 1950, he hired a Chevrolet automobile from the defendant

to drive to Fort Mill, South Carolina; that when he had traveled some 5½ miles and was approaching a South Boulevard intersection he observed the automobile of plaintiffs in front of him stopped for a traffic light; that he applied his brakes, and, finding they would not hold, swerved to the left, but struck the bumper guard and dented the left rear fender of plaintiffs' automobile. The automobile Freeman was driving was equipped with hydraulic brake system. "The brakes wasn't right, did not have a full pedal. If you were driving at any speed at all, say 20 miles an hour, you had to pump them, say twice, to get them to hold. . . . In the condition the brakes were I will say that driving 20 or 25 miles an hour I could bring the car to a stop in 20 or 25 feet. I didn't test the hand brakes. . . . If the fluid is low you do not have a full pedal. You can pump them one time and hold the pedal up. The brakes were not good without pumping."

Freeman further testified, however, that before he hit the plaintiffs' car he drove through the streets of Charlotte at the rate of 20 or 25 miles per hour, stopping several times; that in making these stops he had not detected anything wrong with the brakes because he had not been driving fast enough to press hard on the pedal. He said: "I just detected something wrong when I got to the South Boulevard red light." After the collision he drove the automobile back to the defendant and paid the defendant for the damage caused to the automobile. He testified he had been renting cars from the defendant for five years; that on this occasion at his request the automobile was brought out from the storage lot, stopped in front of defendant's place and turned over to him. He did not ask anything about the brakes. This was about 2:30 to 3:00 p.m. The accident according to the policeman occurred at 3:47 p.m.

On issues submitted the jury rendered verdict in favor of plaintiffs, awarding damages in each case. From judgment on the verdict defendant appealed.

C. M. Llewellyn and John Hugh Williams for plaintiffs, appellees.
Hartsell & Hartsell and Brock Barkley for defendant, appellant.

DEVIN, C. J. The defendant Drive It Yourself, Inc., assigns error in the denial by the trial court of its motion for judgment of nonsuit. The plaintiffs' actions are based upon allegations of breach of duty on the part of the appealing defendant in that it let to hire for use on the highway an automobile with defective brakes when the defendant knew or in the exercise of due care should have known that the brakes were in an unsafe condition.

A bailor for hire, while not an insurer, may be liable for personal injuries to the bailee or third persons proximately resulting from the defective

condition of a rented automobile while being used by the bailee for the purpose known to be intended, if the bailor was aware of the defective condition or by reasonable care and inspection could have discovered it. 131 A.L.R. 845 (note); *Trusty v. Patterson,* 299 Pa. 469; *Ferraro v. Taylor,* 197 Minn. 5; *Milestone System, Inc., v. Gasior,* 160 Md. 131.

It is the duty of a bailor for hire of an automobile to use reasonable care to see that the automobile is in good condition when it is let out for use on the highway, and he is liable for injury to the bailee or a third person proximately resulting from a breach of this duty.

It is a breach of the bailor's duty to let out an automobile for hire for use on the highway with materially defective brakes when he is aware or by the exercise of due care by reasonable inspection should have known of such defective condition.

Here, according to the facts made to appear from plaintiffs' evidence, the duty devolved upon the defendant to exercise due care, by reasonable inspection of the rented automobile before delivery for use on the public highways, to avoid injury to the user or the public from defective brakes or appliances of which defendant was aware or by reasonable diligence could have discovered at the time of letting for hire. *Jones v. Chevrolet Co.,* 217 N.C. 693, 9 S.E. 2d 395; *Harward v. General Motors,* 235 N.C. 88, 68 S.E. 2d 855. However, he would not be responsible for a defect subsequently discovered which was not discernible by reasonable inspection at the time. 6 A.J. 413.

Defendant's motion for judgment of nonsuit presents the question whether plaintiffs' evidence is sufficient to make out a case of negligent breach of the duty imposed by the relationship in which the parties were placed at the time the automobile was delivered to Freeman for operation on the highway. Plaintiffs' witness, however, testified the automobile, a recent model, was driven out from its place of storage, stopped and delivered to him in the customary manner, with nothing to suggest in the manner of operation that the brakes were defective. The witness Freeman then drove the automobile 5½ miles through the streets and environs of Charlotte, and, according to his testimony, had not detected anything wrong with the brakes until just before the collision with plaintiffs' car. The witness' theory was that the fluid for the hydraulic braking system was "low" so that the driver had to "pump" to make the brake operate properly. But it is not perceived how the defendant should be charged with knowledge of this fact when the witness had driven the automobile 5½ miles, during a period of 45 minutes, before he detected the faulty functioning of the brakes.

We reach the conclusion that the evidence offered was insufficient to show a negligent breach of duty on the part of the defendant, and that the motion for judgment of nonsuit should have been allowed.

Reversed.

MEDICAL COLLEGE OF VIRGINIA, MEDICAL DIVISION, A CORPORATION, v. W. M. MAYNARD.

(Filed 19 November, 1952.)

1. Appeal and Error § 6c (2)—

An exception and assignment of error to the judgment presents the sole question whether the facts found by the judge support the judgment.

2. Insane Persons § 4½—

An adjudication of insanity is conclusive as to the parties to the proceeding and their privies, but as to others it is evidence of incompetency and raises a mere presumption to that effect which is not conclusive but may be rebutted.

3. Same: Insane Persons § 9c—Findings held sufficient to rebut presumption of incompetency arising from adjudication of insanity.

Upon motion of the guardian to set aside a default judgment on notes executed by the ward on the ground that her ward had been declared incompetent some twenty-two years prior to the execution of the notes and that the adjudication of incompetency was still subsisting at the time the default judgment was rendered, *held* findings by the court to the effect that the guardianship had been inactive for twenty-nine years and that the judgment debtor had managed his own affairs with the acquiescence of the guardian for a period of at least twenty-four and one-half years, sustains the conclusion that the judgment debtor was mentally competent at the time of signing the notes, and the denial of the motion to set aside is affirmed.

APPEAL by Mamie Maynard, guardian of W. M. Maynard, from *Carr, J.*, at June Civil Term, 1952, of WAKE.

Civil action heard on motion in the cause to set aside a judgment by default, upon the ground that on 17 October, 1923, the Clerk of Superior Court of Harnett County, N. C., entered an order declaring W. M. Maynard incompetent to manage his own affairs for want of understanding, pursuant to which letters of guardianship were issued to Mamie Maynard, and had not been revoked by court order.

The parties stipulate that this action was regularly instituted in the Superior Court of Wake County, N. C., on 3 June, 1948, by the issuance of a summons and duly verified complaint which states a cause of action upon two promissory notes totaling $2,098.20; that summons therein was served on defendant W. M. Maynard on 4 June, 1948; and that said defendant filed no answer or other pleading within the time prescribed by law, and judgment by default final was entered in favor of plaintiff and against defendant, W. M. Maynard, on 22 July, 1948, by Clerk of Superior Court of Wake County for the sum of $2,098.20, with interest from 3 June, 1945, and costs.

And the record on this appeal discloses that on 11 February, 1952, the Clerk of Superior Court of Wake County, N. C., entered an order adjudging that plaintiff is entitled to have a certain sum of money, therein specified, applied to the payment of the judgment in this action; that on same day "Mamie Maynard, Guardian of W. M. Maynard, Ward," filed a motion in the cause in this action to have the judgment herein set aside and declared void for that in a lunacy inquisition in the year 1923, in Superior Court of Harnett County, before the Clerk, upon her petition, W. M. Maynard was declared mentally incompetent, for want of understanding, to manage his affairs; that thereupon she was appointed his guardian; that W. M. Maynard has not been restored by court order, to status of mental competency to manage his affairs; and that she as such guardian was not made a party to this action, nor was she served with summons herein.

When the cause came on for hearing at June Term, 1952, of Superior Court of Wake County, upon the said motion in the cause, and being heard upon affidavits, official records, and testimony presented, the presiding judge made therefrom findings of fact, summarily stated in pertinent part, as follows:

1. That on 17 October, 1923, in a lunacy inquisition in Superior Court of Harnett County W. M. Maynard, then a resident of said county, was declared incompetent for want of understanding to manage his own affairs, and that the records of Harnett County fail to indicate that notice of said lunacy inquisition was served on him prior to the hearing, but do show that he was in fact present at the hearing.

2. That Mamie Maynard was then appointed guardian of W. M. Maynard, incompetent, and posted the required bond, and letters of guardianship were issued to her as such guardian on 22 November, 1923; but that she has not filed any inventory, annual account or final account with the Clerk of Superior Court of Harnett County in her capacity as guardian.

3. That W. M. Maynard has not been restored by court order to competency to manage his own affairs.

4. That W. M. Maynard and Mamie Maynard moved to Wake County in November or December, 1927, and have resided there continuously for 24½ years, during which time Mamie Maynard has dealt with him, and he has farmed and engaged in various business enterprises and business transactions with others, all without regard to said guardianship.

5. That though Mamie Maynard, guardian of W. M. Maynard, was not served with summons and copy of complaint, nor made a party to the present action, W. M. Maynard was in fact mentally competent to conduct his own affairs (a) on 3 June, 1945, when he signed the notes upon which the plaintiff instituted this action, (b) on 4 June, 1948, the date on

which service was made upon him in this action, and (c) on 22 July, 1948, when the default judgment was entered in this action.

Upon these findings of fact the court, being of opinion that the motion of Mamie Maynard, Guardian of W. M. Maynard, to set aside the judgment entered in this action on 22 July, 1948, is not well taken, and should be denied, entered judgment denying the motion.

And further the court affirmed the order of the Clerk of Superior Court of Wake County, entered 11 February, 1952, as above set forth.

To the order and judgment the movant, Mamie Maynard, Guardian of W. M. Maynard, excepted, and appeals to the Supreme Court and assigns error.

F. T. Dupree, Jr., and William Joslin for plaintiff, appellee.

Sam J. Morris and Harris, Poe & Cheshire for defendant, appellant.

WINBORNE, J. Exception to the judgment, and to the entry of it, assigned as error on this appeal, presents for decision the question: Do the facts found by the judge below support the judgment? *Culbreth v. Britt,* 231 N.C. 76, 56 S.E. 2d 15, and cases there cited. See also *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555, and *In re Hall,* 235 N.C. 697, 71 S.E. 2d 140, and cases cited.

This question raises a further and basic question as to whether or not a person who has been declared "incompetent for want of understanding to manage his own affairs," and for whom a guardian has been appointed pursuant to the provisions of G.S. 35-2, formerly C.S. 2285, is conclusively presumed to lack mental capacity to manage his own affairs.

In this connection, and pertinent thereto, this Court in *Sutton v. Sutton,* 222 N.C. 274, 22 S.E. 2d 553, had this to say: "Where a person has been adjudged incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age, disease, or like infirmities, and the court has appointed a guardian . . . the ward is conclusively presumed to lack mental capacity to manage his affairs in so far as parties and privies to the guardianship proceedings are concerned; and, while not conclusive as to others, it is presumptive proof of the mental incapacity of the ward, and this presumption continues unless rebutted in a proper proceeding," citing *Johnson v. Ins. Co.,* 217 N.C. 139, 7 S.E. 2d 475, and other cases. And the Court there held that, in any event, in the absence of proof to the contrary a person for whom a guardian has been appointed pursuant to the provisions of Consolidated Statutes of North Carolina, Vol. 3, Sec. 2285, as amended . . . by Public Laws 1929, Chap. 203, is presumed to lack mental capacity to make or revoke a will.

Johnson v. Ins. Co., supra, is a case in which the defendant was contending that the order in the lunacy proceeding in which plaintiff was pronounced sane and restored to the management of his affairs, is *res judicata* of his sanity and bars plaintiff from asserting a condition of insanity contrary to that finding. Speaking thereto, in opinion by *Seawell, J.,* it is said: "The mental capacity of the plaintiff was a fact, capable of proof as any other fact, regardless of the finding of the jury in the lunacy proceeding or the order of court following upon it. Certainly if a person is adjudged sane in a lunacy proceeding, he is no more conclusively so than he might be under natural conditions before the law became concerned with the inquiry, and an adjudication of such a court, when presented in a matter not connected with the immediate purpose and scope of the proceeding, when admissible at all, is no more than evidence," citing *Sprinkle v. Wellborn,* 140 N.C. 163, 52 S.E. 666.

And continuing in the *Johnson case* the Court declared: "Between those who are not parties or privies to the proceeding, an order in a lunacy proceeding under the statute adjudging a person of unsound mind, or an order in a subsequent proceeding adjudging a person to be of sound mind and restoring him to the management of his own affairs, is not *res judicata,* and is not necessarily conclusive of the mental condition of the person discharged. It may serve as evidence of the condition it purports to find, but such presumptions as arise from it are rebuttable," citing cases.

In the light of these principles the proceeding by which W. M. Maynard was declared in 1923 to be incompetent for want of understanding to manage his own affairs, and pursuant to which a guardian was appointed for him, in so far as the plaintiff in the present action is concerned—it not having been a party or privy to the proceeding, is no more than evidence of his incompetency to manage his own affairs at the time of the execution of the notes on which this action is based, at the time the action was instituted, and at the time the judgment by default final was taken against him.

And the guardian of 1923, having by her motion in the cause in this action raised the question of the competency of the defendant, W. M. Maynard, on dates material to the maintenance of plaintiff's cause of action against him, and the court having found as a fact that on those dates W. M. Maynard was mentally competent to conduct his own affairs, error in denying the motion is not made to appear. The finding of fact is not challenged for lack of evidence to support it. Indeed, it would seem that after twenty-nine years inactivity, the guardianship should be permitted to continue in peaceful slumber, and that it should not now be permitted to be awakened to thwart the collection of a judgment on a debt which is not otherwise challenged on this record.

Let it be noted here that appellee moves in this Court to have W. M. Maynard made a party appellant on this appeal upon the ground that, by order dated 18 August, 1952, and entered in the inquisition of lunacy proceeding of 1923 in Harnett County, he, the said W. M. Maynard, was adjudged to be of sound mind and memory. And W. M. Maynard, having orally through counsel manifested to this Court his desire and consent that he be made a party appellant on this appeal, the motion is allowed, and he is permitted to become such party appellant.

The judgment from which appeal is taken is

Affirmed.

ELLA MAE LEWIS v. DR. W. T. SHAVER.

(Filed 19 November, 1952.)

1. Physicians and Surgeons § 11½—

Evidence tending to show that a surgeon was authorized only to remove an ovarian cyst and that he removed the ovary and ligated the Fallopian tubes, rendering the patient sterile, is sufficient to make out a case of technical assault or trespass upon the person of the patient.

2. Trial § 21—

An order overruling demurrer does not preclude motion for judgment as in case of nonsuit upon the trial, since the demurrer tests the sufficiency of the pleadings, G.S. 1-127, while the motion to nonsuit tests the sufficiency of the evidence, G.S. 1-183, and the two are dissimilar in purpose and effect.

3. Limitation of Actions § 15—

Statutes of limitation cannot be taken advantage of by demurrer but only by answer. G.S. 1-15.

4. Same—

Plaintiff's right to prosecute his cause is not barred unless and until the appropriate statute of limitations is expressly pleaded, even though upon the pleading of the statute the burden is on plaintiff to show that his action was instituted within the time allowed by the statute.

5. Limitation of Actions § 5a—

Statutes of limitation begin to run against a tort from the time the tort is committed with the sole exception of torts grounded on fraud or mistake. G.S. 1-15, G.S. 1-52 (9).

6. Limitation of Actions § 5b—

Mere lack of knowledge of the facts constituting a cause of action in tort, in the absence of fraudulent concealment of the facts by the tort-feasor, does not postpone the running of the statute.

7. Same: Physicians and Surgeons § 11½—Plaintiff's evidence held to negate contention that facts constituting cause were fraudulently concealed.

In this action against a surgeon for a technical assault in performing an operation beyond the scope of the one authorized some seven years prior to the institution of the action, plaintiff alleged that she did not discover the facts until shortly before instituting suit, and also that defendant fraudulently concealed and withheld from plaintiff knowledge of the extent of the operation performed by him. Plaintiff's own evidence disclosed that she did not see or consult with the surgeon in respect to her condition or the operation after it had been performed. *Held:* There being no evidence of fraudulent concealment, plaintiff's cause is barred by the three-year, G.S. 1-52 (5), if not the one-year, G.S. 1-54 (3), statute of limitations.

APPEAL by plaintiff from *Clement, J.*, April Term, 1952, MONTGOMERY. Affirmed.

Civil action to recover damages resulting from an alleged unauthorized operation.

On 31 August 1944 defendant performed an operation on plaintiff, removing an ovary and tying her Fallopian tubes. The evidence tends to show that she went to the hospital for the removal of a cyst on one of her ovaries; that she was not informed that her ovary was to be removed or her Fallopian tubes tied; and she never consented to such an operation. After leaving the hospital, plaintiff consulted several other physicians about pains in her side and inquired as to why she could not have any more children. Finally, in 1951 she consulted Dr. Welton. She then went to the Montgomery Hospital where another operation was performed by him. He discovered that one of her ovaries had been removed and her tubes were blocked. Thereafter, on or about 29 October 1951, defendant told Dr. Welton he had tied plaintiff's Fallopian tubes when he operated on her in 1944. After plaintiff left the hospital in Albemarle she never consulted defendant or inquired of him as to the nature of his operation or why she could not have children although he lived within twenty-four miles of her residence.

Summons in this action was issued 29 August 1951 and defendant, in his answer, after denying the material allegations in the complaint, specifically pleads the one-year and the three-year statutes of limitations.

At the conclusion of plaintiff's evidence the court, on motion of defendant, dismissed the action as in case of nonsuit, and plaintiff appealed.

David H. Armstrong for plaintiff appellant.

J. Laurence Jones and John H. Small for defendant appellee.

BARNHILL, J. The evidence considered in the light most favorable to plaintiff is sufficient to make out a *prima facie* case of technical assault

or trespass upon the person of plaintiff. Therefore, the one question posed for decision is this: Is plaintiff's cause of action barred by the one-year, G.S. 1-54 (3), or the three-year, G.S. 1-52 (5) statute of limitations? We are constrained to answer in the affirmative.

The defendant demurred for that it appears upon the face of the complaint that plaintiff's alleged cause of action is barred by the one-year and the three-year statutes of limitations. The demurrer was overruled. Even so, the order overruling the demurrer was not binding on the trial court on the motion for judgment as in case of nonsuit.

A demurrer to a complaint, G.S. 1-127, and a demurrer to the evidence, G.S. 1-183, are different in purpose and result. One challenges the sufficiency of the pleadings, the other the sufficiency of the evidence. *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *Law v. Cleveland,* 213 N.C. 289, 195 S.E. 809; *Montgomery v. Blades,* 222 N.C. 463, 23 S.E. 2d 844; *Coleman v. Whisnant,* 226 N.C. 258, 37 S.E. 2d 693.

Furthermore, the demurrer on the grounds assigned was an improper and unwarranted pleading. The statutes of limitations can never be taken advantage of by demurrer. *Guthrie v. Bacon,* 107 N.C. 337; *Bacon v. Berry,* 85 N.C. 124; *King v. Powell,* 127 N.C. 10; *Oldham v. Rieger,* 145 N.C. 254; *Logan v. Griffith,* 205 N.C. 580, 172 S.E. 348. "The objection that the action was not commenced within the time limited can only be taken by answer." G.S. 1-15.

Although the plea of a statute of limitations in bar of plaintiff's right to recover places the burden on plaintiff to show that the action was instituted within the time allowed by the pleaded statute, *Allsbrook v. Walston,* 212 N.C. 225, 193 S.E. 151; *Muse v. Muse, ante,* 182, there is no time limitation on the right of such plaintiff to prosecute his cause until and unless the statute is expressly pleaded in the answer.

Plaintiff stressfully contends, however, that in any event she did not ascertain that the alleged tort upon which she relies had been committed until she consulted Dr. Welton in 1951, and that the statute began to run as of that date. But the statute itself fixes the date upon which the statutes began to run. "Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute." G.S. 1-15. And the only "special case" in respect to torts "where a different limitation is prescribed by statute" is contained in the three-year statute, G.S. 1-52. This "different limitation" relates only to actions grounded on allegations of fraud or mistake. G.S. 1-52 (9). Consequently it has no application here.

Furthermore, we have heretofore expressly held that lack of knowledge on the part of plaintiff does not suspend the statute. *Gordon v. Fredle,* 206 N.C. 734, 175 S.E. 126.

The plaintiff in her amended complaint alleges that defendant "wrongfully, knowingly, fraudulently and unlawfully concealed and withheld from the plaintiff the fact that he had ligated . . . both Fallopian tubes and thereby completely and permanently rendered the plaintiff sterile . . . which this plaintiff did not and could not . . . have discovered except as herein alleged." She now contends that the alleged fraudulent concealment suspended the statute which, under the circumstances, began to run on the day in 1951 she actually ascertained the facts.

On the questions whether (1) the lack of knowledge of a cause of action postpones the commencement of the period of limitation until the facts are discovered, 34 A.J. 186, or (2) the fraudulent concealment of the facts constitutes an implied exception to the statutes of limitations, postponing the commencement of the running of the statute until discovery or opportunity to discover the facts, the courts are divided in opinion. See cases cited in 34 A.J. 186, n. 17, and p. 188, n. 13.

As stated, our statute fixes the commencement date of our statutes of limitations, and this Court has already adopted the majority view that the mere lack of knowledge of the facts constituting a cause of action does not postpone the running of the statute. *Gordon v. Fredle, supra.*

Whether the fraudulent concealment of the facts by the tort-feasor constitutes an implied exception to the statute, notwithstanding its express language, we need not now decide for the reason plaintiff offered no evidence to support her allegation of fraudulent concealment. Indeed, she testified the only time she saw the defendant was in the operating room, that he did not visit her in the hospital either before or after the operation, and she did not thereafter consult him about her condition or the operation he performed.

Since the alleged tort was committed in 1944 and summons in this action was issued 25 August 1951, the plaintiff's cause of action is barred by the three-year, G.S. 1-52 (5), if not the one-year, G.S. 1-54 (3), statute of limitations. Therefore the judgment dismissing the action as in case of nonsuit is

Affirmed.

CAROLINA BUILDERS CORPORATION, A NORTH CAROLINA CORPORATION, v. NEW AMSTERDAM CASUALTY COMPANY, A MARYLAND CORPORATION.

(Filed 19 November, 1952.)

1. Principal and Surety § 8—

The fact that a contractor's performance bond, executed in favor of the owner by the contractor as principal and a corporation as surety, stipulates that all persons furnishing labor or material for the job should have a direct right of action on the bond, does not change the *status* of the surety or make it a principal debtor.

2. Same—

A contractor's performance bond must be construed with the building contract to which it refers and relates since the obligations of the surety are to be measured by the terms of the principal's agreement with the owner, and therefore complaint in an action by a material furnisher against the surety which fails to attach the contract between the builder and the contractor or allege the material terms thereof so that the liability of the contractor to the owner may be ascertained, is demurrable notwithstanding that the bond gives material furnishers right of direct action on the bond.

3. Pleadings § 23—

Upon sustaining demurrer to the complaint for its failure to state a cause of action, plaintiff may move to amend within the time allowed by G.S. 1-131. Upon its failure to do so, the cause will be dismissed.

APPEAL by defendant from *Carr, J.*, June Term, 1952, WAKE. Reversed.

Civil action on contractor's performance bond to recover for materials furnished, heard on demurrer.

Plaintiff alleges in its complaint that: (1) on 16 August 1950 defendant executed and issued its owner's protective bond in the sum of $70,000, "reciting that K. R. Benfield, Contractor, had executed a contract with W. A. Harris, Owner, for the construction of 14 houses on Hickory Road and Pecan Road for $5,000 each, said bond being conditioned upon the faithful performance of the contract by said Benfield and the payment of all persons who have furnished labor or material," and providing further that laborers and materialmen shall have a direct right of action on the bond; (2) Benfield began the erection of said buildings and in connection therewith purchased from plaintiff materials of the value of $22,822; (3) Benfield became financially involved and was unable to complete the contract, and defendant was notified of said default; (4) defendant failed to complete the contract as it was obligated to do, whereupon plaintiff and other creditors, after notice to defendant, completed the construction of said dwellings, and that the buildings, after completion, were sold for the highest available prices but it was necessary to apply all the proceeds of said sales to a prior mortgage so that nothing was left to be applied to the payment of the claims of plaintiff and other creditors; and (5) the full amount of $22,822 is still due plaintiff for materials furnished for the payment of which demand has been made of defendant, but defendant has failed and refused to pay the same as it is by its policy obligated to do.

A copy of the compliance bond is attached to the complaint and is by reference made a part thereof. However, the alleged contract between Benfield and Harris is by reference made a part of the bond. A copy of this contract, a material part of the bond, is not attached.

The bond was executed by Benfield as principal and defendant as surety for the protection of Harris, owner, as the indemnitee, and is conditioned substantially as alleged in the complaint. It is stipulated therein that: "All persons who have furnished labor or material for use in or about the improvement shall have a direct right of action under the bond, subject to the Owner's priority."

The defendant demurred in writing for that the complaint of the plaintiff does not state facts sufficient to constitute a cause of action against the defendant, specifying five separate alleged deficiencies therein. The demurrer was overruled and defendant appealed.

Harris, Poe & Cheshire for plaintiff appellee.
Bickett & Banks for defendant appellant.

BARNHILL, J. While the bond in question grants laborers and materialmen the right to maintain an action against defendant, this does not change the status of defendant as a surety and make it a principal debtor. To entitle a materialman to recover from the surety on a performance bond, he must allege and prove a debt due by the contractor for material furnished him for use in the performance of his contract with the owner.

The liability of the surety does not rest solely upon the terms of its bond. It grows out of and is dependent upon the terms of the contract executed by its principal. If there has been no default by the principal, there can be no enforceable debt against the surety.

The obligation of the bond is to be read in the light of the contract it is given to secure. The extent of the engagement entered into by the surety is to be measured by the terms of the principal's agreement. Of necessity, therefore, to determine the surety's liability to third persons on its bond given for their benefit and to secure the faithful performance of a building contract as it relates to them, the contract and the bond must be construed together. *Pearson v. Simon,* 207 N.C. 351, 177 S.E. 124; *Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800; *Mfg. Co. v. Blaylock,* 192 N.C. 407, 135 S.E. 136; *Dixon v. Horne,* 180 N.C. 585, 105 S.E. 270; *McCausland v. Construction Co.,* 172 N.C. 708, 90 S.E. 1010.

The plaintiff does not plead the contract between Benfield and Harris nor does it set forth in its complaint the material terms thereof. It is true the complaint contains the allegation that the defendant executed its bond "reciting" certain facts in respect to a supposed contract between Benfield and Harris. But this will not suffice. The complaint must make it appear that Benfield, by virtue of his contract with Harris, is now indebted to it and the terms of the contract must be pleaded, certainly to the extent necessary to enable the court to determine that, upon the facts alleged, such indebtedness does exist so as to render defendant liable for

the payment thereof. These allegations are essential to the cause of action plaintiff seeks to enforce.

Only a part of the bond itself on which plaintiff relies is by reference made a part of the complaint. The builder's contract is a material part thereof. This contract is not attached either as such or as a part of the performance bond.

Moreover, so far as the complaint discloses, the owner still has on hand a sufficient part of the contract price to satisfy the claim of plaintiff. There is no allegation that any part thereof has been paid by the owner to the contractor or expended by him in the completion of the building project. It is alleged that the creditors—not the owner—completed the erection of the buildings after Benfield's default, and that the proceeds derived from the sale of the property were consumed, not by the cost incurred in the completion of the contract but in the payment of a prior mortgage. What part of plaintiff's claim, if any, was incurred in the completion of Benfield's contract is not made to appear.

Furthermore, plaintiff's right to recover is subject to the owner's priority. What is that priority? Is it of such nature as to foreclose plaintiff's action? The court can answer only upon a consideration of both contracts. Hence it is essential that plaintiff plead both contracts as a part of its cause of action.

The rule of liberal construction does not require or permit us to read into the complaint allegations which are not there.

For the reasons stated we are of the opinion the complaint fails to state a cause of action. Therefore, the cause will be remanded to the end that plaintiff may move to amend as provided by G.S. 1-131. Upon its failure so to do within the time allowed by statute, the cause will be dismissed.

Reversed.

M. C. WHITLEY, TRADING AND DOING BUSINESS AS WHITLEY CONSTRUCTION COMPANY, v. JOHN S. (PET) CADDELL AND WIFE, FANNIE O. CADDELL.

(Filed 19 November, 1952.)

1. Appeal and Error § 10e—

Where oral evidence is offered, the trial court may not settle case on appeal by anticipatory order.

2. Appeal and Error §§ 6c (2), 31b—

Failure of proper statement of case on appeal limits the review to whether the judgment excepted to correctly applies the law to the facts found.

3. Judgments § 27 (a)—

Findings of fact to the effect that defendant's counsel did not appear until after adjournment of the term at which the cause was regularly calendared because he was engaged in the trial of causes in another county, but that he did not request a continuance, *held* to show absence of excusable neglect and to justify the refusal of motion to set aside the judgment, it being required that a party give to his case that degree of diligence ordinarily employed by men of reasonable prudence in looking after business matters of the same or similar importance.

APPEAL by defendants from *Sharp, Special Judge,* June Special Term, 1952, RANDOLPH.

Motion to set aside a judgment on grounds of excusable neglect.

It appears that the action was properly instituted in the Superior Court of Randolph County to recover upon a contract for services rendered in building a fish pond on a tract of land owned by the defendants as tenants by the entirety. Summons was issued, complaint and answer filed, and the case duly and properly calendared for trial and tried at the March 1952 Term of Randolph Superior Court.

The jury answered the issues in favor of the plaintiff and judgment was entered upon the verdict on 27 March, 1952. Thereafter, on 3 April, 1952, the defendants filed a motion to set aside the judgment on the grounds of excusable neglect. This motion was heard on 12 June, 1952, by her Honor, Judge Sharp, upon the judgment roll, affidavits and oral testimony. The court thereupon entered judgment finding and holding that the defendants had not shown any excusable neglect, and denied the motion. In this judgment, the facts found by the court are as follows:

"1. That this case was calendared for trial at the two weeks term of the Superior Court of Randolph County beginning on March 17, 1952, said case being specifically calendared for trial on the printed calendar as the second case on Monday, March 24.

"2. That neither defendants nor their attorney Mr. H. F. Seawell were present in court on March 24.

"3. That on Tuesday, March 25, at the request of Hon. J. H. Clement, Judge Presiding, the Clerk of the Superior Court of Randolph County, Mr. Carl King, telephoned Mr. H. F. Seawell and informed him that this case would be tried on the following day; that Mr. Seawell told the Clerk that he had cases in both Carthage and Sanford on the next day and could not be in Asheboro; that he made no mention of any illness on the part of either of the defendants.

"4. That no request was made of Judge Clement to continue the case on account of defendant's illness or for any other cause.

"5. That the defendant John S. Caddell was present in court upon the hearing of this motion at this term.

"6. That, according to the minutes of this Court, this case was called for trial and issues were submitted to the jury on Wednesday, March 26, 1952, and judgment signed as appears of record on Thursday, March 27, 1952.

"7. That neither the defendants nor their attorney were present in court on March 26, 1952, and neither the defendants nor their attorney took any notice of the term or of the defendants' pending litigation until Mr. Seawell arrived in Asheboro on Thursday, March 27, 1952, sometime after court had adjourned on that day for the term."

The defendants excepted and appealed from the judgment so entered, assigning as error the court's refusal to set aside the original judgment.

In this Court, the plaintiff moves to dismiss the appeal asserting that no statement of case on appeal was ever filed or served on appellee or his attorneys, that no case on appeal has been settled, and that no proper case has been docketed in this Court.

At the time the judgment appealed from was signed, the court attempted to settle the case on appeal by an anticipatory order.

Prevette & Coltrane for plaintiff, appellee.
Seawell & Seawell for defendants, appellants.

VALENTINE, J. The effort of the presiding judge to settle the case on appeal at the time judgment was signed is not a compliance with the statutes regulating appeal procedure and does not serve to properly present the case for review. When oral evidence is offered, the case on appeal cannot be settled by an anticipatory order. *Hall v. Hall,* 235 N.C. 711, and cases there cited.

The failure of appellant to bring up and docket a proper statement of the case limits our consideration to the question of whether there is error in the judgment. *Parker Co. v. Bank,* 200 N.C. 441, 157 S.E. 419; *Casualty Co. v. Green,* 200 N.C. 535, 157 S.E. 797; *Dixon v. Osborne,* 201 N.C. 489, 160 S.E. 579; *Winchester v. Brotherhood of R. R. Trainmen,* 203 N.C. 735, 167 S.E. 49. Hence, defendants' exception to the judgment restricts the scope of this inquiry to a consideration of the correctness of the law as applied to the facts found. *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Hall v. Hall, supra.*

There are no facts found by the court which would establish excusable neglect on the part of the defendants. *Vick v. Baker,* 122 N.C. 98, 29 S.E. 64; *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67. Therefore, the law was correctly applied to the facts found, and defendants' motion was properly denied.

The defendants should have exercised that degree of diligence ordinarily employed by men of reasonable prudence in looking after business

matters of the same or similar importance. *Sluder v. Rollins,* 76 N.C. 271; *Roberts v. Allman,* 106 N.C. 391, 11 S.E. 424; *Pierce v. Eller,* 167 N.C. 672, 83 S.E. 758; *Holland v. Benevolent Assn.,* 176 N.C. 86, 97 S.E. 150; *Cahoon v. Brinkley,* 176 N.C. 5, 96 S.E. 650; *Craver v. Spaugh,* 226 N.C. 450, 38 S.E. 2d 525; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266.

If the business of the defendants' attorney was so pressing as to prevent his attendance upon the trial of this case, he should have made the necessary preparation to have the case handled by some other attorney, or should have requested a continuance based upon such reasons as he could appropriately assign. This was not done, although due notice was given to the defendants' attorney, by order of the presiding judge, that the case would be tried on Wednesday of the week in which it had been duly and properly calendared for trial.

Upon a careful examination of the record before us, we must conclude that the ruling of the court below was correct and the judgment must be upheld.

Affirmed.

GAY ANDERSON v. TALMAN OFFICE SUPPLIES, INC., AND ROY S. DOCKERY.

(Filed 19 November, 1952.)

1. Trial § 31g—

The court's instruction to the effect that the jury should scrutinize the testimony of interested witnesses, but if after such scrutiny the jury were satisfied the witnesses were telling the truth, to give the testimony of the witnesses the same weight as that of any other witness, *is held* without error.

2. Appeal and Error § 39b—

Appellant may not complain of the charge in respect to an issue answered in his favor.

3. Negligence § 20—

The charge of the court in this case defining contributory negligence and placing the burden of proof on the issue upon defendant *held* without error.

APPEAL by plaintiff from *Bobbitt, J.,* February Mixed Term, 1952, BUNCOMBE.

Civil action to recover damages resulting from a collision between a truck and a motorcycle.

On 19 April, 1950, the plaintiff, a motorcycle police officer of the city of Asheville, was assisting in directing a convoy of army vehicles through

that city. Two of the vehicles strayed from the convoy and plaintiff went in pursuit for the purpose of steering them back on the proper course. Plaintiff turned east on College Street near the Langren Hotel, some four or five blocks west of the intersection of Valley and College Streets, and as he did so, he began and continued to sound the siren with which his motorcycle was equipped. College Street along the course traveled by the plaintiff is approximately 60 feet wide. Plaintiff's evidence tended to show that at the time of the collision the southern half of College Street, used by eastbound traffic, was divided into three lanes,—the outer lane for vehicles intending to turn right on Valley Street, the center lane for through traffic, and the lane nearest the center line for traffic intending to turn left,—and that these lanes were plainly marked with arrows indicating the direction to be followed by vehicular traffic. Plaintiff's evidence tended further to show that defendant's truck was in the left-turn lane headed east.

On the contrary, defendants' evidence was to the effect that at the time and point of the collision College Street was marked only by a center line and that there were no arrows or other markings of any kind regulating or indicating the course to be followed by traffic. Defendants' evidence tended to show further that its truck was headed east on College Street in a position near the center of the southern portion of said street, so that there was a space of approximately 10 feet on the right and on the left of said truck, and that the plaintiff was negligent in attempting to pass the truck on its right.

Plaintiff, as he approached the intersection in question, was traveling east on the southern portion of College Street. The truck had stopped in observance of a traffic light. As the plaintiff, still sounding his siren, drew near the truck, the driver turned the truck to the right with the result that the motorcycle and the truck collided near the south curb of College Street. In the collision the plaintiff suffered personal injuries. There was evidence that the driver of the truck heard the siren, but did not see the vehicle. There was also evidence that the driver of the truck turned toward the south curb in obedience to the sound of the siren, which he understood to be the signal of a police or fire department vehicle. The speed of the motorcycle was estimated at 20 to 30 miles per hour.

Plaintiff's evidence tended to prove actionable negligence on the part of the defendants, while the defendants' evidence tended to establish contributory negligence on the part of the plaintiff.

It is admitted that the defendant, Dockery, driver of the truck, was an employee of his codefendant, and that he was at the time of the collision acting within the scope of his employment and was about his master's business; so that, any negligence of Dockery with respect to the collision is attributable to his codefendant.

Upon sharply conflicting evidence on all crucial phases of the case, issues of (1) negligence, (2) contributory negligence, and (3) damages were submitted to the jury. The jury answered the first and second issues Yes. From a judgment upon the verdict, plaintiff excepted and appealed, assigning errors in the charge.

James S. Howell, Oscar Stanton, and Don C. Young for plaintiff, appellant.

Smathers & Meekins and J. Y. Jordan, Jr., for defendants, appellees.

VALENTINE, J. All of appellant's exceptive assignments of error are directed toward the charge of the court. Upon a careful examination of each of these exceptions, we find in them no substantial merit.

For example, appellant's first exception challenges the court's instruction with respect to the weight the jury should give to the testimony of interested witnesses. The appellant contends that the court in this respect set an incorrect standard. The language complained of is as follows: "Now, Gay Anderson, the plaintiff, has testified as a witness in this case. Roy S. Dockery, one of the defendants, has testified as a witness in this case. Each of these two witnesses is what we call an interested witness, that is, interested in your verdict. The court instructs you with reference to each such interested witness that you should scan and scrutinize his testimony carefully in the light of his interest in your verdict, but the law says further that after you have so scanned and scrutinized his testimony closely you come to the conclusion that he is telling the truth, then you will give to the testimony of an interested witness the same weight that you would give to the testimony of a disinterested, credible witness." This portion of the charge conforms to the applicable rule. *McClamroch v. Ice Co.*, 217 N.C. 106, 6 S.E. 2d 850.

Again, appellant directs six other exceptions to portions of the charge which relate to the first issue. Plaintiff is in no position to complain of error, if any there was, in the charge on the first issue, since that issue was answered in his favor. *Scenic Stages v. Lowther*, 233 N.C. 555, 64 S.E. 2d 846, and cases there cited; *Williams v. Raines*, 234 N.C. 452, 67 S.E. 2d 343.

Plaintiff also contends that the trial court erred in its instructions with respect to negligence and contributory negligence. Upon these questions the charge was full and complete. The court correctly defined negligence and contributory negligence and repeatedly told the jury that the burden of proving contributory negligence rested upon the defendant and that this burden not only included the duty of establishing by the greater weight of the evidence the contributory negligence of the plaintiff, but

also included the duty of proving that such contributory negligence was one of the proximate causes of the injury sustained.

The statutes applicable to the facts here presented were fully discussed in the opinion of *Barnhill, J.*, when this case was here on a former appeal. *Anderson v. Office Supplies,* 234 N.C. 142, 66 S.E. 2d 677. The trial court appears to have accepted and followed that opinion as the chart and compass for the second trial.

Upon a careful examination of the entire charge, considered contextually and compositely, we find no error warranting a new trial.

No error.

ELWOOD SECHLER, ADMINISTRATOR OF THE ESTATE OF W. R. SECHLER, v. NEVIN P. FREEZE, ALIAS JAKE FREEZE.

(Filed 19 November, 1952.)

1. Trial § 22b—

Defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and implement it, may be considered on motion to nonsuit.

2. Automobiles §§ 16, 18h (2)—

Evidence tending to show intestate parked his car on the extreme right of the hard surface highway on a dark and misty night, alighted and walked around in front of the car, and that as defendant turned to his left to pass the parked vehicle, intestate suddenly ran in front of his car and was struck about the head and shoulders by the right front of defendant's car *is held* insufficient to be submitted to the jury on the issue of negligence.

APPEAL by plaintiff from *Clement, J.*, May Term, 1952, of ROWAN.

Civil action by plaintiff to recover damages for the alleged wrongful death of his intestate, who was hit by an automobile driven by the defendant.

The families of the defendant Freeze and the intestate Sechler were neighbors, with homes a few hundred yards apart on the Saw-Mill Bridge road near Landis in Rowan County. During the early morning of 18 February, 1951, before daylight, the defendant's father suddenly became ill. The defendant arose and drove to Landis to call a doctor. In the interim, the defendant's sister phoned intestate's wife for help, whereupon intestate set out immediately for the Freeze home. Meanwhile, the defendant was returning from Landis. At a point about 200 yards from the home of defendant's father, the intestate stopped his car on the paved portion of the highway, got out, and moved to a position on the road somewhere near the front of his car. The defendant, approaching from

the rear, turned left, passed alongside the parked car, and collided with the intestate. The defendant's car traveled a short distance across the pavement to the left and went into the side ditch at an angle almost perpendicular to the road.

The intestate, critically injured, died four days later. The defendant was the only surviving eyewitness. It does not appear why the intestate came to park his car and get out on the highway in front of the defendant's approaching car.

The plaintiff's evidence may be summarized as follows: The injury occurred between 4:00 and 5:00 o'clock in the early morning. It was cold, dark, foggy, and misty. No rain—"only a heavy fog and mist." The paved portion of the highway was 18 feet wide, and the shoulders on each side were approximately 8 feet wide. The highway was straight and level. Dr. Black, first to arrive, said he could see the tail light on intestate's car for a distance of 300 feet.

The intestate's car was parked on the pavement on its right side. The right front door was open. The left front door was unlatched but not open. Dr. Black said: "I don't remember whether the car was all on the shoulder or part on the shoulder and part on the hard surface." Patrolman Simmons said: "The car was all on the pavement to the best of my knowledge, all four wheels."

Elwood Sechler, son of intestate, who said he reached the scene about 5:00 o'clock, testified: ". . . My daddy's car, a 1939 Ford, (was) parked on the extreme right of the highway. . . . It was in the right lane, extreme right. I saw another car (the defendant's). It was in the left hand ditch around 40 or 50 feet in front of my daddy's parked car. . . . I noticed approximately 50 feet behind my daddy's car heavy skid marks. I stepped 32 full steps from the beginning of the skid marks to where the Pontiac (defendant's car) stopped. . . . The skid marks . . . straddled the center line as they went by my father's car and then in a few feet in front of Daddy's car they started turning to the left. The front end turned to the left and the skid marks went right on into the bank directly under those tires. I saw blood on the highway approximately 10 feet directly in front of my daddy's car and about 4 feet from the right-hand edge of the pavement." Cross-examination: ". . . The marks were gradually leading to the left. They started about a foot from the edge of the right-hand pavement directly behind Daddy's car approximately 50 feet."

Patrolman Anthony said: ". . . Several days later I had a conversation with Jake Freeze. He told me he started home and he run up on this car parked in the road and there was a man standing beside of the car and he threw up his hands in the air like that and ran across the road in front of his car. . . . He told me he couldn't have missed the man."

One of the witnesses who said he examined the defendant's car stated: ". . . there was a dent on the extreme outside rim. There were a few splotches of blood underneath the right headlight on the (defendant's) Pontiac car."

Dr. Creighton Wrenn, who attended intestate at the hospital, said: ". . . He had a fractured skull, . . . an extensive head and face injury, a crushing blow, . . . in the lower portion of his facial in a downward manner, . . . He . . . had a fractured left arm and other bruises about his shoulder and elbow, . . ." Cross-examination: ". . . I found no grave injury to his legs and I don't think any to his hips."

The defendant's version of the occurrence, given as a witness in his own behalf, is in substance. ". . . about 200 yards from home I seen this car around 50 or 60 feet ahead of me and I pulled over like one would to go around the car. . . . and just as I got at the rear of the Sechler car I saw a man come out with both hands up like that in front of my car. I cut the wheels in the ditch as hard as I could. The man came from in front of his car. I got a quick turn into the ditch on the left as quick as I could whenever I saw him. . . . As I approached the back end of this Sechler car I was going around 25 miles per hour. As I saw the car, I put on brakes and started slowing down. At the time I saw him step in front of my car I was going around 15 miles per hour."

The defendant's motion for judgment of nonsuit, made at the close of the plaintiff's evidence and renewed at the conclusion of all the evidence, was allowed, and from judgment based on such ruling the plaintiff appealed.

Woodson & Woodson and Hudson & Hudson for plaintiff, appellant.
Robinson & Jones for defendant, appellee.

JOHNSON, J. The single question presented by this appeal is whether the court erred in allowing defendant's motion for judgment as of nonsuit.

The plaintiff's evidence is not at variance with the defendant's version of how the injury occurred. Indeed, the testimony of Dr. Wrenn, showing grave injuries to the head and arm but no serious injury to legs or hips, indicates that intestate was not struck by the bumper of the car, but rather tends to show that he must have lunged forward, as the defendant said, with his arm and head coming in contact with the front part of the car above the bumper where the signs were found.

The evidence adduced below, when viewed in its light most favorable to the plaintiff, fails to make out a *prima facie* case of actionable negligence against the defendant. The case is controlled by the principles explained and applied in *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246. See also *Aydlett v.*

Keim, 232 N.C. 367, 61 S.E. 2d 109; *Buccilli v. Shanahan,* 266 Pa. 342, 109 A. 634. Negligence is not to be presumed from the mere fact of injury or that the intestate was killed. *Tysinger v. Dairy Products, supra.* The decisions relied on by plaintiff are distinguishable.

In this view of the case, we do not reach for decision the question of contributory negligence of the intestate.

The judgment below is

Affirmed.

CARRIE ROGERS v. CAROLINA GARAGE, INC. (ORIGINAL DEFENDANT), AND BOYCE C. CAMPBELL, INDIVIDUALLY, AND W. K. WHITESELL, INDIVIDUALLY, AND W. K. WHITESELL, AS ADMINISTRATOR OF THE ESTATE OF WILLA C. WHITESELL, DECEASED, AND BLYTHE BROTHERS COMPANY, INCORPORATED (ADDITIONAL DEFENDANTS).

(Filed 19 November, 1952.)

1. Automobiles § 8d—

The parking of an automobile near the highway, even though its location be such as to obscure the vision of motorists along the highway of automobiles entering the highway from an adjacent parking lot, cannot be held for negligence.

2. Highways § 4b—

A contractor engaged in improving a highway is not under duty to warn motorists along the highway of the entrance into the highway of cars of its employees leaving at the end of the day's work.

3. Automobiles § 24c—

An employer cannot be under duty to foresee negligence of its employee in backing his own automobile onto the highway after the end of the working day.

APPEAL by defendant Carolina Garage, Inc., from *Hatch, Special Judge,* September Extra Civil Term, 1952, of MECKLENBURG. Affirmed.

The demurrer of additional defendant Blythe Bros. Co. to the cross-complaint of defendant Carolina Garage, Inc., for contribution as joint tort-feasor was sustained, and defendant Carolina Garage, Inc., appealed.

The plaintiff Rogers instituted action against Carolina Garage, Inc. (hereinafter referred to as the defendant) to recover damages for a personal injury alleged to have resulted from a collision on 29 August, 1951, between the automobile in which the plaintiff was a passenger and defendant's truck which it was alleged was being negligently operated by defendant's agent and employee on Highway #29. Subsequently Blythe Bros. Co. was made additional party defendant, and the original defend-

ant filed a cross-complaint for contribution, alleging in substance that Blythe Bros. Co. at the time and place referred to was engaged in constructing another portion of Highway #29 east of and parallel with the paved surface of the highway and in the construction of a bridge over a stream spanned by the highway; that employees of Blythe Bros. Co. and others customarily parked their individual automobiles east of the highway; that Blythe Bros. Co. knew these persons would at the close of the day drive their automobiles from the parking site into the highway; that on the occasion alleged Blythe Bros. Co. had parked one of its trucks near Highway 29, off the pavement, on the east side, and permitted it to remain there in such a position as to block the view of travelers on the highway as to vehicles about to enter the highway from a parking site near said parked truck. It was further alleged that about 6 p.m. on this date as the original defendant's truck, proceeding north on Highway #29, approached the parked truck of Blythe Bros. Co., an employee of Blythe Bros. Co., Willie Douglas, started to back his automobile from the site in which it had been parked toward the highway and at such a place that the view of the driver of defendant's truck approaching from the south was obscured by the parked truck as to the backing automobile until it was almost onto the paved portion of the highway; that if as alleged by the plaintiff the defendant's driver in this emergency drove over the center line of the highway and collided with plaintiff's automobile, it resulted from the negligence of Blythe Bros. Co. in parking its truck near the highway and obscuring the view. It was alleged that Blythe Bros. Co. was negligent in permitting its truck to remain parked near the paved portion of the highway knowing that the view of vehicles moving to the highway would be thereby blocked; that in this respect it increased the hazard of motorists by permitting employees leaving their employment to back their automobiles and enter the highway so close to the parked truck that their movements were obscured from travelers on the highway; and that defendant failed to warn travelers of the movement of automobiles when view of such movement was obscured by the parked truck.

The defendant prayed that if it be found negligent in causing the injuries of which the plaintiff complains, it have judgment over against Blythe Bros. Co. for contribution.

From judgment sustaining the demurrer of Blythe Bros. Co. defendant Carolina Garage, Inc., appealed.

Robinson & Jones and Hastings & Booe for Carolina Garage, Inc., defendant, appellant.

C. H. Gover and Helms & Mulliss for Blythe Bros. Co., defendant, appellee.

DEVIN, C. J. We think the allegations contained in the cross-complaint of defendant Carolina Garage, Inc., are insufficient to sustain its action for contribution from Blythe Bros. Co. as joint tort-feasor.

It may not be held to constitute actionable negligence that Blythe Bros. Co. parked a motor truck near but not on the highway, even though it was near where other automobiles were likely to enter the highway from a parking site beyond. To hold that parking a truck under these circumstances was sufficient to sustain the imputation of negligence, even though the view of a driver on the highway might be obscured as to the movement of automobiles beyond the highway, would be to impose an obligation on motorists which neither the statutes nor the dictates of reasonable care and precaution would seem to require. *Walker v. Ill. Com. Tel. Co.,* 315 Ill. App. 553; *Bohm v. Racette,* 118 Kan. 670; *Craig v. Western & Sou. Indemnity Co.,* 119 F. 2d 591.

The circumstances here were not such as to impose a duty on Blythe Bros. Co. to warn approaching drivers on the highway. *Pender v. Trucking Co.,* 206 N.C. 266, 173 S.E. 336; *Council v. Dickerson's, Inc.,* 233 N.C. 472 (476), 64 S.E. 2d 551.

It is not contended, nor would such a position be warranted, that Blythe Bros. Co. was responsible for any negligence on the part of an employee in backing his own automobile after hours from a parking site toward the highway. Nor is it alleged that the automobile of this employee entered into the highway or came in contact with the truck of defendant Carolina Garage, Inc., or the automobile of the plaintiff.

The defendant Blythe Bros. Co. may not be held liable for a negligent breach of duty in failing to foresee that Willie Douglas, the employee referred to, or any other person, would negligently back an automobile toward the highway in such a manner as to cause the driver of an approaching vehicle to turn to the left to avoid an apprehended collision. *Peoples v. Fulk,* 220 N.C. 635, 18 S.E. 2d 147; *Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688.

The ruling of the trial judge in sustaining the demurrer of defendant Blythe Bros. Co. is

Affirmed.

J. WINFIELD CREW, JR., v. S. ELLIS CREW.

(Filed 19 November, 1952.)

1. Pleadings § 28—

In determining a motion for judgment on the pleadings, the court's decision must be based upon facts alleged on the one hand and admitted on the other, and it is error for the court to hear evidence and find facts in support of its judgment upon the motion, since if the pleadings raise any issues of fact they must be tried by a jury in the absence of waiver of jury trial and agreement that the court should find the facts. G.S. 1-172.

2. Trusts § 5c—

Defendant, an attorney in fact for the handling of all business transactions of plaintiff, acquired property of plaintiff at foreclosure sale of a mortgage thereon executed by plaintiff, and thereafter plaintiff executed a quitclaim deed to him. *Held:* Whether a fiduciary relationship existed between the parties in respect to these transactions, which would raise a presumption of fraud, is an issue for the determination of the jury when the predicative facts are controverted by defendant, and the granting of the defendant's motion for judgment on the pleadings was error.

3. Pleadings § 31—

Where the financial condition of a party is material to the inquiry the adverse party may allege such fact, but allegations of particular judgments and claims and indebtednesses should be stricken on motion as being evidentiary or relating to matters immaterial to the issue.

APPEAL by plaintiff from *Stevens, J.*, June Term, 1952, of HALIFAX.

The allegations of the plaintiff's complaint may be summarily stated as follows:

1. The plaintiff volunteered for service in the armed forces of the United States 8 December, 1941. He was accepted and entered the service on 26 December, 1941, and remained therein until 26 April, 1946.

2. In December, 1941, the plaintiff was the owner and in possession of several tracts or parcels of land in Halifax County, North Carolina, subject to certain encumbrances; that one of said parcels which is the subject of this controversy, is situate in Roanoke Rapids and known as the McCrory Stores property.

3. That, in order that the several properties herein referred to could be properly preserved, the plaintiff turned to his two brothers, S. Ellis Crew and W. Lunsford Crew, and arranged with them to take possession of said properties and hold them for the use and benefit of the plaintiff. That in consequence of this arrangement the several instruments hereinafter referred to were duly executed and delivered.

4. That prior to 19 December, 1941, it was agreed by and between the plaintiff and McCrory Stores Corporation that said corporation would bid in the property at a price of $70,000, which property was then being

advertised for sale by Charles R. Daniel, Trustee, under a deed of trust previously executed by the plaintiff as security for certain indebtedness to Phoenix Mutual Life Insurance Company, which indebtedness, in the sum of approximately $64,000, was past due. It was also agreed that the McCrory Stores Corporation would assign its bid to anyone designated by the plaintiff. The property was bid in on 19 December, 1941, for the amount authorized, and the plaintiff directed the McCrory Stores Corporation to assign its bid to S. Ellis Crew and W. Lunsford Crew. This assignment was made to S. Ellis Crew only on 1 January, 1942, and the bid was confirmed on 2 January, 1942.

5. On 20 December, 1941, the plaintiff executed, acknowledged and immediately delivered to his brothers, S. Ellis Crew and W. Lunsford Crew, a general power of attorney, the pertinent parts of which read as follows:

"To sell for cash or credit, or otherwise dispose of, mortgage or lease any real property that I have anywhere, or any personal property, and to otherwise manage as if it were their own all of my business affairs during my stay in the United States Army. They shall have full power to do anything whatsoever in the management of my affairs that I could do if I were present, and I do hereby ratify and confirm all things so done by said attorneys in fact as fully and to the same extent as if by me personally done and performed.

"And I do further provide and declare that all the powers and authority herein given to my said attorneys in fact may be exercised and all things herein set out to be done by them may be done by either one of them acting alone and without the consent or joinder of the other. They shall have authority to collect rents, bring civil actions, defend pending civil actions or civil actions hereafter brought against me, to borrow money from banks or individuals and to execute notes and mortgages as security for the same."

6. Notwithstanding the agreement with S. Ellis Crew and W. Lunsford Crew, who were to hold the property in trust for the plaintiff, and the trustee was so informed, the property was conveyed by the trustee to S. Ellis Crew only by a deed dated 5 January, 1942, which was delivered on 18 February, 1942. (Prior to the execution of a deed of trust on the property by S. Ellis Crew to secure a loan of $55,000, which sum was to be used as a part of the purchase price, and before the delivery of the deed from the trustee to S. Ellis Crew, J. Winfield Crew executed a quitclaim deed to the property in controversy, releasing, conveying, and quitclaiming all his right, title, and interest therein to S. Ellis Crew.)

7. The defendant in his answer denied every material allegation in the complaint and pleaded the quitclaim deed referred to in the above paragraph, as an estoppel by deed in bar of plaintiff's right to recover the

property in controversy, and as a further answer and defense, set out in sixty-six paragraphs allegations bearing principally upon the financial condition of the plaintiff in 1941 and prior thereto.

When the cause came on for hearing, the defendant moved for judgment on the pleadings, and the plaintiff moved to strike all those sections from the further answer which allege in detail that certain judgments had been obtained against the plaintiff, and that other claims were in the hands of attorneys for collection, etc., on the ground that they were prejudicial, irrelevant, and immaterial to the matters at issue. After the jury was selected and impaneled, the court heard both motions. The motion to strike was allowed in part and denied in part. The plaintiff excepted.

With respect to the motion for judgment on the pleadings, his Honor made twenty-three separate findings of fact, and concluded, as a matter of law, that the defendant was entitled to judgment on the pleadings. Judgment was entered accordingly, and the plaintiff appeals and assigns error.

E. R. Tyler, Wade H. Dickens, and Eric Norfleet for plaintiff, appellant.

Johnson & Branch, Allsbrook & Benton, and Gay & Midyette for defendant, appellee.

DENNY, J. This Court recently held in the case of *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384, that, "On a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else . . . He should not hear extrinsic evidence, or make findings of fact. . . . If he concludes on his consideration of the pleadings that a material issue of fact has been joined between the parties, he should deny the motion in its entirety, and have the issue of fact tried and determined in the way appointed by law before undertaking to adjudicate the rights of the parties." And this decision was approved and followed in *Remsen v. Edwards, ante,* 427, where it was again pointed out that, "Issues of fact must be tried by a jury, unless trial by jury is waived. G.S. 1-172." There, as here, a jury trial was not waived, nor did the parties consent for the trial judge to find the facts.

Certain facts must be found by a jury before it can be determined whether a fiduciary relationship existed between the plaintiff and the defendant at the time the various transactions were consummated, which would, as a matter of law, raise a presumption of fraud as was the case in *Sorrell v. Sorrell,* 198 N.C. 460, 152 S.E. 157, and *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615. On the other hand, if it should be found that no fiduciary relationship existed between the parties at the time of

the execution and delivery of the conveyances involved, *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028, and similar cases, would seem applicable.

The judgment entered below is set aside, and the case is remanded for a new trial to the end that the material issues of fact raised by the pleadings may be submitted to a jury for decision. *Erickson v. Starling, supra.*

The court also erred in not allowing the plaintiff's motion to strike *in toto.* The defendant has the right to allege and prove that in 1941 the plaintiff was in difficult financial circumstances, but the matters and things which the plaintiff moved to strike are only evidentiary or immaterial to the matters at issue.

Error.

RUTH J. NEIGHBORS v. HOWARD S. NEIGHBORS.

(Filed 19 November, 1952.)

1. Courts § 5—

No appeal lies from one Superior Court Judge to another, and ordinarily one Superior Court Judge may not modify, overrule, or change the judgment of another Superior Court Judge previously made in the same action.

2. Same: Divorce and Alimony § 20½—

While provisions of a decree awarding custody of the minor children of the marriage is subject to modification upon a change of circumstances affecting the welfare of the children, where there had been no such change, another Superior Court Judge may not modify the provisions of the decree theretofore entered in the cause.

APPEAL by defendant from *Sharp, Special Judge,* August 1952 Special Term, JOHNSTON.

Civil action for divorce from bed and board and for support, maintenance and custody of children.

The action was commenced by the issuance of summons on 27 October, 1950. Plaintiff filed a complaint alleging as her cause of action that the defendant had violated the provisions of G.S. 50-7, and asking for custody of the children of the marriage. The defendant answered denying generally the basic allegations upon which plaintiff's cause of action was laid and requested that he be awarded the custody of the children. Four children were born of the marriage, one of which was over 18 years of age at the time the suit was instituted and another has reached the age of 18 years since that time, so that the custody of only two children is involved in this appeal.

The cause first came on for hearing before Judge W. H. S. Burgwyn, who made an order on 16 January, 1951, requiring the defendant to

make certain payments for the support and maintenance of the three children who were then under 18 years of age and dividing the custody of said children between the litigants.

The matter came on again for hearing at the June Term, 1952, before Judge W. C. Harris, who, upon a proper showing that since the order of Judge Burgwyn the plaintiff had established a residence in the State of Florida, thereby creating a substantial change in the conditions affecting the welfare of said children, signed an order in which it was ordered and adjudged "that the said children shall remain within the State of North Carolina in the custody of the defendant until such time as the plaintiff returns to North Carolina and makes her home within the State of North Carolina, and the plaintiff is hereby ordered and directed not to remove or take said children outside the boundaries of the State of North Carolina so long as she continues to reside and make her home in Florida or at any other place outside North Carolina." To this order, there was no exception made and from it, no appeal taken.

Thereafter, on 29 August, 1952, the plaintiff filed a motion requesting "that the Order made in this cause at the June 1952 Term of this Court be modified to the extent that plaintiff may be permitted to have custody of her children at her home in the State of Florida upon such terms and conditions as the Court may direct." It is admitted in plaintiff's brief that in said motion "there was no allegation that there were any changes in the conditions affecting the welfare of the children which had occurred since Judge Harris' order was entered in June."

Plaintiff's motion was heard at the August 1952 Special Term by Judge Susie Sharp, who made and entered an order, the pertinent part of which is as follows: "It is therefore ordered, adjudged and decreed that the plaintiff, Mrs. Ruth J. Neighbors, be, and she is hereby given custody of the said minor children, Jenny Lynn Neighbors and Howard S. Neighbors, Jr., and is permitted to remove them to the State of Florida; . . ." This order provided that the plaintiff execute a bond in the sum of $3,000 conditioned that "she shall be and remain amenable to the further orders of the Court in this matter and that she shall produce the said children in Court in North Carolina upon the order of the Court."

From the order of Judge Sharp the defendant excepted and appealed, assigning error.

J. R. Barefoot for plaintiff, appellee.
Wellons, Martin & Wellons for defendant, appellant.

VALENTINE, J. It is well established in this jurisdiction that no appeal lies from one Superior Court judge to another. *Phillips v. Ray,* 190 N.C. 152, 129 S.E. 177; *Wellons v. Lassiter,* 200 N.C. 474, 157 S.E.

434; *Revis v. Ramsey,* 202 N.C. 815, 164 S.E. 358; *S. v. Lea,* 203 N.C. 316, 166 S.E. 292; *S. v. Oil Co.,* 205 N.C. 123, 170 S.E. 134; *Fertilizer Co. v. Hardee,* 211 N.C. 56, 188 S.E. 623; *Dail v. Hawkins,* 211 N.C. 283, 189 S.E. 774. Nor, does one Superior Court judge have the power to overrule or reverse the judgment of another Superior Court judge previously made in the same action, except in certain well-defined cases. *Roulhac v. Brown,* 87 N.C. 1; *Henry v. Hilliard,* 120 N.C. 479, 27 S.E. 130; *Price v. Insurance Co.,* 201 N.C. 376, 160 S.E. 367; *Newton v. Mfg. Co.,* 206 N.C. 533, 174 S.E. 449; *Davis v. Land Bank,* 217 N.C. 145, 7 S.E. 2d 373; *In re Adams,* 218 N.C. 379, 11 S.E. 2d 163; *Bank v. Daniel,* 218 N.C. 710, 12 S.E. 2d 224.

One of the exceptions to this rule is a decree awarding the custody of minor children. Such a decree determines only the present rights with respect to such custody and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the children. *In re Means,* 176 N.C. 307, 97 S.E. 39; *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884.

Plaintiff's brief admits that there is no allegation of a change of circumstances adversely affecting the welfare of the children involved in this litigation since the order of Judge Harris. It appears that the facts justify and the record supports that admission. It is true the defendant has suffered a heart attack, but this occurred on 11 February, 1952, which was prior to the order of Judge Harris. The defendant's physical condition was evident at the time that order was entered and the only change since that time has been an improvement.

There appear no grounds sufficient to justify the order appealed from and for that reason the same must be

Reversed.

WILLIAM A. TILLIS, SR., v. CALVINE COTTON MILLS, INC., A CORPORATION, AND LEON SALKIND.

(Filed 19 November, 1952.)

Appeal and Error § 37: Pleadings § 27—

Motion for bill of particulars is addressed to the sound discretion of the trial judge, and his ruling thereon is not reviewable in the absence of abuse. G.S. 1-150.

APPEAL by defendants from *Moore, J.,* April Term, 1952, of MECKLENBURG. Appeal dismissed.

This was a suit to recover damages for breach of contract. After the case had been once partially tried and the plaintiff had been examined adversely under order, the defendants moved for a bill of particulars. The motion was denied in the court's discretion.

From the order denying motion for a bill of particulars the defendants appealed.

G. T. Carswell and B. Irvin Boyle for plaintiff, appellee.

Clayton & Sanders for defendants, appellants.

PER CURIAM. It is the uniform holding of this Court that an application for a bill of particulars under G.S. 1-150 is addressed to the sound discretion of the trial judge, and that his ruling thereon is not reviewable on appeal, except in case of manifest abuse of discretion. *Building Co. v. Jones,* 227 N.C. 282, 41 S.E. 2d 742; *Cody v. Hovey,* 219 N.C. 369, 14 S.E. 2d 30; *Tickle v. Hobgood,* 212 N.C. 762, 194 S.E. 461; *Temple v. Tel. Co.,* 205 N.C. 441, 171 S.E. 630; *Townsend v. Williams,* 117 N.C. 330, 23 S.E. 461; McIntosh 361.

On this record no evidence of abuse of discretion is made to appear.

Appeal dismissed.

JENRETTE TRANSPORT COMPANY v. ATLANTIC FIRE INSURANCE COMPANY.

(Filed 26 November, 1952.)

1. Insurance § 43b—

A policy indemnifying insured carrier against loss of cargo specifically excluded loss caused directly or indirectly by the load or any portion thereof colliding with any object unless the vehicle also collided with such object. The cargo was damaged in a collision with some part of an underpass. *Held:* By the terms of the policy, insurer was not liable if no part of the truck or trailer collided with any part of the underpass, and it is immaterial that stakes of the body holding the cargo were damaged if such damage resulted solely from the collision of the cargo alone.

2. Trial § 23a—

Even though on motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, it must do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury.

3. Insurance § 43b—

In determining the issue of whether some part of the vehicle collided with the underpass or whether the cargo alone collided therewith within

the meaning of a policy of cargo insurance, testimony of a witness that some two weeks after the collision he found certain "scarring" on the right pier of the underpass about seven feet from the ground has no probative value and should have been excluded on insurer's objection.

4. Same—Evidence held to raise mere speculation as to whether truck or its cargo collided with object, and nonsuit was proper.

Insured's driver testified on direct examination that he drove slowly under an underpass, heard a lot of noise, stopped the truck before the rear had cleared the underpass, and found part of the cargo had been knocked off and a part of the stake body of the truck, which secured the cargo, had been broken. He also testified that the tops of the tanks transported in the front part of the truck had been bent backward. Insurer introduced a sworn statement signed by the driver shortly after the accident in which he stated that no part of the truck or trailer came in contact with any part of the underpass. Upon insured's cross-examination of the driver on the ground that he was a hostile witness, the driver testified that his statement was based on opinion only and that he did not actually know how the collision occurred. *Held:* Plaintiff's testimony raises no more than speculation or conjecture as to whether any part of the tractor or trailer collided with any part of the underpass, and therefore insured's motion to nonsuit under a clause of the policy precluding liability if the cargo alone collided with any object, should have been allowed.

5. Trial § 22b—

Defendant's evidence which is not in conflict with that offered by plaintiff but which explains or makes clear plaintiff's testimony is properly considered on motion to nonsuit.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Godwin, Special Judge,* January Term, 1952, and *Carr, J.,* February Term, 1952, of WAKE.

This is a civil action to recover on contract of insurance.

The defendant, under date of 27 April, 1948, issued and delivered to Gresham Petroleum Transport, Inc., its Motor Vehicle Cargo Insurance Policy effective from the above date until 27 April, 1949. The annual premium of $263.00 was paid. The policy, with the approval of the defendant and by proper endorsement, was thereafter assigned to the plaintiff and the plaintiff was duly made the assured therein on 28 August, 1948. The amount of loss recoverable under the terms of the policy is limited to $1,500 for any one disaster.

On the face of the policy appears the following: "THIS POLICY DOES NOT INSURE—The legal liability of the Assured for: . . .

"(g) Loss or damage . . . caused directly or indirectly by the load or any portion thereof coming into contact with any other object unless the carrying vehicle also collides with such object; . . ."

The plaintiff alleges, "That on or about April 7, 1949, while the said policy was in full force and effect, one of the plaintiff's trailer trucks

covered by the said policy was loaded with thirty (30) fuel tanks and was en route from Raleigh, N. C. to Friendship, N. C.; that when the said trailer truck had reached a point on the highway, in or near the city limits of Greensboro, N. C. and was being driven along the said highway and was about to pass under an overhead bridge or through an underpass under the said bridge, the said truck and some of the tanks which were the said cargo on the truck, collided with the side supports of the said bridge, or underpass; that as a result of the said collision, the said truck and its cargo were so badly damaged that 19 of the fuel tanks were not accepted by the concern which had ordered the same and were a loss to the plaintiff to the extent and value of $557.25."

Roy Hargis, a witness for the plaintiff, testified: "In April 1949 I was a driver for plaintiff, Jenrette Transport Company. . . . On April 7, 1949 I was driving one of their trucks on a trip from Raleigh to Friendship, N. C., through Greensboro. I had a load of storage tanks, . . . I know there were different sizes on there, the larger ones in front and the smaller ones were behind. As to how they were loaded on that truck, they were standing straight up—standing on end. . . . You reach Greensboro on #70 highway and the truck lane turns to the left on #421 going south and it's just about a block from there to an underpass under a railroad. It is downhill from the place where you turn off about a block away. The underpass has a division between it, one lane on the right-hand and one on the lefthand; there's a division between the sidewalk on the other side of the bridge, too. There are supports or piers up from the division in the center and from the curb up to the underpass to support the underpass of the railroad. You have to turn out a little bit to miss that center support. I wasn't paying any mind to the underpass as I had been through there several times before with the same sort of load and what happened to the tanks I don't know. I just heard a terrible noise as I started under the underpass. I stopped the truck then with the back end of it just before it got out from under the underpass; at the time I was going slow, would say I was going 12 or 15 miles an hour only. When I got out of the truck I found that some of the tanks were off the truck on the righthand side of the underpass and sidewalk and that part of the stake body of the truck had been broken off. Q. Did you find that the side of the truck was damaged and that a number of the tanks were off the truck? A. Yes sir, the side of the truck. . . . I am not with the Jenrette Transport Company now."

On cross-examination this witness testified: "Right after this accident happened I knew more about it than I remember here this morning. On the 12th day of April 1949 I made a statement about it, a statement under oath. . . . I said, 'I was traveling highway #421 and had reached a point within the city limits of Greensboro.' Q. And I ask you if you didn't go

on and say, 'As I attempted to drive through an underpass the two top tanks struck the underside of the bridge, forcing them back against the other tanks, causing the tanks to break the sides of the trailer, letting the tanks roll onto the pavement,' you said that, didn't you? A. I did not put that on the paper but that was my opinion. . . . That was the statement I gave. Q. I'm asking you if that isn't what you said about it 5 days after it happened? A. I gave the statement. Q. You said that, what I just read, at the time, didn't you? A. Yes sir; from the way it looked after I got back there and examined the tanks it looked as though the two front tanks had struck it, and hit the underpass. Q. Then did you say in your statement, when you were telling about it, 'There were some angle irons in the front corner of the trailer that were used when hauling 1,000-gallon tanks. The irons were not being used on the load that I was hauling and in some way one of the irons fell to the floor and the bumps caused by the roadbed caused one of these irons to slip under the front tanks which raised the tanks enough to let them hit the bridge.' Didn't you say that? A. I couldn't tell. Q. You said that at the time, didn't you? A. That could have happened. I don't know because I didn't see that. Q. Now, at the time that you were making this statement and swore to it, didn't you also say, 'No part of the truck or trailer came into contact with the bridge either at the top or at the sides.'? A. No part of it did come in contact with the bridge. There was no sign of a tractor or trailer going to the side, being forced over on the right. I made the statement that no part of the truck or trailer came into contact with the bridge either at the top or at the sides."

The court then, over the objection of the defendant, permitted the plaintiff on redirect examination to cross-examine Hargis as a hostile witness. Numerous questions were propounded to him along the general line of the following: "Q. Well, Mr. Hargis, you said a while ago that of course you couldn't see what happened behind you on that truck? A. No sir, I couldn't. Q. You don't know what struck what do you? A. No sir. That was my opinion about it. . . . Q. You said and you say now that that was just an opinion, is that right? A. That's right, yes sir, I couldn't see back there. Q. You don't know what happened back there on the truck, do you? A. No sir; . . . Q. You don't know that the top of the tanks or the top tanks either one struck the bridge, do you? A. No sir; all I know is, something struck it. Q. You just know that something struck the bridge underpass. A. That's right. Q. And after the thing was over you found the side of the truck torn up and the tanks torn up? A. Yes sir, that's right. Q. What they struck and which one struck first and all that you just don't know, do you? A. No sir. . . . Q. And while you said your recollection was fresher at that time than it is now, when you wrote that, that something struck the bridge, that wasn't anything

you recalled, that was simply your opinion, wasn't it? A. Yes, that's right. When I seen the tanks, pulled over and looked it looked as if the top tanks had hit the bridge. Q. But you don't know that and that is simply your opinion? A. No, I don't know it. Q. That was simply your opinion then and is now? A. That's right. Q. In other words, you are just guessing about that, aren't you? A. Yes, sir."

On recross-examination, with respect to the statement which this witness signed on 12 April, 1949, he testified: "I made this statement to Mr. Love, who is sitting over here. He asked me to make a statement as to just how this thing happened, and I did it as near as I knew how. And in response to his questions to me and his request of me, I told him how it happened. Q. And he wrote it down and after it was written down you read it, said in the statement that you had read it over and that it was a correct statement? A. Yes sir, I sure did, the best I could. Then I swore to it before a Notary Public. . . . Q. And this morning, Mr. Simms asked you who showed you the statement and you said I showed it to you and I ask you if I didn't then ask you if it was correct, Mr. Hargis, this morning? A. Well, it is correct excepting that I couldn't swear to what caused the tanks to hit the underpassing."

This witness further testified that two of the four or five large tanks that were standing up in the front part of the trailer were bent close to the top; that he entered the underpass as near in the middle as possible and when he stopped he found the tanks all over the street and sidewalk; that he did not think the trailer was out of line with the tractor in any way.

The plaintiff's evidence further tends to show that the underpass is 15 feet 5 inches wide from curb to curb and 16 feet 1 inch wide from pier to pier. It is 12 feet 9½ inches high on the extreme right and 12 feet 8 inches high in the center, and 12 feet 6 inches high on the left. The bed of the truck was 4 feet 5 inches above the pavement and the large tanks were 8 feet long. The stakes on the sides of the truck were 5 feet high. Three sections of the body were broken or torn off. There was no damage to the platform of the trailer. The tanks were chained up and down the sides and across from side to side to hold them together to keep them from swaying. The chains went through and between the tanks from side to side and were tied to the sides of the trailer. The trailer is ordinarily just a platform, but around the edges or sides there are places in a steel band to put stakes in and there were chains laced back and forth making the tanks fast.

J. M. Jenrette, Sr., was permitted to testify, over the objection of the defendant, that about two weeks after this collision occurred he examined the underpass and found certain scarring on the right pier about 7 feet from the ground.

The defendant introduced in evidence the statement made by Hargis on 12 April, 1949, and renewed its motion for judgment as of nonsuit. The motion was denied and defendant excepted.

Issues were submitted to the jury and answered as follows:

"1. Was the loss or damage sustained by plaintiff caused by the truck colliding with the underpass?

"Answer: Yes.

"2. What amount is plaintiff entitled to recover?

"Answer: $557.25."

Upon the return of the verdict, the defendant moved to set it aside as to both issues. The motion was denied as to the first and allowed as to the second in the discretion of the court. A new trial was ordered on the second issue and the case was set for trial as the first contested case on 18 February, 1952. At the second trial, before Carr, J., the court submitted the issue as to what amount the plaintiff was entitled to recover of the defendant, and the jury answered: "$557.25 and six per cent interest dating retroactive to June 1, 1949." From the judgment entered, the defendant appeals assigning errors based on the exceptions taken in both trials.

Simms & Simms and John M. Simms for plaintiff, appellee.

Murray Allen for defendant, appellant.

DENNY, J. This appeal turns on whether or not the plaintiff offered more than a scintilla of evidence in the trial below in support of its allegation that plaintiff's truck and some of the tanks which were being transported, collided with the side of the underpass. If no part of the truck or trailer collided with the underpass, the plaintiff is not entitled to recover, irrespective of any damage that may have resulted from the tanks having collided therewith. *Cf. Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295, where the cargo insurance policy contained no exclusion clause such as that contained in the present contract.

The plaintiff is entitled to have the evidence considered in the light most favorable to it and to the benefit of every reasonable inference to be drawn therefrom. *Chambers v. Allen*, 233 N.C. 195, 63 S.E. 2d 212; *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609; *Winfield v. Smith*, 230 N.C. 392, 53 S.E. 2d 251. But, when the evidence is so considered, it must do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury. *Denny v. Snow*, 199 N.C. 773, 155 S.E. 874.

A verdict or finding must rest upon proven facts or upon facts of which there is substantial evidence. A verdict or finding in favor of one having the burden of proof will not be upheld if the evidence upon which it rests

raises no more than mere conjecture, guess, surmise, or speculation. "There must be legal evidence of every material fact necessary to support the verdict or finding, and such verdict or finding must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C.J., pp. 51-52; *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730; *Denny v. Snow, supra; Broughton v. Oil Co.,* 201 N.C. 282, 159 S.E. 321; *Shuford v. Scruggs,* 201 N.C. 685, 161 S.E. 315; *Sutton v. Herrin,* 202 N.C. 599, 163 S.E. 578; *Plyler v. Country Club,* 214 N.C. 453, 199 S.E. 622; *Cummings v. R. R.,* 217 N.C. 127, 6 S.E. 2d 837; *Mercer v. Powell,* 218 N.C. 642, 12 S.E. 2d 227; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Lumber Co. v. Elizabeth City,* 227 N.C. 270, 41 S.E. 2d 761. As was said by the late *Chief Justice Stacy,* in *S. v. Johnson, supra:* "The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. But as was said in the case where a darky was being prosecuted for the larceny of a pig, there must be more than the argument of the solicitor: 'Gentlemen of the jury, there was a hog. Here is a negro. Take the case.' *Wilson v. Lumber Co.,* 194 N.C. 374, 139 S.E. 760; *Moore v. R. R.,* 173 N.C. 311, 92 S.E. 1."

What is the evidence in this case to support the finding that the plaintiff's truck or trailer collided with the underpass?

The evidence of Mr. Jenrette to the effect that about two weeks after this collision he examined the underpass and found certain "scarring" on the right pier about 7 feet from the ground, has no probative value, and the defendant's objection to its admission should have been sustained.

The plaintiff must rely upon the testimony of its driver, Roy Hargis, and the reasonable inferences that may be drawn therefrom to sustain the verdict on the first issue, and when his testimony is so considered, if it is insufficient to sustain the verdict, the defendant's motion for judgment as of nonsuit must be allowed.

This witness testified that no part of the tractor or trailer came in contact with the bridge either at the top or at the sides. He also made a sworn statement to this effect to an agent of the defendant five days after the collision occurred, and repeated it two or three times in his oral testimony at the trial.

Counsel for plaintiff was permitted by the court not to impeach this witness but to cross-examine him on the ground that he was hostile. Pursuant to this ruling, counsel tried diligently and with some success to get the witness to characterize his signed statement as well as his testimony about what occurred at the time of the collision as being merely his

opinion or a guess on his part. This added nothing by way of proof that plaintiff's truck or trailer came in contact with the underpass, but merely tended to raise a doubt as to what did cause the collision and thereby leave the ascertainment of the crucial facts in the case wholly to conjecture, surmise, or speculation. Even so, while being so examined, the witness said: "When I seen the tanks, pulled over and looked it looked as if the top tanks had hit the bridge." Moreover, he testified on cross-examination by defendant's counsel, that two of the four or five large tanks that were standing up in the front of the trailer were bent close to the top; that he entered the underpass as near in the middle as possible and when he stopped, the rear end of the trailer was still under the underpass; that at the time of the collision he was going only 12 or 15 miles an hour; that when he got off the truck, part of the stake-body of the trailer on his right-hand side had been broken off; that no part of the tractor or trailer came in contact with the bridge, and there was "no sign of a tractor or trailer going to the side, being forced over on the right." Furthermore, he testified that the sworn statement that he made and signed before a Notary Public on 12 April, 1949, was correct "excepting that I couldn't swear to what caused the tanks to hit the underpassing."

If, as this witness testified, no part of the truck or trailer came in contact with the underpass, and there seems to be no evidence to the contrary, unless it be by inference based on mere speculation or conjecture, it becomes immaterial whether the three stakes on the trailer were broken by the pressure of the tanks against them or by the pressure of the tanks against the chains by which they were held in place and tied to the sides of the trailer. In any event, the right-hand side of the platform of the trailer, including the steel band, or bands, which held the upright stakes in place, was not damaged.

The sworn statement referred to above was introduced in evidence by the defendants. However, in considering the motion for judgment as of nonsuit renewed at the close of the entire evidence, the evidence of the defendant which is not in conflict with the evidence of the plaintiff, may be used to explain or make clear what has been offered by the plaintiff. "This was the purpose of the Legislature in providing that such motion might be renewed at the conclusion of all the evidence." *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769; *Hare v. Weil,* 213 N.C. 484, 196 S.E. 869.

The evidence adduced in the trial below, in our opinion, is insufficient to support the verdict. The motion for judgment as of nonsuit should have been allowed.

Reversed.

PARKER, J., took no part in the consideration or decision of this case.

HARRIS EXPRESS, INC., v. T. B. JONES, JR.

(Filed 26 November, 1952.)

1. **Trial § 22b—**

Where plaintiff's witness testifies as to statements made by defendant, and defendant testifies in explanation and clarification thereof, defendant's testimony is competent to be considered on plaintiff's motion to nonsuit.

2. **Automobiles §§ 8d, 18h (3)—Evidence held to show contributory negligence as a matter of law on part of driver sideswiping rear of trailer standing on highway.**

Plaintiff's evidence tended to show that defendant was driving his tractor-trailer at night along a four-lane highway and stopped on the right shoulder to investigate motor trouble, leaving the left rear of the trailer projecting over the hard surface for some two feet, that plaintiff's driver was proceeding in the same direction in the right-hand traffic lane and, because partly blinded by the lights of approaching vehicles, was watching the line marking his traffic lane and did not see defendant's trailer until the right side of his trailer collided therewith. *Held:* The evidence discloses contributory negligence as a matter of law on the part of plaintiff's driver, and nonsuit was properly entered. As to whether the evidence disclosed a "parking" of defendant's tractor-trailer within the meaning of G.S. 20-161 (a) and as to whether the evidence disclosed that rear lights of defendant's tractor-trailer were not burning, *quære?*

ERVIN, J., dissenting.

JOHNSON, J., concurs in dissent.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *McLean, Special Judge,* at 12 May, 1952, Extra Civil Term, of MECKLENBURG.

Civil action to recover for property damage allegedly resulting from actionable negligence of defendant in which upon trial in Superior Court judgment of nonsuit was entered at close of all the evidence.

Plaintiff alleges in its complaint, and defendant admits in his answer, that at about 12:45 a.m., on 19 November, 1950, a semi-trailer owned by it was being operated in a northerly direction along U. S. Highway No. 29 at a point approximately four miles south of Salisbury in Rowan County, North Carolina, and that a collision occurred between the right front of its semi-trailer and the left rear corner of defendant's semi-trailer.

Plaintiff also alleges in substance the following: That at the time of the collision a tractor and trailer owned and operated by defendant was parked on the right-hand side of U. S. Highway No. 29; with left rear corner thereof extending over the pavement, so as to block a portion of the extreme east or right-hand edge of the pavement; that as plaintiff's trailer was being operated in a northerly direction along the highway at a reasonable rate of speed, the driver met two vehicles traveling in the opposite

direction—the lights of those vehicles shining in his eyes; and that he did not observe that defendant's trailer had been so parked, and without any negligence on his part, the collision occurred, and by reason thereof plaintiff's trailer, and the cargo being transported therein, were damaged in specified sum.

Plaintiff further alleges that the collision and damage were the proximate result of the negligence and carelessness of the defendant, in that he parked a tractor and trailer (a) on the shoulder of the highway with left rear corner of it extending over and partially blocking the pavement, (b) without sufficient lights or other warning signals thereon, (c) and failed to display not less than 200 feet to the front and rear of the vehicle a warning signal in violation of G.S. 20-161, and (d) left same in such position that he knew or should have known that it would endanger other traffic moving in a northerly direction along said highway.

Defendant, answering the complaint, denies in material aspect the allegations therein contained, except as covered by the admissions hereinabove first stated.

And defendant, as a further answer and defense, avers in substance that the driver of plaintiff's tractor and semi-trailer, while acting as the agent and servant of plaintiff and in the course and scope of his employment, was negligent in that he failed: (a) to keep a proper lookout for vehicles in or about the highway, (b) to have plaintiff's tractor and semi-trailer under control, (c) to stop within the range of its headlights, and (d) to operate same at a reasonable rate of speed under the existing circumstances, and by such negligence contributed to and proximately caused the collision and damage of which complaint is made, and such contributory negligence is pleaded in bar of plaintiff's right to recover in this action.

And defendant set up and pleaded a counterclaim arising out of the same collision as that on which plaintiff bases its action,—details of which need not be stated here since the nonsuit was granted on motion of defendant, and he does not appeal.

Upon the trial in Superior Court evidence offered by plaintiff tends to show these facts: At the time of the collision U. S. Highway No. 29 was paved—approximately 40 feet in width—the driver of plaintiff's tractor and semi-trailer saying 48 feet—with shoulder on the east side about 15 feet wide. There were painted lines on the pavement indicating two lanes for northbound traffic, and two lanes for southbound traffic. At the scene of the accident the highway is straight and level,—there being a crest of a rise about 100 yards south of the point of the accident.

There were involved in the accident (1) a White tractor owner by R. C. McCord, pulling a trailer owned by plaintiff, and operated by one Eugene J. Helms, and an International tractor and semi-trailer owned

and operated by defendant. Both were traveling northerly. Plaintiff's trailer was about six inches wider than the tractor which was pulling it. The width was estimated to be twelve feet two inches.

And the following is pertinent testimony of witnesses for plaintiff:

W. M. Anthony, a member of the North Carolina State Highway Patrol, testified: "I investigated the accident . . . at the time I reached the scene . . . the tractor and trailer of Mr. Jones was headed north and was on its right-hand or the east shoulder. The left rear trailer wheel was 6 inches . . . and the left front tractor wheel was 18 inches east of the east edge of the pavement. The left rear corner . . . had been damaged.

"The Harris Express tractor and trailer was also headed north, and was located on the right-hand or east shoulder, and was some distance beyond, or north, of the defendant's tractor and trailer. The right-hand side . . . had been ripped open, and bolts of yarn were scattered about for about a block.

"I saw no marks on the shoulder immediately south of the Jones vehicle. Mr. Jones was present and told me that he had stopped because of some engine trouble and had done some work on his engine immediately prior to the accident.

"I saw no flares about the scene. There were red lights on the rear of Mr. Jones' trailer but those lights were dim.

"There were marks on the pavement opposite the Jones trailer and located a few inches to the left or west of the east edge of the pavement."

Eugene J. Helms, by deposition, testified: "On November 19, 1950, I was employed by Harris Express as a truck driver. On the night of November 18 I left Charlotte to drive a White tractor and semi-trailer to New York . . . about 11:10 or 11:15 P. M. Shortly after midnight on the morning of November 19, I was involved in an accident.

"North of Kannapolis, N. C., I was traveling along a four-lane highway, and met two automobiles which were traveling side by side. I dimmed my lights a couple of times. The automobile on the outside lane dimmed its lights, but the one on the inside did not. The car which did not dim its lights was the one closest to me.

"When the cars were about 100 or 150 feet from me, one was moving towards me a little bit, and I eased over. About that time I struck the tractor and trailer parked on the right-hand side of the road. The tractor was parked about 8 feet off the pavement . . . and the back of the trailer . . . the left corner . . . going in the direction I was going, was about two feet over the paved portion of the highway.

"After I entered the four-lane stretch of highway I was running 40 or 45. I slowed down, and at the time of this collision I was running around 30 miles an hour—not over 30 miles . . .

"Immediately prior to the collision my tractor and trailer unit was completely on the highway, and before the collision no portion of my tractor or trailer had left the paved portion of the highway."

Then the witness was asked these questions and gave answers as shown:

"Q. When did you first see this tractor-trailer unit that was parked along the east side of the highway? A. When I hit it. Q. You hadn't seen it prior to then? A. No. He didn't have his flares or anything out, fusees, flares or anything out."

Then the witness continued: "After the collision my unit traveled 15 feet. I pulled off on the shoulder. I went back to the other unit, and there was a man standing in front of the truck. A State Patrolman came to the scene about 5 minutes after the accident happened. The right front corner of my trailer hit the left rear corner of the other trailer. There were marks on the pavement made by my tires. The right tires made the marks. The collision jerked the trailer around as I put on brakes."

Then the witness was asked in pertinent part the following questions to which he answered as shown:

"Q. What was the condition of the road that night? A. Fair, sort of foggy. Q. Foggy? A. Not foggy, but you know late at night like that the dew starts falling. Q. And you had a little trouble with the visibility, didn't you? A. Yes, Sir, with lights in front of me. Q. How far can you see either way from the point where the collision took place? A. About a half mile. I was traveling . . . in the extreme right-hand lane . . . The highway has a center line on it. Q. You could see the center line? A. Yes, Sir, by looking down close. The cars in front of me had me blinded, and I was looking down at the line so I couldn't get over the line. Q. You were using that as a guiding spot to keep you in the road? A. Yes, Sir. Q. And you didn't see any vehicle in front of you until you came to within 100 feet of it? A. I didn't see it then. Q. You didn't see it then? A. No, Sir. There was nothing between me and the vehicle with which I collided. I did not see any flares nor any red lights. The cab of my tractor had passed the parked trailer before the collision took place . . . Q. Now, were the vehicles in front of you that you came in contact with in motion at the time? A. Yes, Sir, the two cars meeting me had me blinded and I wasn't looking at the right-hand side. I was looking at the line. Q. You had your eyes centered on the center line; you weren't looking in the immediate direction straight ahead, were you? A. No, Sir. Q. You never did take your eyes off the center line of that roadway, did you? A. No, Sir. The cars had me blinded, and I was keeping on my side so nobody would side-swipe me."

Then on re-direct examination, the witness concluded by saying: "My vision was obscured by a reflection of the lights of approaching cars. When there were no cars approaching, I could see 300 yards."

When plaintiff first rested its case, motion of defendant for judgment as of nonsuit was overruled. Then defendant, reserving exception thereto, testified in pertinent part as follows: "I own the tractor and trailer which was involved in the accident . . . My engine began to miss, and I pulled to the right shoulder to see about it . . . I stopped on the shoulder . . . I had completely checked my engine, and was standing near the tractor preparing to get into it when the collision occurred . . ."

Defendant's motion for judgment as of nonsuit, renewed at the close of all the evidence, was allowed, and from judgment in accordance therewith plaintiff appeals to Supreme Court, and assigns error.

Covington & Lobdell for plaintiff, appellant.
Robert D. Potter and B. Irvin Boyle for defendant, appellee.

WINBORNE, J. Testing the evidence offered by plaintiff and so much of defendant's evidence as is favorable to plaintiff, or tends to explain and make clear that which has been offered by the plaintiff, in this case, *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543, it may be fairly doubted that there is shown any evidence of actionable negligence on the part of defendant. *Morris v. Transport Co.,* 235 N.C. 568, 70 S.E. 2d 845.

Here, as in the *Morris case,* the uncontradicted statement of defendant, offered in evidence by plaintiff through its witness, Patrolman Anthony, and explained by the testimony of defendant, refutes the theory of "a parking" of defendant's tractor-trailer at the place of the collision in question, within the meaning of the statute G.S. 20-161 (a) as amended by Chap. 165 of 1951 Session Laws of North Carolina. (See discussion in the *Morris case.*)

Likewise as to permitting the tractor-trailer of defendant to be on the highway without lights. The factual situation here is so similar to that in the *Morris case* that what is said there in this respect is applicable and appropriate here.

But if it be conceded that defendant was negligent in some respect alleged in the complaint, it is manifest that the driver of plaintiff's tractor-trailer was negligent in the operation of it, and that such negligence was the proximate cause, or at least one of the proximate causes of the collision and property damage of which complaint is here made.

The case comes within and is controlled by the principles enunciated and applied in *Weston v. R. R.,* 194 N.C. 210, 139 S.E. 237, the *Morris case, supra,* and the list of cases cited in the *Morris case* at pp. 576-577, as well as in the case of *Morgan v. Cook, ante,* 477. Compare *Hammett v. Miller,* 227 N.C. 10, 40 S.E. 2d 480, and *Clark v. Lambreth,* 235 N.C. 578, 70 S.E. 2d 828.

Hence the judgment below is

Affirmed.

ERVIN, J., dissenting: When I construe the evidence in the light most favorable to the plaintiff, I reach the deliberate conclusion that it makes out this case:

The defendant knowingly permitted the rear end of the semi-trailer drawn by his disabled road tractor to project onto the main traveled part of a congested highway on a dark and cloudy night. While so doing, he violated G.S. 20-134 by failing to exhibit a red tail light at the rear of his semi-trailer, and G.S. 20-161 by failing to display red flares to warn approaching motorists of the impending peril. The plaintiff's northbound motor vehicle came upon the scene from the rear in the charge of a driver who was keeping a proper lookout and proceeding at a reasonable speed. As the plaintiff's motor vehicle neared the rear of the defendant's stationary and unlighted semi-trailer, it met a motor vehicle which was moving along the highway in the opposite direction. This southbound motor vehicle projected glaring headlights into the face of the plaintiff's driver, blinding him and compelling him to fix his gaze on the painted line marking the inner edge of his traffic lane in order to avoid collision with the approaching vehicle. As a consequence of these events, the plaintiff's driver was unable to see the stationary and unlighted semi-trailer of the defendant in time to avoid striking it.

For this reason, I am of the opinion that the question of whether the defendant was guilty of actionable negligence and the question of whether the plaintiff's driver was guilty of contributory negligence were for the jury.

I am unable to give my assent to the legal premise which necessarily underlies the decision of the majority—that the law imposes upon the nocturnal motorist the absolute and unvarying duty not to move a motor vehicle along a highway at all unless he has a complete knowledge of all obstructions lying ahead, no matter how unexpectable and unperceivable those obstructions may be. This legal premise requires of the nocturnal motorist an infallibility not possessed by any man who ever traveled over the earth's surface by motor vehicle or otherwise.

JOHNSON, J., concurs in dissent.

PARKER, J., took no part in the consideration or decision of this case.

WILL E. WOODALL, ADMINISTRATOR OF THE ESTATE OF DEAN B. STOVER, SR., DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 November, 1952.)

Railroads § 4—Evidence held to show contributory negligence as matter of law on part of motorist driving across tracks without looking.

The evidence tended to show that on a day when a light rain was falling, a motorist, first in a line of traffic stopped at a crossing by a southbound train, started across the tracks immediately the crossing was cleared by the southbound train, and was struck by a northbound train on the far track notwithstanding that the tracks were straight and that his view was unobstructed when he reached a point within about twenty feet of the tracks. There was also evidence that the flagman attempted to attract the motorist's attention and keep him from continuing across the tracks. *Held:* The evidence discloses contributory negligence as a matter of law on the part of the motorist, barring recovery. Testimony of one of plaintiff's witnesses that the motorist could not have seen the flagman *held,* when considered in context, merely an argumentative deduction of the witness respecting the estimate of the motorist's vision.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Sharp, Special Judge,* August Special Term, 1952, of JOHNSTON.

Civil action by plaintiff to recover damages for the alleged wrongful death of his intestate, caused by an automobile-train collision at a grade crossing.

The collision occurred about 11:00 o'clock on the morning of 12 January, 1950, when the DeSoto automobile driven by the plaintiff's intestate, Dean B. Stover, Sr., was struck by one of defendant's freight trains at a grade crossing in the town of Benson, North Carolina, where Main Street crosses the north-south double line tracks of the defendant railroad. The tracks run through the town of Benson in a north-south direction; Main Street runs east and west and crosses the railroad at about right angles. The intestate was driving easterly, and was first in a line of cars stopped on the west side of the crossing while it was blocked by a southbound passenger train on the track next to him. As soon as the rear of the passenger train cleared the crossing, intestate drove his car across the southbound track next to him onto the easternmost track, on the far side, immediately in front of, and was hit by, the locomotive of an approaching northbound freight train. Intestate was fatally injured in the collision.

A watchman or flagman was regularly maintained by the defendant at the crossing. Intestate was employed as a traveling salesman. During the preceding 35 years he visited Benson three or four times a year.

The evidence respecting physical conditions around the crossing at the time of the collision may be summarized as follows: Main Street at the railroad crossing is about 66 feet wide. On the south side of the street, next to the west side of the railroad right of way, is a brick store building known as Hudson's place. Opposite this store and on the north side of the street, next to the railroad right of way, is the First Citizens Bank & Trust Company building. Both of these buildings are about 65 feet from the southbound or westernmost railroad track, and it is about 8 feet between the east rail of the southbound and the west rail of the northbound tracks. Located on the right of way between the Hudson Building and the railroad tracks was a watchman's shanty—a little house 8 or 10 feet square and about 12 feet high. This shanty was located about 20 feet from the west rail of the northbound track. Some cars were parked near the shanty on Railroad Street, but there was "no obstruction to a view of the track to the south at a point even with the watchman's shack. . . . After you pass the watchman's shack you can see an indefinite distance down the track. . . ."

The plaintiff's further evidence may be summarized as follows:

The witness Chester Tart testified: ". . . I was standing between Hudson's store and the railroad track, . . . in Railroad Street. I saw a maroon car (intestate's) sitting on Main Street, stopped, about 8 or 10 feet from the southbound line. . . ., and as quick as the train going south cleared the track, he started on across. The freight train was coming north and hit him right plumb in the side. . . . I saw the watchman at the crossing. When the car started to pulling off after the passenger train pulled on south, the flagman broke out from the house and started out there, he was about halfway from the little house to Main Street. The flagman made efforts to stop him. He held up the flag and hollered something . . ., the car was going across the southbound track. The watchman was on the right side of the car. . . ., not on the track; . . . As the watchman raised his stop sign and flag, the car was going down Main Street, . . . The car wasn't making over 10 miles an hour; it had just started in low gear. I did not hear any signal right at that time, but just about the time it hit, the best I recollect, the train blew. . . . I would say the train was making between 50 and 75 miles an hour." Cross-examination: ". . . It was raining hard enough some people had on raincoats . . ., but at that time it was drizzling. . . . The watchman stand is on the west side of the railroad, and the way Mr. Stover was traveling it would have been on his right. The watchman was in the little house when he started to pull off. I would say Mr. Stover was not over 15 or 20 feet from the nearest rail of the southbound track, the first rail of the first track. . . . When the flagman was trying to stop him, he had done started across. Mack had a stop sign and hollered something when Mr.

Stover crossed the southbound track. If he touched the car, I did not see him, he was not close enough to touch it when he crossed the first track. . . . I didn't see Mr. Stover look to the right or left, it was so quick; . . . About the time he hit the first track, the watchman raised the flag and hollered something. . . . At the time he was talking to Mr. Stover and trying to get him to stop, I would say he was about 7 feet from him, about middleway of the car. . . . The Stover car was the only one that tried to pass."

The witness Mike Parnell testified in part: ". . . I was standing beside Hudson's store, . . . When the passenger train pulled up . . ., the fellow who got killed pulled up and stopped and waited until the train pulled off. As soon as this train pulled off, I looked around toward him, he throwed up his hand at me, and when he pulled across the track this other train hit him. . . . I did not observe the watchman. I looked at the center of the street. . . . I did not hear any warning sound such as a whistle or bell and didn't even know the train was around. In my opinion the train was running between 60 and 70 miles an hour when it hit the car."

Earl Stewart testified in part: ". . . I was standing on the street on the northwest side right in front of the Citizens Bank. The maroon DeSoto car came in about 7 or 7½ feet from me. The weather was bad, you couldn't see. It was cold and foggy and rainy; you couldn't see through the glass at all. . . . I didn't observe the watchman in the vicinity right at that time, but just about the time the train hit the car, I looked and saw the watchman. . . . When Mr. Stover started across the railroad track, the watchman was on the south side of Main Street, just the least bit; . . . he was over halfway on the south side. I didn't hear any warning signals such as whistle or bells. . . ." Cross-examination: ". . . The passenger train had moved off when I first saw the DeSoto car coming directly west. It was moving when I saw it first; . . . The flagman was across the street, a little below the middle of the street toward the south. . . . Mr. Stover was not crossing in the middle of the street, he made kind of a little curve on the left side of the street going east. Cars were parked, and he came in around the cars, . . . I say he could not have seen the flagman. He couldn't have or I couldn't have either. . . . There was no car in front of Mr. Stover when he whipped around to the left."

The witness Fulton Surles testified: ". . . I came out of the Clerk's office at the back of the bank and happened to be there at the time this happened. . . . I saw the crossing watchman. I couldn't say the position of the crossing watchman at the time the car started to move. I was about 115 or 120 feet away, standing in the door, and it looked like the watchman tried to stop the car. The watchman was kind of on the side

of the car, the south side of the street, the off-side from the driver. I couldn't say I heard the whistle blow." Cross-examination: ". . . I saw one train pass going south towards Dunn. The train that hit the car was going north towards Four Oaks and Smithfield. . . . After passing the Hudson corner and before he got to the watchman's tower, he could have seen an approaching train from the direction of Dunn a good ways, a block, I would say. . . . After the car passed Hudson's corner and before he got to the little house, he could have seen a pretty good ways, a mile if it was clear, right straight down the railroad. . . . As soon as he passed that (the watchman's shanty), he could see a mile down the railroad. It is perfectly straight. It is something like 20 feet from the eastern edge of the watchman's tower to the first rail of the northbound line, I don't know definitely, but there were six or seven steps within which a man could have seen one or two miles. It had been raining that morning, and at the time the train hit the auto it was dropping a light rain, not hard enough to keep a man from seeing a train. . . ., it looked like the watchman tried to stop the man. He had a red flag and a stop sign in his hand. I could see them both. . . . He was waving the flag as it started across, and I believe he touched the car. I couldn't tell where he touched it from where I was, but it looked to me like he was kind of at the right-hand front of the car. The driver was on the other side. . . . I could not tell whether the man in the car looked in either direction. . . . He was the first man to cross. . . ., and no one else attempted to cross at that time."

Plaintiff's witness C. N. Proctor testified on cross-examination that he was standing in the door of the baggage room on the west side of the station, adjacent to the northbound tracks, and had a clear and unobstructed view of the Main Street crossing, except as it was blocked by the southbound train before it pulled off: "I saw Hosea Mack, the crossing watchman, standing in the crossing in the middle of the east side, holding up the sign and flag in the middle of the street. I saw a maroon-colored car approaching the watchman from the west. As soon as the rear of No. 75 (the passenger train) cleared, this maroon car (intestate's) came up from the west going east rather fast. It looked to me like he drove around something else and was driving around the rear of 75. The crossing watchman was in the middle of the street trying to stop traffic. . . . The Stover car was the only one that moved onto the track. . . . At the time the car passed the crossing watchman, it was close enough for him to hit the side of the car with his flag and stop sign. . . . There was just a little drizzle, vision was good; . . . Where a vehicle passes the eastern edge of that (Hudson) building, there was nothing to obstruct the view to the south except the rear of the train that had just departed. I heard the signals of the freight train going north call for signals. He blowed the whistle four times, calling for instructions. . . ."

The defendant offered the testimony of several eyewitnesses who testified that timely signals were given by the approaching freight train and that the watchman, Hosea Mack, did not leave the street crossing or go back to the shanty prior to the arrival of the freight train that struck the intestate. In substance, these witnesses said that as soon as the rear of the southbound train cleared the crossing, the watchman from his position in the street on the east side of the tracks moved over to the west side facing intestate and the line of traffic behind him. As the witness Norman Duncan put it, the watchman "crossed from one side to the other near the center of the street. . . . I would say a little bit south of center. He had a red flag in his hand and an iron sign that says 'STOP' . . ." The witness Aaron Johnson said: "After the passenger train got by, I saw Hosea Mack somewhere near the middle of the street with a red flag in one hand and a stop sign in the other which was a round piece of metal about 18 inches. I think he was in such a position as to be seen by people crossing the street if they had looked. . . . He took the red flag and waved it right over near the windshield of the Stover car and said something to him. . . . I was about 8 feet from the Stover car at the time he started its movement across the intersection. . . . From the time the passenger train got there until the time Mr. Stover was killed I did not see Mack go to the watchman's shack, and I was 6 or 8 feet from the shack, right there at it."

The defendant's motion for judgment as of nonsuit, made at the close of the plaintiff's evidence and renewed at the conclusion of all the evidence, was allowed, and from judgment based on such ruling the plaintiff appealed, assigning the ruling and judgment of the court as error.

E. A. Parker and Jane A. Parker for plaintiff, appellant.
Shepard & Wood for defendant, appellee.

JOHNSON, J. This case involves no new question requiring extended discussion. Conceding, without deciding, that the evidence offered below made out a *prima facie* case of actionable negligence against the defendant, even so, it is manifest, as the only reasonable inference deducible from the plaintiff's evidence, that the intestate, in driving his car on the northbound track immediately behind a passing train, without in any way trying to ascertain whether another train was about to pass on this track, and in failing to pay attention to the warning given by the watchman in the street, failed to exercise due care for his own safety, and that such failure to exercise due care contributed to, and was a proximate cause of, his death. This defeats recovery. The case is controlled by the principles explained and applied in *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598. See also: *Moore v. R. R.*, 203 N.C. 275, 165 S.E. 708; *Johnson v.*

R. R., 214 N.C. 487, 199 S.E. 704; *Miller v. R. R.*, 220 N.C. 562, 18 S.E. 2d 232; *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137; *Carruthers v. R. R.*, 232 N.C. 183, 59 S.E. 2d 782; *Jones v. R. R.*, 235 N.C. 640, 70 S.E. 2d 669; 44 Am. Jur., Railroads, Sec. 556; Annotation: 56 A.L.R. 543.

We have not overlooked the statement of the plaintiff's witness Earl Stewart that "he (intestate) could not have seen the flagman." This statement was made on cross-examination. When considered in context it is nothing more than an argumentative deduction of the witness respecting his estimate of the range of intestate's vision while he was pulling to the left side of the street to go over the tracks. Previously, this witness had stated that the watchman was out in the street—"just the least bit . . . over halfway on the south side." See *Parker v. R. R.*, 232 N.C. 472, bot. p. 474; 61 S.E. 2d 370; *Tart v. R. R.*, 202 N.C. 52, 161 S.E. 720; *Harrison v. R. R., supra.*

The judgment below is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. JULIUS M. FOX, D/B/A FOX TRANSFER COMPANY, GASTONIA, NORTH CAROLINA.

(Filed 26 November, 1952.)

Utilities Commission § 5—

Upon appeal from the denial by the Utilities Commission of a petition for amendment of certificate to permit petitioner, an irregular route common carrier of property, to interchange traffic with named interstate common carriers of property, *held* review in the Superior Court is limited to the record as certified and to questions of law therein presented, and where the decision in the Superior Court is based on additional findings made by the court, the cause will be remanded to the Superior Court for judgment on the questions of law presented by the record as certified or for remand to the Utilities Commission for additional findings if any be deemed necessary.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by North Carolina Utilities Commission and Protestants, from *Nettles, J.*, September Civil Term, 1952, of GASTON. Remanded.

This was a proceeding instituted before the North Carolina Utilities Commission by the application of Julius M. Fox, an irregular route com-

mon carrier of property, operating under the name of Fox Transfer Company, for an order amending his certificate as such carrier and permitting interchange of traffic of all kinds with four other named common carriers of property.

The applicant is holder of Certificate C-178 issued by the North Carolina Utilities Commission, and has also been granted Certificate MC-97873 by the Interstate Commerce Commission by the terms of which he is authorized to interchange traffic with other common carriers in interstate commerce, subject to the approval of the North Carolina Utilities Commission.

Applicant alleges that he has been advised that under the regulations of the Interstate Commerce Commission he "may conduct operations in interstate commerce only to the extent permitted in intrastate commerce by his state certificate"; and that Rule 44 as adopted by the Utilities Commission unduly restricts applicant's right of interchange; and that the amendment of his state certificate so as to permit interchange of traffic as prayed would prevent an unjust and unlawful restriction upon his rights.

The order of the Utilities Commission referred to as Rule 44, is as follows:

"Rule 44. Interchange of Traffic. No traffic shall be interchanged between contract carriers, nor between a contract carrier and a common carrier, nor between a regular route common carrier and an irregular route common carrier, nor between two irregular route common carriers, except after application to the Commission and upon the filing of an application the Commission shall within a reasonable time, fix a time and place for hearing such application not less than thirty (30) days after such filing. . . . The Commission shall cause notice of the time and place of hearing to be given by mail to the applicant; to other motor carriers holding certificates or permits and operating in the territory proposed to be served by the applicant; to other motor carriers who have pending applications to so operate; and to rail carriers operating in such territory. Dual operations, that is, the authority to operate both as a contract carrier and as a common carrier, or both as a regular route common carrier and as an irregular route common carrier, shall be construed as separate and independent operations for the purpose of this rule, and no interchange or transfer of traffic from one such operation to another shall be made except after compliance with the foregoing provisions of this rule."

Protests to the granting of the application were filed by Fredrickson Motor Express, Miller Motor Express, Helms Motor Express, Great Southern Trucking Co., Bottoms-Fiske Co., McLean Trucking Co., and Overnite Transportation Co., and these were admitted as parties to the record.

After hearing the evidence offered the Commission entered order denying the application. Exceptions filed by applicant were overruled and his petition to rehear was denied.

In the order denying the application the stated views of the Utilities Commission may be summarized as follows:

The purpose of the applicant is to obtain right to interchange interstate traffic with certain named carriers of property. The Utilities Commission does not have the power to grant or deny the applicant the right to engage in interstate commerce. The interchange of interstate traffic with other carriers, within or without the State, is controlled by Federal laws and regulations. The Interstate Commerce Act does not require a carrier engaged solely in intrastate commerce to obtain authority from the Interstate Commerce Commission for transportation of property in interstate commerce between places within the State, if there is a commission in the State and the carrier has a certificate from such commission. "Such transportation shall, however, be otherwise subject to the jurisdiction of the (Interstate Commerce) Commission under this part." Sec. 206, Part II, I.C.C. Act. The applicant, having been advised by the Interstate Commerce Commission that he could not interchange with other carriers traffic moving in interstate commerce without authority granted by the State, now applies to the Utilities Commission for an order amending his certificate so as to permit him to interchange traffic of all kinds with the named carriers. This the Utilities Commission declines to allow. The Utilities Commission adds that if Rule 44 needs modification this should be done in a proper proceeding for that purpose after notice to all carriers.

In his petition to rehear the applicant points out that the order denying his application in effect sustains the validity of Rule 44; that while the Commission holds it does not undertake to regulate interstate commerce, Rule 44 constitutes a direct regulation of interstate commerce; that the order deprives him of rights vested in him by sec. 7 of the North Carolina Truck Act as he was a common carrier by motor vehicles 1 January, 1947. He asserts that Rule 44 violates Art. I, sec. 17, of the Constitution of North Carolina, and that it violates Art. I, sec. 8 (3), of the Constitution of the United States, and deprives him of his property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States.

In the Superior Court the judge found the following facts:

"That Julius M. Fox, d/b/a Fox Transfer Company, Gastonia, North Carolina, is now, and has been for a period of approximately 18 years, engaged in the transportation of freight for hire and at the time of this hearing operated three tractors, one straight truck, two flat trailers, and three vans; and it further appearing to the court that subsequent to the

adoption of the North Carolina Truck Act, the said Julius M. Fox was awarded Certificate C-178 granting him authority to transport freight for compensation as an irregular route common carrier within the territory defined in said Certificate C-178;

"That the said Fox Transfer Company holds Certificate No. MC-97873 issued by the Interstate Commerce Commission authorizing the carrying on of business in interstate commerce;

"That prior to the adoption of the North Carolina Truck Act, said Julius M. Fox engaged in the interchange of freight with Grubb Motor Lines, Lexington, North Carolina, and with Billings Transfer Corporation, Inc., Lexington, North Carolina, and that since the adoption of said Truck Act has interchanged freight with Bruce Johnson Trucking Company of Charlotte, North Carolina, and had at the time of his application made arrangements for interchanging freight with James H. C. Huitt, d/b/a Huitt Roofing and Trucking Company, Hiddenite, North Carolina.

"That subsequent to the issuance of said Certificate C-178, the North Carolina Utilities Commission undertook to adopt Rule 44 as Supplement No. 1 to General Order No. 4066-A and ordered the same to become effective on July 1, 1951.

"That on December 5, 1951, the said Julius M. Fox, d/b/a Fox Transfer Company, was notified by letter from the Interstate Commission that due to the adoption of Rule 44 by the North Carolina Utilities Commission it would be a violation of the Interstate Commerce Commission's regulations for the said carrier to interchange freight with any other irregular route common carrier or any regular route common carrier due to the limitation enunciated in said Rule 44.

"That an application dated January 19, 1952, was filed by the said Fox Transfer Company with the said North Carolina Utilities Commission pursuant to Rule 44, praying that an order be issued by the Commission amending its Certificate C-178 to provide that the Fox Transfer Company may thereafter interchange traffic of all kinds with the abovenamed carriers with whom he had done business and/or made arrangements to thereafter engage in the business of interchanging traffic or freight. That hearing upon said application was had on March 6, 1952, before the North Carolina Utilities Commission and that thereafter, on March 21, 1952, an order was entered by said Commission denying the application of the Fox Transfer Company and rejecting the contention of the said applicant that Rule 44 was unlawful and unconstitutional and arbitrarily and capriciously adopted by the Commission.

"That on April 9, 1952, a petition for rehearing was filed with the Commission by Julius M. Fox, d/b/a Fox Transfer Company, but petition was denied by order of the Commission dated April 21, 1952.

"That on April 28, 1952, Julius M. Fox, d/b/a Fox Transfer Company, gave notice of appeal to the Superior Court from the order of the Commission denying the petition for rehearing and the order of the Commission dated March 21, 1952, above referred to.

"Upon the foregoing findings of fact and the consideration of the law arising in this cause:

"It is ordered, adjudged and decreed that the order of the North Carolina Utilities Commission dated March 21, 1952, and the order denying petition for rehearing dated April 21, 1952, are hereby declared null and void for the reason that the same are arbitrary and capricious and in violation of the constitutional provisions and in excess of the statutory authority of the said Commission;

"And it is further ordered, adjudged and decreed that Rule 44 promulgated by the Commission as a part of Supplement No. 1 to General Order No. 4066-A of the North Carolina Utilities Commission is hereby declared to be null and void for the reason that the same is arbitrary and capricious and the attempt by said Commission to adopt the same was unlawful and in violation of constitutional provisions and in excess of the statutory authority granted to said Commission by the General Assembly."

From the judgment entered the Utilities Commission and the intervening protestants appealed.

Attorney-General McMullan and Assistant Attorney-General Paylor for North Carolina Utilities Commission, plaintiff, appellant.

Arch T. Allen for Great Southern Trucking Company, appellant, intervener.

J. Ruffin Bailey for Fredrickson Motor Express, Helms Motor Express, Inc., and Miller Motor Express, appellants, interveners.

J. Wilbur Bunn for Overnite Transportation Company, intervener.

Basil L. Whitener for defendant, appellee.

DEVIN, C. J. The General Assembly has constituted the North Carolina Utilities Commission, for certain enumerated purposes, a court of record, with right of appeal therefrom to the Superior Court, and has prescribed the procedure, scope and extent of review on such appeal. Ch. 989, Session Laws 1949, now codified as G.S. 62-26.10. The Superior Court is authorized to review the proceedings without a jury, and such review shall be confined to the record as certified, except as to certain matters not here pertinent, and "the court shall decide all relevant questions of law." *Utilities Com. v. R. R.*, 235 N.C. 273, 69 S.E. 2d 502. "Appeals from the Utilities Commission are confined to questions of law, and on appeal the appellant may not rely upon any grounds for relief

which are not set forth in his petition for rehearing by the Commission." *Utilities Com. v. Coach Co.*, 233 N.C. 119, 63 S.E. 2d 113.

When the appeal from the order of the Utilities Commission in the instant case was duly prosecuted and presented to the Superior Court, the extent of the review was limited to the record as certified and to the questions of law therein presented. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order of the Utilities Commission brought in question.

Here it appears the trial judge made findings of fact and upon the findings so made rendered judgment that the order of the Commission was null and void.

Without undertaking at this time and in this state of the record to determine the questions sought to be presented for decision, we deem it proper to remand the case to the Superior Court for judgment on the questions of law presented by the record as certified, or for remand to the Utilities Commission for additional findings if any may be deemed necessary.

Remanded.

PARKER, J., took no part in the consideration or decision of this case.

INTERNATIONAL MINERALS AND METALS CORPORATION v. BEN WEINSTEIN AND ALEXANDER WEINSTEIN, INDIVIDUALLY AND TRADING AS WEINSTEIN HIDE & METAL COMPANY.

(Filed 26 November, 1952.)

1. Contracts § 10—

Where the agreement between the parties does not specify the time of performance, the law prescribes that the act must be performed within a reasonable time.

2. Same—Supplemental agreement held to extend time for performance for reasonable period.

Defendants, by written contract, agreed to deliver a certain quantity of scrap metals to plaintiff at a specified price by a specified time, with further provision that upon failure of delivery, plaintiff might buy in the open market at any time within sixty days after delivery was due, and charge defendants with the difference in cost. Thereafter by supplemental oral agreement, made within sixty days after delivery was due, defendants agreed to ship the metals in accordance wtih the terms of the original contract as soon as defendants could dispose of certain other business matters, and plaintiff, in reliance thereon, did not buy the metals in the open market within the sixty day period. Over four months thereafter, plaintiff notified defendants that plaintiff would purchase the metals in the open

market if delivery was not made within twenty-one days, and defendants notified plaintiff they would not deliver the metals. *Held:* Defendants' contention that the oral agreement modified the original contract so as to make delivery due at the convenience of defendants is untenable, but the oral agreement only extended the time for delivery for compliance by defendants within a reasonable time under the circumstances outlined in the oral agreement, and where plaintiff purchases in the open market thereafter, he is entitled to recover of defendants the difference between the contract price and the market price.

3. Contracts § 18—

Notification by the purchaser that he would accept delivery if made by a specified date in accordance with an oral supplemental agreement extending the time for delivery for a reasonable period after the delivery date specified in the original contract, *held* not to constitute a waiver of the seller's breach in failing to make delivery in accordance with the original contract as modified.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Carr, J.*, March Term, 1952, of WAKE.

Civil action to recover the difference between the market and contract price of certain materials which the defendants agreed to deliver to the plaintiff but failed to do so.

The plaintiff and defendants entered into a written contract dated 1 May, 1948, by the terms of which the defendants agreed to sell and ship one carload of scrap metal, consisting of ten tons of assorted scrap copper and ten tons of automobile radiators, to the plaintiff within thirty days. Specifications were agreed upon, and the price the plaintiff was to pay for the various types of scrap copper and the other materials was set out in the contract.

The contract also provided that if the defendants failed to ship the materials specified in the contract within the time prescribed, that the plaintiff should have the right to buy like materials in the open market at any time within sixty days after delivery was due, and to charge the defendants with the difference in cost in the event it was compelled to pay a higher price in the open market than that agreed upon in the contract. Delivery was due 31 May, 1948, but was not made.

Thereafter, it is alleged by the plaintiff that the plaintiff's agent and the defendants entered into a supplemental oral agreement on or about 11 June, 1948, whereby the defendants agreed and promised to ship the materials contracted for in accordance with the terms of the original contract as soon as the defendants could dispose of certain other matters of business in which they were then engaged; that the plaintiff relied on said promise and agreement and did not buy in the materials contracted for within the sixty-day period set by the terms of the original contract; that during the summer and early fall of 1948 the defendants continued

to promise and agree to ship the materials contracted for, and not until 25 October, 1948, did the defendants notify the plaintiff through its agent that they would not ship the materials.

Plaintiff offered testimony tending to support the allegations of its complaint including the amendments thereto. On 25 October, 1948, the plaintiff notified defendants by registered letter that unless shipment of the materials called for in the original contract was made by 15 November, 1948, the plaintiff would buy such materials in the open market and charge the defendants with the difference between the contract price and the price it had to pay. The defendants did not ship the materials and the plaintiff went into the open market on 17 November, 1948, and purchased such materials at a cost of $1,075 greater than the contract price.

The court submitted the following issues which were answered by the jury as indicated:

"1. Did the plaintiff and the defendants enter into a supplemental oral contract by which the time for the delivery of the scrap material described in the written contract was extended, as alleged in the Amended Complaint?

"Answer: Yes.

"2. If so, did the defendants breach said written contract and said supplemental oral contract, as alleged in the Complaint and the Amended Complaint?

"Answer: Yes.

"3. What damage, if any, is the plaintiff entitled to recover of the defendants?

"Answer: 1075.00."

From the judgment entered on the verdict the defendants appeal and assign error.

Ehringhaus & Ehringhaus for defendants, appellants.

Smith, Leach & Anderson for plaintiff, appellee.

DENNY, J. The only assignment of error brought forward and argued in the appellants' brief is based upon their exceptions to the failure of the court below to sustain their motion for judgment as of nonsuit.

The defendants contend that the "supplemental oral agreement" left the delivery date indefinite, and converted the original contract into one for the purchase and sale of materials at a stated price, delivery to be made at the convenience of the seller. We do not concur in this view.

We construe the supplemental oral agreement to do nothing more than to extend the time of delivery temporarily and to assure the defendants that during the time of such extension, the plaintiff would not exercise its right to go into the open market and purchase the materials. The

plaintiff's evidence tends to show that each time the defendants were contacted prior to 25 October, 1948, they promised to make shipment. But, on the above date, the plaintiff's agent was informed by the defendants that shipment would not be made until the market went down to where it was when the contract was made. There is nothing in the alleged supplemental oral agreement, or in the testimony of the defendants, to indicate that the time for delivery was in any way made dependent upon the status of the market. Neither is there anything in the evidence offered by the defendants to indicate that the failure to make delivery was due to the other business matters in which the defendants were engaged when the time for delivery was extended.

Manifestly, it was the duty of the defendants to act with reasonable promptness and diligence to comply with the terms of their contract. And when the plaintiff extended the time for delivery for the reasons stated, it was under no obligation to wait any longer than was reasonably necessary under the existing circumstances for the defendants to comply with their agreement. "If no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time." *Trust Co. v. Insurance Co.,* 199 N.C. 465, 154 S.E. 743; *Erskine v. Motors Co.,* 185 N.C. 479, 117 S.E. 706, 32 A.L.R. 196; *Winders v. Hill,* 141 N.C. 694, 54 S.E. 440. Certainly the defendants are in no position to complain because they were extended additional time to carry out the terms of their contract. This is particularly true since the extension of time was given in response to their promise to ship the materials. Neither can it be seriously contended that the plaintiff did not give the defendants a reasonable time in which to ship the materials after the extension of time for shipment was given on 11 June, 1948.

We hold that when the defendants informed the agent of the plaintiff that they would not ship the materials described in the contract until the market fell to where it was when the contract was made, such action constituted a breach of the original contract and of the supplemental oral agreement. And the fact that the plaintiff notified the defendants that the materials contracted for would be accepted if shipped prior to 15 November, 1948, did not constitute a waiver of the breach, if the materials were not shipped, so as to prevent the plaintiff from going into the open market at any time within sixty days from and after 25 October, 1948, and purchasing the materials as it was authorized to do under the terms of the original contract.

The case was submitted to a jury in a trial free from prejudicial error. And the facts and contentions of the respective parties were considered by the jury, and the issues answered against the defendants. The verdict will be upheld.

No error.

PARKER, J., took no part in the consideration or decision of this case.

E. A. RAY v. THE HOSPITAL CARE ASSOCIATION, INCORPORATED.

(Filed 26 November, 1952.)

1. Insurance § 13a—

Where a contract of insurance does not contravene public policy or positive law and the language employed is plain and unambiguous, the court must construe and enforce the contract as it is written, regardless of whether such action works hardship on the one party or the other.

2. Insurance § 38—

Where both the policy of hospital care insurance and the agreement for reinstatement after its lapse for nonpayment of premiums stipulate that the policy as reinstated should not cover subsequent hospitalization for a physical condition existing prior to reinstatement, such provision is not in contravention of public policy or positive law and must be enforced to exclude liability of insurer for hospitalization as a result of a physical condition existing prior to the date of reinstatement.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Burgwyn, Special Judge,* at March Term, 1952, of MECKLENBURG.

Civil action upon a hospital and medical care certificate tried in the Superior Court upon the appeal of the defendant from an adverse judgment of a justice of the peace.

After the appeal had been docketed in the Superior Court, the parties agreed upon the facts and submitted the cause to the presiding judge upon a case agreed. The essential facts appear in the numbered paragraphs set forth below.

1. The defendant, the Hospital Care Association, Incorporated, is a nonprofit hospital service corporation which issues hospital and medical care certificates for stipulated dues.

2. On 1 November, 1947, the defendant issued to the plaintiff, E. A. Ray, a hospital and medical care certificate providing for payment by the defendant of specified amounts to hospitals and physicians furnishing hospital and medical services to the plaintiff, or his wife, Ethel F. Ray, or his daughter, Joyce Anne Ray.

3. The certificate was issued in consideration of quarterly dues of $12.00 payable in advance, and specified that all rights under it should be immediately forfeited by a "failure to make payment of dues on or before (their) due date."

4. Section XI of the certificate contained these relevant provisions respecting lapses and reinstatements: "Any . . . certificate which shall have terminated in any manner or for any cause may be reinstated by this Association, in its sole discretion, upon such terms and conditions as it may determine; and . . . the Association shall not be liable for a condition that existed or had its inception prior to the date of the application for reinstatement unless the facts relating to such condition shall have been set forth in such application for reinstatement."

5. The certificate lapsed because of the plaintiff's failure to pay the quarterly dues which became due on 1 November, 1949.

6. Subsequent to that event, to wit, on 15 December, 1949, the plaintiff applied to the defendant in writing for reinstatement of the certificate. The application stated that the reinstatement of the certificate, if permitted by the Association, should be upon the terms and conditions set forth in Section XI of the certificate; that the plaintiff understood that the Association should not be liable for a condition that existed or had its inception prior to the date of the application for reinstatement unless the facts relating to such condition were set forth in the application; and that the plaintiff, his wife, and daughter were in good health and free from conditions which might require hospital or medical care. The plaintiff tendered to the defendant with his application for reinstatement the sum of $12.00 to be applied to the payment of dues for the quarter beginning on 1 November, 1949, in the event the defendant reinstated the certificate.

7. On 16 January, 1950, the defendant approved the application of the plaintiff for reinstatement of the certificate "effective November 1, 1949, subject to the provisions of . . . (the) . . . certificate"; notified the plaintiff of that fact, and "invited . . . (his) . . . attention" to the provisions of the certificate relating to the reinstatement of a lapsed certificate; and applied the $12.00 tendered by the plaintiff to the dues for the quarter beginning 1 November, 1949.

8. Subsequent to the reinstatement of the certificate, to wit, from 17 July to 2 August, 1950, the plaintiff's wife required and received hospital and medical care for conditions that existed prior to 15 December, 1949, the date of the application of the plaintiff for the reinstatement of the certificate.

9. The defendant disclaimed all liability under the certificate for the expenses of the hospital and medical care furnished to the plaintiff's wife for the conditions specified in the preceding paragraph. As a consequence of this disclaimer, the plaintiff was compelled to pay such expenses himself. He thereupon brought this action against the defendant to compel it to reimburse him for his outlay on the theory that the defendant was liable for the expenses under the contract embodied in the certificate

and that its denial of liability for them constituted a breach of such contract. The plaintiff and the defendant agree that "the plaintiff is entitled to recover . . . the sum of $197.00 plus the court costs . . . in this action . . . if . . . (he) . . . is entitled to recover" at all.

When the cause was heard upon the case agreed, the judge rendered a judgment in favor of the plaintiff and against the defendant for $197.00 with interest and costs, and the defendant excepted and appealed, assigning the entry of such judgment as error.

Charles Truett Myers and John F. Ray for plaintiff, appellee.
Claude V. Jones for defendant, appellant.

ERVIN, J. The appeal presents this single question: Did the contract between the plaintiff and the defendant obligate the defendant to make payments for hospital and medical care received by the plaintiff's wife subsequent to the reinstatement of the certificate for conditions that existed prior to the date of the application for reinstatement?

This rule is well settled: Where a contract of insurance does not contravene public policy or positive law and the language employed in it is plain and unambiguous, the court must construe and enforce the contract as it is written, regardless of whether such action works hardship on the one party or the other. *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295; *Indemnity Co. v. Hood*, 226 N.C. 706, 40 S.E. 2d 198; *Bailey v. Insurance Co.*, 222 N.C. 716, 24 S.E. 2d 614, 166 A.L.R 826; *Ford v. Insurance Co.*, 222 N.C. 154, 22 S.E. 2d 235; *Person v. Tyson*, 215 N.C. 127, 1 S.E. 2d 367; *Sanderlin v. Insurance Co.*, 214 N.C. 362, 199 S.E. 275; *Whitaker v. Insurance Co.*, 213 N.C. 376, 196 S.E. 328; *Roberts v. Insurance Co.*, 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310; *Lexington v. Indemnity Co.*, 207 N.C. 774, 178 S.E. 547; *Jolley v. Insurance Co.*, 199 N.C. 269, 154 S.E. 400; *Gant v. Insurance Company*, 197 N.C. 122, 147 S.E. 740; *McCain v. Ins. Co.*, 190 N.C. 549, 130 S.E. 186; *Power Co. v. Casualty Co.*, 188 N.C. 597, 125 S.E. 123; *Penn v. Insurance Co.*, 158 N.C. 29, 73 S.E. 99, 42 L.R.A. (N.S.) 593.

The contract between the plaintiff and the defendant does not contravene public policy or positive law. It is evidenced by both the certificate itself and the agreement of the parties reinstating the certificate subsequent to its lapse. The certificate and the agreement declare in plain and unambiguous language that the defendant "shall not be liable for a condition that existed or had its inception prior to the date of the application for reinstatement unless the facts relating to such condition shall have been set forth in such application for reinstatement." The case agreed shows that the expenses involved in this litigation were incurred for hospital and medical care furnished the plaintiff's wife subsequent to the

reinstatement of the certificate for conditions that existed prior to the date of the application for reinstatement, and that the facts relating to such conditions were not set forth in the application for reinstatement.

These things being true, the contract between the plaintiff and the defendant explicitly and plainly exempts the defendant from liability on the claim now asserted by the plaintiff.

This conclusion necessitates a reversal of the judgment. The plaintiff has no just cause for complaint because it is axiomatic in the law of contracts that "as a man consents to bind himself, so shall he be bound." *Whitaker v. Insurance Co., supra.*

The judgment is

Reversed.

PARKER, J., took no part in the consideration or decision of this case.

NEW HANOVER COUNTY AND C. R. MORSE, CITY-COUNTY TAX COLLECTOR, v. ABEL HOLMES AND WIFE, IF MARRIED.

(Filed 26 November, 1952.)

1. Appeal and Error § 31c—

Where judgment is rendered during the December Term of a Superior Court, an appeal to the following Fall Term of the Supreme Court is too late.

2. Taxation § 40h: Dower § 1—

Inchoate dower cannot deprive the purchasers at a tax foreclosure from the present right of possession.

3. Trial § 13: Appeal and Error § 2—

Additional evidence may not be introduced after judgment, and no appeal lies from the denial of a party's motion to be permitted to introduce such evidence.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Burgwyn, Special Judge,* February Term, 1952, NEW HANOVER. Appeal dismissed.

Tax foreclosure action in which both defendants were duly served with summons. They failed to answer and the property was duly sold. Final order was entered 27 April 1951. The cause was heard on two different occasions on motions made by defendants after final judgment, and also on motion of the purchasers for a writ of possession. The defendants excepted to the orders entered and appealed.

G. C. McIntire and Isaac C. Wright for plaintiff appellees.

Rodgers & Rodgers for defendant appellants.

PER CURIAM. At the December Term 1951, Burney, J., denied the male defendant's motion to vacate the decree of foreclosure and the deed executed pursuant thereto. The appeal from this order comes too late. *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335.

At the February Term, 1952, Burgwyn, Special Judge, entered an order directing that a writ of possession issue. *Feme* defendant excepted. The exception is without merit. *Feme* defendant's inchoate right of dower, if not barred by the judgments heretofore entered, does not deprive the purchasers of the present right of possession.

On 17 May 1952, Morris, J., denied defendants' motion to be permitted to supplement the testimony at the prior hearing by filing additional documentary evidence "for further consideration." No appeal lies from said order. Indeed, the judge was without authority to augment the evidence at that stage of the proceedings.

The defendants have had their day in court. They were accorded a full opportunity to be heard before the order of foreclosure was entered. Their present unfortunate predicament is due to their own negligence from which the Court can afford them no relief.

Appeal dismissed.

PARKER, J., took no part in the consideration or decision of this case.

A. L. WILSON v. GEIGY & COMPANY, A CORPORATION.

(Filed 26 November, 1952.)

Damages § 1a—

Compensatory damages may not be recovered for damage to a tobacco crop when plaintiff's evidence fails to establish any causal connection between the dust from defendant's chemical plant which settled on the crop and injury to the crop.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Nettles, J.,* at March Term, 1952, of MOORE.

Civil action to recover for damage to plaintiff's tobacco crop allegedly caused by actionable negligence of defendant in that it negligently permitted "highly toxic and poisonous dust including benezine hexachloride-dust," emanating from the manufacture of insecticide at its plant, to

escape and spread to and over plaintiff's nearby field of growing tobacco causing injury thereto.

Defendant denies, in material aspects, the allegations of the complaint.

Upon trial in Superior Court plaintiff offered evidence tending to show these facts: In late July and early August, 1949: (1) Fogs of dust from defendant's chemical plant spread over and settled on plaintiff's tobacco crop, and "a very strong odor of benezine hexachloride" was noticed. (2) Plaintiff had an airplane dust the tobacco—blowing dust on it. (3) There was a drought. But there is no other evidence as to the kind or quality of dust emanating from defendant's plant, or blown from the airplane. The tobacco "burned up and rotted off."

And plaintiff's expert witness gave this pertinent summary: "There were two types of trouble there. One was the killing of the leaves, and the other was the odor on the tobacco, the bad smell. The injury was not evident to me. I couldn't be sure just what caused it. And there was one more factor and it was what per cent should be attributed to various factors."

Motion of defendant for judgment as of nonsuit, entered at close of plaintiff's evidence, was allowed—and from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

Robert L. McMillan, Jr., and Herbert F. Seawell, Jr., for plaintiff, appellant.

Spence & Boyette for defendant, appellee.

PER CURIAM. Taking the evidence offered by plaintiff in the light most favorable to him, and giving to him the benefit of every reasonable intendment upon the evidence, and reasonable inference to be drawn therefrom, as is done when considering a demurrer thereto under G.S. 1-183, the evidence is insufficient to make out a case of actionable negligence. The element of causal relation between the dust from defendant's plant and the injury to plaintiff's tobacco crop is missing. The establishment of that relation may not be based upon speculation or conjecture.

Hence the judgment below is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

GEORGE W. FLEMING, MRS. MILDRED F. POWELL AND C. S. ROYAL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 December, 1952.)

1. Railroads § 7—

In an action against a railroad company to recover for timber destroyed by fire, evidence tending to show that fire was set out by defendant's engine on defendant's right of way, which had been allowed to remain in a foul condition for a considerable time, *is held* insufficient in the absence of evidence that the fire on the right of way spread to and burned plaintiffs' timber, and when it appears that the engine set fire to the right of way at a point some eight miles distant from plaintiffs' property, and there is no evidence that the fire on the right of way spread to plaintiffs' land, nonsuit is proper.

2. Trial § 23a—

While the evidence must be considered in the light most favorable to plaintiff on motion to nonsuit, the evidence must tend to prove the fact in issue as a fairly logical and legitimate deduction, and evidence which raises merely a speculation, conjecture or possibility is insufficient to justify the submission of the issue to the jury.

3. Appeal and Error § 39e—

Where plaintiffs' witnesses in an action against a railroad company to recover for the destruction of timber on plaintiffs' land by fire, have testified in detail as to the condition of defendant's right of way at the time, the exclusion of a photograph of the right of way taken some two years after the fire and competent only for the purpose of illustrating the witnesses' testimony on the theory that it showed conditions similar to those existing at the time of the fire, cannot be held prejudicial.

4. Evidence § 31½—

Where deposition of a witness is duly taken with full opportunity of cross-examination by the adverse party, with no objection before trial, and the witness is out of the State at the time of trial, exception to the deposition at the trial is without merit. G.S. 8-82.

5. Railroads § 7—

In an action against a railroad company to recover for timber destroyed by fire, an instruction that it would constitute negligence on the part of defendant to permit inflammable and combustible material to remain on its right of way for a period of several months, will not be held prejudicial as requiring an unreasonable length of time to fix the railroad company with notice when all the evidence is to the effect that defendant had done nothing to remedy the condition of its right of way for a much longer period of time.

6. Same—

In an action against a railroad company to recover for timber destroyed by fire, an instruction in conformity with the evidence that if defendant's engine was equipped with proper spark arrester but sparks nevertheless escaped and set fire to inflammable matter which had been allowed to remain on the right of way, defendant would be liable for the fire, will not

be held erroneous as equivalent to an instruction that if the engine was not equipped with spark arrester defendant would not be responsible for the fire.

7. Same—

A railroad company is not an insurer against loss by fire originating from sparks from its engines, but may be held liable therefor only on the ground of negligence, with the burden on plaintiff to prove such negligence by the preponderance of the evidence.

8. Evidence § 7e—

A *prima facie* case, as distinguished from a presumption, does not affect the burden of proof, but merely constitutes evidence sufficient to justify, but not compel, a favorable verdict, and places the adverse party in the position of having to go forward with the evidence or risk such adverse finding.

9. Railroads § 7—

In an action against a railroad company to recover for loss of timber by fire, evidence that the fire originated on defendant's right of way from sparks emitted by defendant's engine, makes out a *prima facie* case, placing defendant in the position of having to go forward with the evidence or risk an adverse verdict, but does not create a presumption of fact that defendant's engine was not handled by a skillful engineer in a reasonably careful manner.

10. Same—Instruction in this case held not prejudicial in view of evidence and theory of trial.

Where plaintiff's evidence tends to show that the fire which burned timber on his land originated on defendant's right of way from sparks emitted by defendant's engine, and that the right of way had been allowed to remain in a foul condition for a long period of time, but there is no evidence that the engine was improperly handled, but to the contrary all the evidence is to the effect that the train was a short passenger train traveling over level ground on approximate schedule, an instruction that there was no evidence from which the jury could properly find that the engine was not operated by a skillful engineer in a reasonably careful manner, cannot be held prejudicial. G.S. 1-180.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Morris, J.*, April Term, 1952, of NEW HANOVER. No error.

This was an action to recover damages for the burning over of plaintiffs' lands alleged to have been caused by fire negligently set out by defendant's locomotive. Plaintiffs' title to the lands described was admitted.

Plaintiffs alleged two causes of action. The first cause of action was for damages to a portion of plaintiffs' lands caused by fire set out by defendant's locomotive 11 April, 1950, and the second cause of action was for damages to other portions of plaintiffs' lands caused by fire set out 8 April, 1950.

As to the first cause of action there was a verdict for the defendant, and on the second cause of action the court rendered judgment of involuntary nonsuit at the close of plaintiffs' evidence.

From the judgment on the verdict and the court's allowance of the motion to nonsuit as to the second cause of action, the plaintiffs appealed.

John Bright Hill and Isaac C. Wright for plaintiffs, appellants.

Poisson, Campbell & Marshall for defendant, appellee.

DEVIN, C. J. The line of railway operated by the defendant Atlantic Coast Line Railroad Company known as the A. & Y. Branch passes through plaintiffs' large area of land, some 5,000 acres, in a generally north and south direction. Plaintiffs allege that a large portion of their land was burned over as the result of fires set out by defendant's coal burning locomotives on two different occasions, and accordingly in their complaint state the causes of action for damages resulting therefrom separately. The date of the fire constituting the basis of the cause of action first stated was 11 April, 1950, and that of the fire causing damage to other portions of plaintiffs' land, stated in the second cause of action, was 8 April, 1950.

Plaintiffs appeal from an adverse judgment as to both causes of action. The judgment as to the first cause of action was predicated on the verdict of the jury, and that as to the second cause of action followed the allowance of defendant's motion for judgment of nonsuit.

1. Coming then first to the consideration of the judgment of nonsuit as to the second cause of action, we reach the conclusion after a careful examination of the record that the ruling of the trial judge in sustaining the defendant's motion for judgment of nonsuit should be upheld.

There was evidence tending to show that the fire on 8 April complained of was set out by one of defendant's locomotives; that it caught on defendant's right of way; that there was on the right of way dry grass and straw and other combustible material, and that the fire which was thus originated spread eastward from the railroad and subsequently due to a change in direction of the wind burned westward; and that it was found later that portions of plaintiffs' land were burned over. *Gainey v. R. R.*, 235 N.C. 114, 68 S.E. 2d 780; *Betts v. R. R.*, 230 N.C. 609, 55 S.E. 2d 76. But the testimony offered by the plaintiffs does not show the continuous progress of the fire from the point where it originated on defendant's right of way so as to afford substantial evidence that the fire thus caused extended to and burned over plaintiffs' land. The point of origin of this fire was identified as having been near Montague Station, just north of Croom's crossing. Montague Station according to plaintiffs' brief was eight or ten miles north of Fishing Creek which it was testified was the

boundary of plaintiffs' land. From an examination of the record we do not think the evidence warrants the conclusion that the fire of 8 April reached the land of the plaintiffs.

While the evidence on a motion to nonsuit must be considered in the light most favorable to the plaintiff (*Nash v. Royster,* 189 N.C. 408, 127 S.E. 356), there must be some legal evidence of every material fact necessary to support the action before the plaintiff is entitled to have his case submitted to the jury. *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406. The evidence must do more than raise a suspicion, or suggest a possibility. The evidence offered must reasonably tend to prove the fact in issue as a fairly logical and legitimate deduction therefrom. Stansbury, sec. 210. "The plaintiff is required to offer evidence which reasonably tends to prove the facts essential to the maintenance of his case." *Smith v. Duke University,* 219 N.C. 628, 14 S.E. 2d 643.

2. In the cause of action designated in the complaint as their first cause of action the plaintiffs sought to recover damages for the burning over of 1,600 acres of land near the station of Nonesta by a fire alleged to have been set out by defendant's locomotive on 11 April, 1950. The issue addressed to the question of the defendant's negligence in causing this fire was submitted to the jury and answered in favor of the defendant. Judgment was entered in accord with the verdict.

The plaintiffs now seek to avoid the adverse decision on this cause of action on the ground that erroneous rulings of the trial judge constituted a material factor in influencing the verdict and bringing about the result of which they complain. In their appeal they have brought forward numerous assignments of error based on exceptions duly noted at the trial.

The plaintiffs offered a number of photographs purporting to show portions of the land burned over and the character of the growth thereon. All of these, except the one marked J, were admitted, but only for the purpose of illustrating the testimony of the witnesses. Whether or not this restriction upon the use of the photographs as evidence be regarded as meaningless, the ruling of the trial court in this instance was in accord with the uniform decisions of this Court. *S. v. Matthews,* 191 N.C. 378, 131 S.E. 743; Stansbury, sec. 34, and cases cited. Plaintiffs, however, noted exceptions to the exclusion of Photograph "J." This purported to show the condition of the right of way at the point where plaintiffs contended the fire originated, but it was taken more than two years after the fire. Plaintiff offered to show that the condition of the right of way just before the fire was similar to that shown in the photograph. If it be conceded that this photograph should have been admitted under the same rule as the others to illustrate the testimony of the witnesses, we do not perceive that its exclusion was prejudicial. Plaintiffs had offered several witnesses who testified that there was on the right of way an accumulation

of grass and broomstraw, and that some of the broomstraw was 2½ feet high. Hence cumulative evidence, for the purpose of illustration only, contained in a picture not of the condition of the right of way as it existed before the fire but of a similar condition existing two years later, would be only in addition to the substantive evidence of the witnesses to prove the same fact. Nor does it appear in the record how the witness would have used the photograph to explain his testimony. *Woods v. Roadway Express, Inc.*, 223 N.C. 269, 25 S.E. 2d 856. Besides the defendant's defense was based largely on testimony that the fire originated elsewhere and was observed moving toward the railroad from the west before the advent of the locomotive. The ruling of the court in this respect was not of sufficient moment to warrant a new trial on that ground.

Plaintiffs' exception to the deposition of the witness Venters is without merit. The witness at the time of the trial was in Pittsburgh, Pennsylvania, and counsel had had full opportunity to cross-examine him, and had done so. There was no objection to the deposition noted before trial. G.S. 8-82.

Plaintiffs noted exception to the judge's instruction to the jury that it would constitute negligence on the part of the defendant to permit "inflammable and combustible material to be and remain thereon (on right of way) for a period of several months and did nothing to remove the same." While ordinarily it would not require "several months" to fix the railroad company with notice of the foul condition of its right of way, the instruction here complained of related to the testimony that nothing had been done to remove combustible matter from the right of way since December of the preceding year. *Herring v. R. R.*, 189 N.C. 285 (291), 127 S.E. 8.

The plaintiff excepted to the following portion of the court's charge to the jury:

"If you find said engine was equipped with proper spark arresters, and was in a reasonably good state of repair, but that sparks did escape therefrom at the point in question and upon the right of way of the defendant, and caught it on fire, and that the right of way of the defendant was at the time and at the place in question in a foul condition by reason of the negligence of the defendant, and that the fire so caused or originated upon the right of way of the defendant spread therefrom to the lands of the plaintiffs, and damaged said lands, it will be your duty to answer the first issue YES; if you are not so satisfied, it will be your duty to answer it No."

It is suggested that the effect of the last clause of this instruction was to tell the jury if they found the engine was not equipped with proper spark arrester and set out fire on a foul right of way they should answer the issue No. But we think the jury understood the meaning of this

instruction, in keeping with the tenor of the charge throughout, that if they found the engine was equipped with proper spark arrester and were not satisfied that sparks escaped therefrom and ignited combustible matter negligently left on the right of way they should answer the issue No.

The plaintiffs also excepted to the following portion of the judge's charge:

"I instruct you, gentlemen of the jury, there is in this case no evidence upon which you may properly find that the said engine was not operated by a skillful engineer, and in a reasonably careful manner or way."

Plaintiffs urge the view that a finding that the burning originated from fire thrown off from defendant's engine raised a presumption of fact that the engine was not properly equipped and properly handled by a skillful engineer, and that this presumption presented a matter for the consideration of the jury, and the judge thus expressed an opinion on the weight of the evidence in violation of G.S. 1-180. This requires consideration of the effect of the evidence offered by plaintiffs tending to show that the fire complained of was caused by sparks emitted from defendant's engine.

The plaintiffs based their action upon the allegation that the fire which burned over their land resulted from sparks emitted from defendant's engine, and that this was due to the negligence of the defendant in failing to have its engine equipped with proper and effective spark arresters and to the improper handling of the engine, as well as to the defendant's failure to keep and maintain its right of way reasonably free and clear of inflammable and combustible matter. It is well settled that a railroad company using coal burning engines as the motive power for its trains is not an insurer against loss to adjoining property occasioned by the escape of fire from its engines, and may be held liable therefor only on the ground of negligence. And where negligence is alleged as the basis of recovery of damages for loss by fire the burden of proof rests upon the plaintiff to establish such negligence by the preponderance of the evidence. However, where liability is sought to be imposed upon the railroad company for damages caused by fire set out by the company's locomotive on the ground, or as one of the grounds, that the locomotive at the time was not properly equipped with reasonably effective spark arresters in good condition, and that the engine was not operated in a careful manner, proof of the fact that the fire which burned over plaintiffs' land was caused by sparks emitted from the company's locomotive would make out a *prima facie* case, and it would then devolve upon the railroad company to rebut the *prima facie* effect of such evidence by showing that the locomotive was properly equipped with spark arresters which were in general and approved use and in good condition, and that the locomotive was handled with proper care, or incur the risk of an adverse verdict.

There are expressions in earlier decisions of this Court in which the *prima facie* effect of proof of fire caused by the emission of sparks from railroad locomotives is referred to as a presumption of fact which would of itself constitute evidence of negligence in the respects mentioned (*Aycock v. R. R.*, 89 N.C. 321; *Blue v. R. R.*, 117 N.C. 644, 23 S.E. 275; *Kornegay v. R. R.*, 154 N.C. 389, 70 S.E. 731; *Currie v. R. R.*, 156 N.C. 419, 72 S.E. 488; *Stemmler v. R. R.*, 169 N.C. 46, 85 S.E. 21; *Williams v. Mfg. Co.*, 177 N.C. 512, 99 S.E. 370; *Denny v. R. R.*, 179 N.C. 529, 103 S.E. 24; *Matthis v. Johnson*, 180 N.C. 130, 104 S.E. 366), but we think the rule is more accurately stated by *Justice Hoke* in *McDowell v. R. R.*, 186 N.C. 571, 120 S.E. 205, as follows: "The question presented has been the subject of extended discussion in this Court, and there has been some variety of decision concerning it, but it is the settled ruling of the later and prevailing cases that where it is shown that the property of a claimant has been destroyed by fire communicated from defendant's train, that will make a *prima facie* case carrying the issue of liability to the jury, and of itself and without more is sufficient to justify a verdict as for a negligent wrong. In numbers of the cases, particularly of the former time, it is said that the facts suggested raise a presumption of negligence, but, as shown in *Overcash v. Electric Co.*, 144 N.C. 572-582, and other cases, it is but evidence and termed presumptive only in the sense as stated, that it permits and justifies an inference of liability if the jury are thereby satisfied that a negligent wrong is established, and it should never have the effect of changing the burden of the issue by putting on the defendant, as was done in this instance, the burden of disproving the negligence charged, by the greater weight of the evidence."

And from 22 Am. Jur., at page 646, we quote: "But a more accurate expression of the rule, in the light of the authorities, is believed to be that when the plaintiff proves that sparks from a railroad locomotive set fire to his property, a *prima facie* case is presented, and it then devolves upon the railroad to rebut such *prima facie* case, and unless it does rebut the plaintiff's case, the plaintiff is entitled to recover without further proof."

What is meant by a *prima facie* case and its effect upon the production of proof has frequently been the subject of judicial discussion. *Royster v. Hancock*, 235 N.C. 110, 69 S.E. 2d 29; *Russ v. Tel. Co.*, 222 N.C. 504, 23 S.E. 2d 681; *Ferrell v. R. R.*, 190 N.C. 126, 129 S.E. 155; *McDaniel v. R. R.*, 190 N.C. 474, 130 S.E. 208; *Speas v. Bank*, 188 N.C. 524 (529), 125 S.E. 398; *McDowell v. R. R.*, 186 N.C. 571, 120 S.E. 205; *Page v. Mfg. Co.*, 180 N.C. 330, 104 S.E. 667; 59 A.L.R. 490; *Sweeney v. Erving*, 228 U.S. 233; *Continental Ins. Co. v. Chicago & N. W. Ry. Co.*, 97 Minn. 467.

The offering of sufficient evidence to make out a *prima facie* case does not affect the burden of proof. It only involves the risk of nonpersuasion.

S. v. Davis, 214 N.C. 787, 1 S.E. 2d 104. In *In re Will of Wall,* 223 N.C. 591, 27 S.E. 2d 728, it was said: "A presumption of fact used in the sense of an inference is a deduction from the evidence, having its origin in the well recognized relation between certain facts in evidence and the ultimate question to be proven." And in Wigmore on Evidence, sec. 2491, "A 'presumption of fact' in the loose sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact."

From *Gillett v. Traction Co.,* 205 Mich. 410, we quote: "It is now quite generally held by the courts that a rebuttable or *prima facie* presumption has no weight as evidence. It serves to establish a *prima facie* case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, without giving any evidential force to the presumption." This statement of the law was quoted with approval in *In re Will of Wall, supra,* and in *Jeffrey v. Mfg. Co.,* 197 N.C. 724 (727), 150 S.E. 503.

"The burden of proof in a civil action is not shifted when the plaintiff makes out a *prima facie* case, nor is the defendant required to offer evidence to rebut a *prima facie* showing, or to escape liability on such a showing. A *prima facie* case means, and means no more, than evidence sufficient to justify, but not to compel, an inference of liability, if the jury so find. It furnishes evidence to be weighed, but not necessarily to be accepted, by the jury. It simply carries the case to the jury for determination, and no more." *McDaniel v. R. R.,* 190 N.C. 474, 130 S.E. 208.

Here there was no evidence that the engine from which it was alleged the destructive fire escaped was improperly handled. On the contrary, the uncontradicted testimony was to the effect that this was a passenger engine drawing a train consisting of only two coaches, moving over a level countryside, on approximately schedule time, with no unusual strain to require unnecessary expulsion of sparks from smokestack or fire from the ashpan. Nor was there anything to indicate unskillfulness on the part of the engineer. Hence to instruct the jury that there was no evidence upon which they could properly find that the engine was not operated by a skillful engineer and in a reasonably careful manner, may not be held to constitute prejudicial error. There was sufficient evidence under the rule to carry the case to the jury, but the burden of the issue was at all times upon the plaintiffs.

The plaintiffs noted exception to the manner in which the court stated the contentions of the parties in several particulars, but an examination of the entire charge fails to disclose any unfairness, or to afford ground for serious complaint.

The plaintiffs brought forward in their appeal 49 assignments of error. We have examined each of these, whether herein discussed or not, and reach the conclusion that no error has been made to appear of sufficient

moment to warrant a new trial. In our opinion the record does not afford substantial ground which would justify us in disturbing the result.

No error.

PARKER, J., took no part in the consideration or decision of this case.

TROY BROWN, MRS. R. F. YOUNG, H. YOUNG, D. W. BEAUCHAMP AND J. F. ROBINSON, IN BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND RESIDENTS AND TAXPAYERS OF BUNCOMBE COUNTY WHO WISH TO MAKE THEMSELVES PARTIES, PLAINTIFFS, v. COKE CANDLER, GEORGE YOUNG, JOHN VANCE, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF BUNCOMBE COUNTY; DR. B. E. MORGAN, C. C. BELL, R. C. TORIAN, GLENN WEST AND JOHN M. JAMES, CONSTITUTING THE BOARD OF EDUCATION OF BUNCOMBE COUNTY, AND T. C. ROBERSON, SUPERINTENDENT OF SCHOOLS OF BUNCOMBE COUNTY, DEFENDANTS.

(Filed 10 December, 1952.)

1. Appeal and Error § 40c—

While the court's findings of fact upon the hearing for an interlocutory or preliminary injunction are reviewable on appeal, they will not be disturbed when the evidence justifies and requires such findings.

2. Schools § 6a—

While school authorities have the discretionary power to select sites for new schools and to change the location of existing schools, G.S. 115-85, their action in this regard may be enjoined when it is without authority of law, or when the selection of a proposed site is so clearly unreasonable as to amount to a manifest abuse of their discretion.

3. Same—

A "school district" is the equivalent of a "township" within the meaning of G.S. 115-61, and therefore the selection of a site by the school authorities for the sole high school within a school district is not forbidden by the statute even though it result in two high schools within the township.

4. Same—

Even though a county home be construed a county building within the purview of G.S. 153-9 (9), the statute refers to a change in the location of a county building, which embraces the space occupied by the building and such adjacent land as is reasonably required for its convenient use, and not to changes in the use of a part of the site of a county building, and therefore the statute does not preclude school authorities from selecting, without advertising, a part of the grounds of a county home for the site of a high school when its use would not interfere with the use of the remainder of the site for a county home.

5. Same—

The fact that the site for a high school selected by the school authorities in a mountainous section of the State may be approached only by a crooked highway and over a narrow bridge, and that there may be other satisfactory sites for such school, does not compel or support the conclusion that the school authorities abused their discretion in selecting the site.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Bobbitt, J.*, at March Term, 1952, of BUNCOMBE.

Suit by taxpaying electors for permanent injunction enjoining conveyance of county land by board of county commissioners to county board of education for use as site of new high school building heard on application of plaintiffs for an interlocutory or preliminary injunction to restrain such conveyance until the final trial of the suit.

The evidence presented to the judge on the hearing of the application was sufficient to establish the matters recited in the numbered paragraphs set forth below.

1. The Buncombe County Administrative Unit includes the Leicester School District and the West Buncombe School District. Each of these districts lies within the bounds of Leicester Township, which is one of the larger townships of Buncombe County, and contains a union school, *i.e.*, a school embracing both elementary and high school grades, which has been in continuous operation for a period of time antedating the year 1923.

2. The high school department of the West Buncombe School serves a portion of Leicester Township, and the high school department of the Leicester School serves the remainder of Leicester Township and the adjacent Township of Sandy Mush. Each of these high school departments is a standard high school.

3. In 1950, the Board of Education of Buncombe County, acting with the approval of the State Board of Education, adopted a comprehensive plan of organization covering the entire school system in the portion of Buncombe County committed to its charge. This plan of organization was devised by the Board of Education of Buncombe County upon a consideration of all relevant factors, and was based in large measure upon recommendations made to it by the State School Survey Panel and an independent advisory group of citizens of Buncombe County who surveyed and studied the educational needs of the school population of the Buncombe County Administrative Unit. The voters of Buncombe County have approved the issuance of county bonds to defray the expense of erection of the new school buildings required for the consummation of the plan of organization.

4. The plan of organization calls for the continued operation of the elementary school and high school departments of the union school in the Leicester School District; the use of all the existing buildings in the West Buncombe School District for elementary school purposes; and the erection of a new high school building at a new site in the West Buncombe School District to serve the high school children residing in the West Buncombe School District and portions of three other school districts lying outside the bounds of Leicester Township. Under the plan of organization, the new high school building to be erected in the West Buncombe School District is to house a consolidated standard high school to be known as the West Buncombe Consolidated High School.

5. Subsequent to the adoption of the plan of organization covering all of the schools in the Buncombe County Administrative Unit, the Board of Education of Buncombe County, acting with the approval of the State Board of Education, selected approximately 30 acres of land lying within the bounds of the West Buncombe School District as the site for the West Buncombe Consolidated High School building. In making the selection, the Board of Education of Buncombe County accepted a recommendation made to it by an advisory committee composed of residents of all the areas to be served by the West Buncombe Consolidated High School, who had been requested "to suggest the most suitable location for the site of the new consolidated high school."

6. The 30 acres chosen as the site for the West Buncombe Consolidated High School building are a part of a tract of 177 acres owned by Buncombe County in fee simple and known as the "Old County Home Property." Subsequent to the event described in paragraph 5, the Board of Commissioners of Buncombe County and the Board of Education of Buncombe County entered into a contract whereby the board of county commissioners has agreed to convey the 30 acres to the county board of education in fee simple for use as the site for the new high school building, and whereby the county board of education has promised to pay the board of county commissioners a stipulated price for them. These boards will forthwith carry out their contract unless they are enjoined by the court from so doing. No publication of any notice of the proposed conveyance has been made.

7. The Buncombe County Home for the Aged and Infirm was located on the 177-acre tract until 1946, when the old county home building was condemned by the State Commissioner of Insurance and razed to the ground by the board of county commissioners. Since that time the Board of Commissioners of Buncombe County has maintained the county home for the aged and infirm in a building of modern brick construction commonly called the Boys' Reformatory Building on account of its former use. This structure is half a mile distant from the spot occupied in times

past by the old county home building, and stands on a tract of 100 acres owned by Buncombe County in fee simple and known as the Brookshire Land. The 177-acre tract and a portion of the Brookshire Land are now used as a county farm to produce food for the inmates of the county home and the county jail. The county home is under the direction of a county home superintendent, and the county farm is under the management of a county farm supervisor. The operations are separate in all respects. The 30 acres do not embrace the spot formerly occupied by the old county home building, and their "sale and conveyance will not affect the desirability or usefulness of the present county home site."

On 23 February, 1952, the plaintiffs, who are taxpaying citizens and residents of Buncombe County, brought this action against the defendants Coke Candler, George Young, and John Vance, constituting the Board of Commissioners of Buncombe County, and Dr. B. E. Morgan, C. C. Bell, R. C. Torian, Glenn West, and John M. James, constituting the Board of Education of Buncombe County, and T. C. Roberson, Superintendent of Public Instruction of Buncombe County, to obtain a permanent injunction enjoining the conveyance of the 30 acres by the board of county commissioners to the county board of education for use as the site of a building to house the West Buncombe Consolidated High School.

The complaint lays claim to the injunction sought on these alternative grounds: (1) That the statutes incorporated in G.S. 115-61 and subdivision 9 of G.S. 153-9 deny to the defendants the legal power to select and use the 30 acres as the site for the West Buncombe Consolidated High School; (2) that the location of the West Buncombe Consolidated High School on the 30 acres would be so clearly unreasonable as to amount to a manifest abuse of any discretionary power lodged in the school authorities to select a site for such school because the approach to the 30 acres is "over a narrow bridge . . . and a crooked highway" and because a satisfactory site for such school can be found in "the Beaverdam Ward of Asheville Township" or elsewhere in "that part of Buncombe County north of the French Broad River." The answers controvert the validity of each of these claims.

The plaintiffs applied to Judge Bobbitt for an interlocutory or preliminary injunction staying the proposed conveyance until the trial of the suit on its merits. After hearing the evidence presented to him by the parties, Judge Bobbitt found facts conforming to those stated in the seven numbered paragraphs set out above; concluded as matters of law upon such findings that the statutory provisions invoked by the plaintiffs do not deny to the defendants the legal power to select and use the 30 acres as the site for the West Buncombe Consolidated High School, and that the school authorities have not abused their discretion in selecting the 30 acres as the site for the West Buncombe Consolidated High School; and entered

an order refusing to grant the interlocutory or preliminary injunction sought by the plaintiffs. The plaintiffs excepted and appealed. They assert by their assignments of error that the facts found by the judge are contrary to the evidence; and that the conclusions of the judge and his resultant denial of the interlocutory or preliminary injunction are contrary to law.

Tom S. Garrison, Jr., and J. W. Haynes for plaintiffs, appellants.

Zebulon Weaver, Jr., Roy A. Taylor, and Don C. Young for defendants, appellees.

Attorney-General McMullan and Assistant Attorney-General Love for the State Board of Education, Amicus Curiae.

ERVIN, J. Since some of the assignments of error challenge the correctness of the findings of fact of the judge, we have reviewed these findings in conformity with the rule which obtains in such case on an appeal from an order granting or refusing an interlocutory or preliminary injunction. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 876. The review convinces us that the evidence presented to the judge in the court below both justifies and requires his findings of fact. As a consequence, we disallow the exceptions to the findings of fact, and take up the assignments of error which question the validity of the conclusions of law and the resultant order refusing the temporary injunction sought by the plaintiffs.

When all is said, it is obvious that the real purpose of the instant suit is to prevent the school authorities from effectuating their selection of the 30 acres as the site for the proposed West Buncombe Consolidated High School.

These propositions are well settled:

1. The Superior Court may enjoin the action of school authorities in selecting a site for a new school, or in changing the location of an existing school, when their action is without authority of law. *Kistler v. Board of Education,* 233 N.C. 400, 64 S.E. 2d 403; *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Davenport v. Board of Education,* 183 N.C. 570, 112 S.E. 246.

2. Although the law may confer upon school authorities the discretionary power to select a site for a new school, or to change the location of an existing school, the Superior Court may enjoin the selection of a site for a new school or the change of location of an existing school by such authorities when their action is so clearly unreasonable as to amount to a manifest abuse of their discretion. *Kistler v. Board of Education, supra; Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714; *Board of Education v. Lewis,* 231 N.C. 661, 58 S.E. 2d 725; *Atkins v. McAden, supra; Messer*

v. Smathers, 213 N.C. 183, 195 S.E. 376; *McInnish v. Board of Education,* 187 N.C. 494, 122 S.E. 182.

The statute now codified as G.S. 115-85 undoubtedly confers upon school authorities the general discretionary power to select sites for new schools and to change the locations of existing schools. *Feezor v. Siceloff, supra; Board of Education v. Lewis, supra; Atkins v. McAden, supra; Moore v. Board of Education,* 212 N.C. 499, 193 S.E. 732. The plaintiffs assert, however, that this general discretionary power is subject to certain limitations embodied in G.S. 115-61 and subdivision 9 of G.S. 153-9, which preclude the selection and use of the 30 acres as the site for the proposed West Buncombe Consolidated High School.

G.S. 115-61 is phrased as follows: "Since the cost of good high school instruction is too great to permit the location of small high schools close together, it shall be the duty of the county board, wherever the needs demand it, to locate not more than one standard high school in each township or its equivalent: Provided, it shall be discretionary with county boards of education to continue standard high schools in existence in 1923 contrary to the provisions of this section, and to establish such high schools in townships in which city schools are already located."

The plaintiffs lay hold on the fact that the plan of organization contemplates the continued operation of the standard high school constituting a part of the union school in the portion of Leicester Township lying within the bounds of the Leicester School District, and argue that the selection and utilization of the 30 acres as the site for the West Buncombe Consolidated High School will place "two . . . high schools in Leicester Township . . . in violation of . . . G.S. 115-61."

We will assume without so adjudging for the purpose of this particular controversy that G.S. 115-61 forbids the county board of education "to locate . . . more than one standard high school in each *township* or *its equivalent.*" This question arises on this assumption: What is the equivalent of a township? The term "township" was brought into North Carolina law by Sections 3, 4, 5 and 6 of Article VII of the Constitution of 1868. A "township" is a territorial and political subdivision of a county, and is established for the convenient exercise of some of the elementary functions of government. *Powers v. Thorn,* 155 Kan. 758, 129 P. 2d 254; *State v. Bone Creek Tp., Butler County,* 109 Neb. 202, 190 N.W. 586. A school district is the equivalent of a township because it is a "convenient territorial division or subdivision of a county, created for the purpose of maintaining within its boundaries one or more public schools." G.S. 115-9. Since the West Buncombe School District is the equivalent of a township and the West Buncombe Consolidated High School will be the only standard high school located within its boundaries, G.S. 115-61 does not limit in any degree the discretionary power of the

school authorities to select and use the 30 acres as the site for the West Buncombe Consolidated High School.

Subdivision 9 of G.S. 153-9 grants to the board of commissioners of each county the power "to remove or designate a new site for any county building" subject to these limiting conditions: "But the site of any county building already located shall not be changed, unless by a unanimous vote of all the members of the board at any regular monthly meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three months, next immediately preceding the monthly meeting at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the General Assembly."

The plaintiffs insist that the limiting conditions specified in this statute preclude the present selection and use of the 30 acres as a site for the new consolidated high school. They advance these arguments to support this position: That the county home for the aged and infirm is a county building within the purview of the statute; that the statute inhibits any change in the use of any part of the site of the county home until the limiting conditions, *i.e.,* the three months' publication of notice of the proposed change and the ensuing vote of the board of county commissioners approving the change, have taken place; that the 30 acres constitute a part of the site of the county home, and cannot be devoted to any other use at this time because the limiting conditions applicable to them have not occurred; and that as a consequence of these things the board of county commissioners has no present legal power to convey the 30 acres to the county board of education for use as a site for the new consolidated high school.

The position of the plaintiffs is unsound even if the statutory provision embodied in subdivision 9 of G.S. 153-9 be construed to cover county homes for the aged and infirm as well as county courthouses and county jails, the only county buildings in use in 1868, when the statutory provision was originally enacted. The plaintiffs have misinterpreted the statute. The limiting conditions incorporated in it are concerned with changes in the locations of the sites of county buildings, and not with changes in the uses of parts of the sites of county buildings. It necessarily follows that the statute has no application whatever to the proposed conveyance of the 30 acres. The legal standing of the plaintiffs would not be bettered a whit, however, if the construction which they put upon the statute were the correct one. The site of a county building embraces only the space occupied by the building and such adjacent land as is reasonably required for the convenient use of the building. *Board of*

Education v. Forrest, 190 N.C. 753, 130 S.E. 621; *State v. Jersey City,* 36 N.J.L. 166. Under this definition and the evidence, it is obvious that the 30 acres do not constitute a part of the site of the county home.

The evidence and the findings of fact are in harmony with the conclusion that the school authorities did not abuse the discretion reposed in them by law in choosing the 30 acres as the site for the West Buncombe Consolidated High School. The circumstance that the approach to it may be "over a narrow bridge . . . and a crooked highway" neither compels nor supports the contrary conclusion. In the very nature of things, ways of travel are ofttimes imperfect in a region justly famed for the rugged grandeur of its mountains. The additional circumstance that there are satisfactory sites for the new schoolhouse at other places does not disprove the soundness of the decision on the present phase of the litigation. Indeed, it illustrates the necessity for the legislation vesting in the school authorities the discretionary power to determine which one of the various available sites is to be used.

The order refusing the interlocutory or preliminary injunction is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA ON RELATION OF THE UTILITIES COMMISSION v. CAROLINA COACH COMPANY, QUEEN CITY COACH COMPANY, ATLANTIC GREYHOUND CORPORATION, SEASHORE TRANSPORTATION COMPANY, AND SMOKY MOUNTAIN STAGES, INC.

(Filed 10 December, 1952.)

1. Statutes § 5a—

Where the same statute contains a particular provision, which embraces the matter under consideration, and a general provision, which includes the same matter and is incompatible with the particular provision, the particular provision must be regarded as an exception to the general provision, and the general provision must be held to cover only such cases within its general language as are not within the terms of the particular provision.

2. Utilities Commission § 2: Carriers § 2—

The North Carolina Utilities Commission does not have regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their employment even in cases where the persons conducting such operations are engaged at the same time or at other times in carrying on the callings of common carriers by motor vehicle. G.S. 62-121.47(1)(3).

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by Atlantic Greyhound Corporation, Carolina Coach Company, Queen City Coach Company, Seashore Transportation Company, and Smoky Mountain Stages, Inc., from *Carr, J.*, at March Term, 1952, of WAKE.

Proceeding originating before the North Carolina Utilities Commission and involving the interpretation of the provisions of the Bus Act of 1949 relating to the transportation of *bona fide* employees of industrial plants to and from the places of their regular employment.

The legal question arising on this appeal grows out of the events and statutes mentioned in the numbered paragraphs set forth below.

1. Atlantic Greyhound Corporation, Carolina Coach Company, Gabriel Bus Line, Queen City Coach Company, Seashore Transportation Company, and Smoky Mountain Stages, Inc., are common carriers of passengers by motor vehicle, and as such are engaged in the transportation by motor vehicle in intrastate commerce of passengers for compensation over regular routes and between fixed termini under certificates of public convenience and necessity issued to them by the North Carolina Utilities Commission pursuant to the provisions of the Bus Act of 1949.

2. The certificate issued to Carolina Coach Company specifies that one of its authorized routes as a common carrier of passengers by motor vehicle covers the stretch of United States Highway No. 29 between Landis and Kannapolis.

3. The certificate issued to Gabriel Bus Line limits its operating rights as a common carrier of passengers by motor vehicle to the portions of State Highways Nos. 150, 152, and 153 connecting Mooresville and Landis.

4. On 1 April, 1951, Carolina Coach Company and Gabriel Bus Line executed an agreement in writing whereby Carolina Coach Company leased to Gabriel Bus Line "the privilege of operating three schedules daily between Landis and Kannapolis over the franchise route of Carolina (Coach Company) for the purpose of transporting workers employed in the mills at Kannapolis to and from their places of employment." The agreement was not to "become operative and binding upon the parties . . . except upon the prior written approval of the North Carolina Utilities Commission."

5. On 27 April, 1951, Carolina Coach Company and Gabriel Bus Line made application to the North Carolina Utilities Commission for its written approval of the lease agreement in conformity to Section 20 of the Bus Act of 1949. See: G.S. 62-121.62.

6. On 3 May, 1951, the North Carolina Utilities Commission entered an order denying the application of Carolina Coach Company and Ga-

briel Bus Line for the approval of the lease agreement. It assigned these reasons for its decision: That subsection (3) of Section 5 of the Bus Act of 1949 entirely excludes from the regulatory supervision of the Utilities Commission all operations of any person devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their employment, regardless of whether or not the person conducting such operations is engaged at the same time or at other times in carrying on the business of a common carrier by motor vehicle; and that in consequence of this exclusion the Utilities Commission has no legal authority to approve the lease agreement whereby Carolina Coach Company undertakes to permit Gabriel Bus Line to carry on as a limited privilege an operation which Gabriel Bus Line has full liberty to perform as an unlimited right in common with all other persons.

7. Carolina Coach Company forthwith petitioned the North Carolina Utilities Commission for a rehearing of the application for the approval of the lease agreement under the provision of the North Carolina Utilities Commission Procedure Act of 1949 now codified as G.S. 62-26.6. The petition sets forth specifically that the order denying the application is not warranted by the Bus Act of 1949 for these interdependent reasons: That subsection (1) of Section 5 of the Bus Act of 1949 reserves to the Utilities Commission in express terms regulatory supervision of all operations of any person devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their regular employment if such person is "engaged at the time or other times in the transportation of other passengers by motor vehicle for compensation"; that as a consequence the Utilities Commission has regulatory supervision of the acts of Gabriel Bus Line in operating motor vehicles over the authorized route of Carolina Coach Company between Landis and Kannapolis for the exclusive purpose of transporting *bona fide* employees of industrial plants in Kannapolis to and from their places of regular employment because Gabriel Bus Line is engaged in the transportation of other passengers by motor vehicle for compensation over its own regular route between Mooresville and Landis under the certificate of convenience and necessity issued to it by the Utilities Commission; and that for these reasons the Utilities Commission erred to the prejudice of Carolina Coach Company when it refused to approve the lease agreement on the ground that it has no authority under the law to take such action. Atlantic Greyhound Corporation, Queen City Coach Company, Seashore Transportation Company, and Smoky Mountain Stages, Inc., intervened at this stage of the proceeding as parties "vitally affected by the interpretation and application of Subsection (3) of Section 5 of the Bus Act of 1949," and made common cause with Carolina Coach Company.

8. Subsequent to the filing of the petition for a rehearing, the North Carolina Utilities Commission heard Carolina Coach Company and the intervening parties in oral argument on the question of the correct interpretation and application of the section of law in controversy. Thereafter, to wit, on 29 August, 1951, the Utilities Commission denied the petition for a rehearing in an elaborate majority opinion, which reaffirmed the legal position taken by the Commission in its original order of 3 May, 1951, and rejected the legal position taken by Carolina Coach Company in its petition to rehear. Atlantic Greyhound Corporation, Carolina Coach Company, Queen City Coach Company, Seashore Transportation Company, and Smoky Mountain Stages, Inc., thereupon appealed from the Utilities Commission to the Superior Court of Wake County, assigning error in matter of law.

9. When the appeal was heard at the March Term, 1952, of the Superior Court of Wake County, Judge Leo Carr, who presided, entered a judgment affirming the orders of the Utilities Commission. Atlantic Greyhound Corporation, Carolina Coach Company, Queen City Coach Company, Seashore Transportation Company, and Smoky Mountain Stages, Inc., excepted to this judgment and appealed to the Supreme Court, assigning error in matter of law.

Attorney-General McMullan and Assistant Attorney-General Paylor for the State of North Carolina on relation of the Utilities Commission, appellee.

J. Ruffin Bailey and Fuller, Reade, Umstead & Fuller for Atlantic Greyhound Corporation, appellant.

Arch T. Allen and L. P. McLendon for Carolina Coach Company, appellant.

Shearon Harris and L. P. McLendon for Queen City Coach Company and Smoky Mountain Stages, Inc., appellants.

D. L. Ward for Seashore Transportation Company, appellant.

ERVIN, J. This appeal is occasioned by conflicting provisions in the Bus Act of 1949, and presents this question for decision: Does the North Carolina Utilities Commission have regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their regular employment where the person conducting the operations is engaged at the same time or at other times in carrying on the business of a common carrier by motor vehicle? As here used, the word "person" denotes "a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit," and the term "common carrier by motor vehicle" signifies "any person which holds

itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers for compensation over regular routes and between fixed termini." G.S. 62-121.46 (6) (15).

The Bus Act of 1949 is now codified as Article 6C of Chapter 62 of the General Statutes. Section 3 of the Act, which appears in G.S. 62-121.45, confers upon the North Carolina Utilities Commission "full power and authority to administer and enforce the provisions of this article, and to make and enforce reasonable and necessary rules and regulations to that end."

The conflicting provisions of the Act giving rise to the present controversy are subsections (1) and (3) of section 5, which is now embodied in G.S. 62-121.47 and deals with exemptions from regulations.

Subsection (1) of section 5 provides that "nothing in this article shall be construed to include persons and vehicles engaged in one or more of the following services if not engaged at the time or other times in the transportation of other passengers by motor vehicle for compensation: (a) transportation of passengers for or under the control of the United States Government, or the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State; (b) transportation of passengers by taxicabs or other motor vehicles performing *bona fide* taxicab service and carrying not more than six passengers in a single vehicle at the same time and not operated on a regular route or between fixed termini; provided, no taxicab while operating over the regular route of a common carrier outside of a town or a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in (h) of this paragraph, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers; (c) transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations; (d) transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft; (e) transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service; (f) transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services; (g) transportation of *bona fide* employees of an industrial plant to and from their regular employment; (h) transportation of passengers when the movement is within a town or municipality exclusively, or within contiguous towns or municipalities and within a residential and

commercial zone adjacent to and a part of such town or municipality or contiguous towns or municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone."

Subsection (3) of section 5 specifies that "none of the provisions of this section nor any of the other provisions of this article shall apply to motor vehicles used for the transportation of passengers to or from religious services and/or in the transportation of *bona fide* employees of an industrial plant to and from places of their regular employment."

The general provision of subsection (1) of section 5 of the Bus Act of 1949 to the effect that the Utilities Commission retains regulatory supervision of all operations otherwise exempted from the coverage of the Act if such operations are conducted by persons "engaged at the time or other times in the transportation of other passengers by motor vehicle for compensation" is certainly broad enough to give the Utilities Commission regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their regular employment where such operations are conducted by a person who is engaged at the same time or at other times in carrying on the business of a common carrier by motor vehicle; and the particular provision of subsection (3) of section 5 of the Bus Act of 1949 to the effect that neither section 5 nor any other provisions of the Bus Act "shall apply to motor vehicles used . . . in the transportation of *bona fide* employees of an industrial plant to and from places of their regular employment" is certainly emphatic enough to exclude from the coverage of the Act and the regulatory supervision of the Utilities Commission all operations devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their regular employment, irrespective of whether or not such operations are conducted by persons who are engaged at the same time or other times in carrying on the callings of common carriers by motor vehicle.

This case lends itself to much writing, and tempts the appellate judge to cite many legal authorities and to split many legal hairs. When all is said, however, the case must turn on one or the other of two conflicting provisions of the same statute, and the Court must invoke the aid of the appropriate canon of construction in deciding which provision is to prevail.

The relevant canon of construction may be stated in this way: Where the same statute contains a particular provision, which embraces the matter under consideration, and a general provision, which includes the same matter and is incompatible with the particular provision, the particular provision must be regarded as an exception to the general provi-

sion, and the general provision must be held to cover only such cases within its general language as are not within the terms of the particular provision. *In re Steelman,* 219 N.C. 306, 13 S.E. 2d 544; *School Commissioners v. Aldermen,* 158 N.C. 191, 73 S.E. 905; *Nance v. R. R.,* 149 N.C. 366, 63 S.E. 116; *Handtoffski v. Chicago Consol. Traction Co.,* 274 Ill. 282, 113 N.E. 620; 50 Am. Jur., Statutes, section 367; 59 C.J., Statutes, section 596.

When the conflicting provisions embodied in subsections (1) and (3) of section 5 of the Bus Act of 1949 are read in the light of this canon of construction, it is manifest that the particular provision of subsection (3) must be regarded as an exception to the general provision of subsection (1). This being true, the North Carolina Utilities Commission does not have regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their employment even in cases where the persons conducting such operations are engaged at the same time or at other times in carrying on the callings of common carriers by motor vehicle.

This decision necessitates the affirmance of the judgment.

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

B. A. BRADHAM, E. M. REDDICK, A. TENNANT, R. W. BRADHAM, AND JULIUS McCOLLUM, TRUSTEES OF MT. OLIVET A.M.E. ZION CHURCH, v. A. D. ROBINSON.

(Filed 10 December, 1952.)

1. Trial § 55—

The judge, in the trial of an issue of fact under agreement of the parties, is required to state his findings of fact and his conclusions of law separately and adjudicate the rights of the parties accordingly, all in writing.

2. Same—

The findings of fact by the trial court under agreement will be construed to uphold the judgment if this may reasonably be done.

3. Same—

Where the issue of fact submitted to the judge is whether persons purporting to execute a mortgage on church property as trustees were in fact authorized to do so, the court's findings to the effect that the instrument was executed by individuals and that in so far as the church is concerned the instrument is void, will be construed as findings that such persons were

not authorized to execute the instrument, and thus support the decree that the instrument be canceled.

4. Same—

Where the judge dictates his findings to the court reporter and causes the reporter to transcribe them, it amounts to a finding of the facts by the judge in writing.

5. Same—

The failure of the judge to sign his findings of fact and incorporate them into the formal judgment rendered in the cause does not render the judgment void, there being a substantial compliance with G.S. 1-185.

6. Mortgages § 27—

Where the verdict of the jury establishes that the asserted mortgagor is not indebted to the mortgagee in any amount, the mortgage has no validity, and decree of cancellation is proper.

BARNHILL, J., concurring in result.

APPEAL by defendant from *Patton, Special Judge,* and a jury, at April Term, 1952, of GUILFORD.

Civil action to cancel a mortgage so as to remove the cloud resulting from it from a church's title to the land mortgaged.

The controlling facts are summarized in the numbered paragraphs set out below.

1. The plaintiffs B. A. Bradham, E. M. Reddick, A. Tennant, R. W. Bradham, and Julius McCollum are the present trustees of the Mt. Olivet A.M.E. Zion Church, a religious congregation, which is hereinafter called Mt. Olivet Church, and which adheres to the well established religious denomination known as the African Methodist Episcopal Zion Church.

2. Mt. Olivet Church owns a church building and a parsonage on Beech Street in Greensboro, North Carolina.

3. Under the Book of Doctrines and Discipline of the African Methodist Episcopal Zion Church, the trustees of each adhering church take and hold property for such church. The trustees cannot alienate or encumber such property without the consent of a majority of all the members of the congregation in meeting assembled and the consent of the annual conference or the bishop of the district in which the adhering church is located.

4. The defendant A. D. Robinson served as pastor of Mt. Olivet Church from "the fall of 1942 . . . until . . . the fall of 1945."

5. On 17 November, 1947, Caroline Davis, Eugenia Smith, and Viola Wade, who purported to act as trustees of Mt. Olivet Church, executed to the defendant a paper writing sufficient in form to mortgage the church building and the parsonage of the Mt. Olivet Church to the defendant as security for the payment of $3,600. According to the recitations of the

paper writing, this sum is due the defendant by the Mt. Olivet Church. The paper writing, which was forthwith registered in the office of the Register of Deeds of Guilford County, is hereinafter designated as the mortgage.

6. Subsequent to these events, the plaintiffs brought this action against the defendant to obtain a decree canceling the mortgage as a cloud upon the title of Mt. Olivet Church to its church building and parsonage. They allege as grounds for the cancellation of the mortgage that Mt. Olivet Church is not indebted to the defendant in any sum whatever, and that the persons who executed the mortgage had no authority to make it. Their complaint avers in detail that Caroline Davis, Eugenia Smith, and Viola Wade were never trustees of Mt. Olivet Church, and never had any authority from its congregation, or from the annual conference or the bishop of the district in which it is located, to encumber its property.

7. The defendant answered, denying the truth of the matters invoked by the complaint as grounds for the cancellation of the mortgage. The answer pleads in detail by way of counterclaim that Mt. Olivet Church owes the defendant $4,600 for moneys loaned and services rendered to it by him during his pastorate, and that the payment of a part of the debt, to wit, $3,600, is secured by the mortgage, which was executed to him by the duly authorized trustees of Mt. Olivet Church. The answer prays the court to award the defendant an affirmative judgment against the plaintiffs for the total amount of the debt, and to order the mortgage to be foreclosed for the satisfaction of the part of the debt secured by it. The plaintiffs filed a reply, denying the truth of the counterclaim and pleading the three-year statute of limitations as a bar to any recovery on it.

8. When the action came on to be heard before Judge George B. Patton, who presided at the April Term, 1952, of the Superior Court of Guilford County, the parties waived "a jury trial . . . on all matters . . . in controversy with the exception of the sole issue of indebtedness" and submitted "the remainder of the questions involved . . . (to) . . . the court . . . without the intervention of a jury."

9. The opposing sides undertook to support their respective allegations by offering evidence before the presiding judge and the trial jurors. The jury returned a verdict to the effect that Mt. Olivet Church is not indebted to the defendant in any amount, and Judge Patton made these findings: "The court is of the opinion from this evidence and so finds that . . . the purported mortgage deed is not binding on the church; that in so far as the church is concerned, it is a void instrument, it being an instrument executed by three individuals to this defendant, nothing more and nothing less; that so far as the church is concerned, it is void."

Judge Patton dictated these findings to the court reporter, who reduced them to writing. Judge Patton did not sign the findings after they were reduced to writing, or incorporate them in the formal judgment mentioned in the next paragraph.

10. After the jury returned its verdict and he made his findings, Judge Patton entered a formal judgment wherein he concluded the mortgage to be "void and unenforceable . . . as a matter of law," adjudged that the defendant is not entitled to recover anything of the plaintiffs on his counterclaim, and canceled the mortgage as a cloud on the title of Mt. Olivet Church to its church building and parsonage. The defendant excepted and appealed, assigning errors.

E. M. Stanley for plaintiffs, appellees.

Henderson & Henderson and Percy L. Wall for defendant, appellant.

ERVIN, J. The defendant makes these assertions by his assignments of error:

1. That the judge did not observe the provisions of G.S. 1-185, specifying that "upon the trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately."

2. That the judge committed error in signing the judgment.

The pleadings in the instant case raise these issues of fact: Whether Mt. Olivet Church is indebted to the defendant; whether the persons who executed the mortgage to the defendant were authorized to do so by Mt. Olivet Church and the annual conference or the bishop of the district in which Mt. Olivet Church is located; and whether the counterclaim is barred by the three-year statute of limitations. The legal importance of the last of the issues is contingent on Mt. Olivet Church being indebted to the defendant.

The parties agreed upon an unusual mode for the trial of the issues of fact in the court below. They stipulated that the question of whether Mt. Olivet Church is indebted to the defendant should be left to the jury, and that the other issues of fact should be decided by the judge.

Where the trial of an issue of fact by a jury is waived by the parties to a civil action, the judge who tries the issue of fact is required by G.S. 1-185 to do these three things in writing: (1) To find the facts on the issue of fact submitted to him; (2) to declare the conclusions of law arising on the facts found by him; and (3) to adjudicate the rights of the parties accordingly. In performing this task, the judge must state his findings of fact and his conclusions of law separately. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639.

The defendant argues with much earnestness on his appeal that the trial judge failed "to make any findings of fact" in respect to whether the persons who executed the mortgage to the defendant were authorized to do so by Mt. Olivet Church and the annual conference or the bishop of the district in which Mt. Olivet Church is located, and in that way ignored the plain statutory requirement that a judge who tries an issue of fact must find the facts on such issue.

Candor compels the reluctant observation that the able trial judge fell somewhat short of the exceedingly high standards which ordinarily characterize his judicial labors when he made his findings on the issue of fact under consideration. He ought to have couched his findings in specific language not requiring construction to reveal its meaning, and he ought to have embodied his findings in the document containing his conclusions of law and his adjudication.

Nevertheless, we are constrained to reject the position of the defendant on this phase of the appeal under the rule that the findings of the trial judge will be construed to uphold, rather than to defeat, the judgment, if this may reasonably be done. 64 C.J., Trial, section 1149. When the findings of the judge are interpreted in the light of the pleadings, issues, and evidence, they may justly be held to mean that the three persons who executed the mortgage to the defendant were not authorized to do so by the congregation of Mt. Olivet Church and the annual conference or the bishop of the District in which Mt. Olivet Church is located.

It thus appears that the judge found the facts on the issue of fact under consideration. Since he who does a thing through the agency of another does it himself, the judge found the facts in writing when he dictated his findings to the court reporter and caused the court reporter to transcribe them. He made proper conclusions of law and entered a proper adjudication on the facts found by him when he adjudged the mortgage to be "void and unenforceable" and ordered it canceled as a cloud on the title of Mt. Olivet Church to its church building and its parsonage. 12 C.J.S., Cancellation of Instruments, section 34. He certainly separated his findings of fact and his conclusions of law when he put them in different documents. These things being true, the judge complied in a substantial manner with all the requirements of G.S. 1-185.

The assignment of error based on the exception to the signing of the judgment raises the solitary question whether the facts found by the judge and the jury support the judgment. *Deaton v. Deaton,* 234 N.C. 538, 67 S.E. 2d 626; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609. What has already been said makes it plain that the findings of fact of the judge justify the order for the cancellation of the mortgage. The verdict of the jury sustains the adjudication that the defendant is not entitled to recover anything of the plaintiffs on his counterclaim. Indeed,

the verdict also supports the order of cancellation. A mortgage which purports to secure the payment of a debt has no validity if the debt has no existence. 59 C.J.S., Mortgages, section 87.

For the reasons given, there is in law

No error.

BARNHILL, J., concurring in result: It is admitted that the plaintiffs are at present trustees of Mt. Olivet A.M.E. Zion Church. As such they are vested with the title to the church property. The jury found as a fact that they, as trustees, are not indebted to the defendant in any amount. So what boots it whether those who signed the alleged mortgage were then trustees or mere interlopers, or whether the mortgage, when executed, was void *ab initio* or a valid lien upon the church property, or whether the judge complied with the statute in finding the facts on the issue submitted to him?

So soon as the jury rendered its verdict, what the judge might or might not do in respect to the issue submitted to him became wholly immaterial.

The jury has found that plaintiffs are not indebted to defendant in any amount. The paper writing is still of record, uncanceled. It constitutes a cloud on the title of plaintiffs. As there is no valid exception directed to the jury trial on the issue of debt, the plaintiffs are entitled to a judgment decreeing its cancellation. A decree to this effect was entered. I therefore concur in the conclusion that no error is made to appear.

AMERICAN TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF CURTIS B. JOHNSON, DECEASED, v. MRS. IRVING HARDING JOHNSON, WIDOW; MRS. IDA J. LEE; GEORGE LEE, SAM M. LEE, JR.; HARRY J. LEE; MRS. BETTY WEIR LEE REX; ROBERT WEIR LEE; SUSAN A. LEE; PATRICIA D. LEE; AND MELINDA REX; AND UNBORN CHILDREN OF GEORGE LEE, SAM M. LEE, JR., AND HARRY J. LEE, AS MAY HEREAFTER BE BORN PRIOR TO THE DEATH OF MRS. IRVING HARDING JOHNSON.

(Filed 10 December, 1952.)

1. Wills §§ 33k, 40—

In the absence of an express or implied provision in the will to the contrary, a vested remainder, even though it be a defeasible fee, will be accelerated upon the failure of the life estate if the remaindermen may be identified, and the fee simple absolute vest, and the dissent of the widow is a rejection of her life estate within the meaning of this rule.

2. Same—

Where the will gives the widow a life estate with vested remainder of the defeasible fee to named beneficiaries, and also provides for an annuity

to testator's sister, *held*, upon the widow's dissent, the judgment accelerating the vested interest of the remaindermen in the assets of the estate after allotting to the widow her distributive share and the setting aside of sufficient assets to pay the annuity should further provide that upon the death of testator's sister such funds retained and not expended in the payment of annuity should be divided among the remaindermen.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff and the defendant guardian *ad litem* from *Moore, J.*, June Term, 1952, of MECKLENBURG.

Curtis B. Johnson, a citizen and resident of Mecklenburg County, North Carolina, died on 6 October, 1950, leaving a last will and testament which was duly filed and admitted to probate in the office of the Clerk of the Superior Court in the aforesaid county on 24 October, 1950.

Thereafter, in due and apt time, the defendant Mrs. Irving Harding Johnson, the surviving widow of the testator, renounced her right to qualify as executrix of her husband's will and filed her dissent therefrom. See *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12.

This action was instituted by the plaintiff, the duly appointed and acting executor and trustee under the last will and testament of Curtis B. Johnson, deceased, to obtain the advice and instruction of the court with respect to the following questions:

1. Did the dissent of the widow, Mrs. Irving Harding Johnson, from the will of her husband, Curtis B. Johnson, accelerate the vesting of the interests of George Lee, Sam M. Lee, Jr., and Harry J. Lee, the three nephews of the deceased?

2. Did the deceased, Curtis B. Johnson, die partially intestate and, if so, to what extent or in what respect?

Trial by jury was waived by all parties and their counsel of record, and it was agreed that his Honor should hear the matter, find the facts, draw his conclusions of law, and enter judgment accordingly.

The testator, Curtis B. Johnson, died leaving him surviving his widow, Mrs. Irving Harding Johnson; one sister, Mrs. Ida Johnson Lee; and three nephews, George Lee, Sam M. Lee, Jr., and Harry J. Lee; the sister and two of the nephews being residents of California, and one nephew a resident of Michigan.

The defendants Mrs. Betty Weir Lee Rex and Robert Weir Lee, are the children of George Lee; Susan A. Lee and Patricia D. Lee are the children of Harry J. Lee; and Melinda Rex is the daughter of Mrs. Betty Weir Lee Rex. The defendant Sam M. Lee, Jr., has no children.

The defendants Melinda Rex, Susan A. Lee and Patricia D. Lee are minors and are duly represented in this proceeding by B. Irvin Boyle as guardian *ad litem,* who is also guardian *ad litem* for the unborn children of George Lee, Sam M. Lee, Jr., and Harry J. Lee.

All beneficiaries under the will of Curtis B. Johnson, except pecuniary legatees whose legacies have been paid, and all heirs and next of kin of the testator are parties to this action.

The only real estate owned by the testator at the time of his death was the residence and lot situate in California and devised in his will.

The parts of the will pertinent to this appeal are as follows:

"I give, devise and bequeath to my sister Ida J. Lee, of Beverly Hills, California, during her lifetime, the home she is now living in at above location including any interest I may have in the household furniture contained therein—I also direct that she be paid out of my Estate the sum of $750.00 per month during her lifetime. After her death this property she is living in to pass into the ownership of my three nephews, George Lee, of Algonac, Michigan, S. M. Lee, Jr., of Glendale, California and Harry Lee of Los Angeles, California. I direct that it be sold by them within six months following the death of my sister, Ida J. Lee, and the proceeds divided equally between them.

"In addition to the above gift to the aforesaid nephews, I direct that each of them shall be paid ($25,000) Twenty Five Thousand Dollars from the assets of my estate as if and when the funds are conveniently available as determined by my wife, Irving Harding Johnson, who is hereby appointed my executor and the American Trust Co. of Charlotte, hereby appointed Trustee of my estate. (Then follows a large number of gifts to executives and employees of the Charlotte Observer, personal friends, and servants.) . . .

". . . Payment of all gifts to be made at time payment is made to my three nephews. To my wife, I leave the residue of my estate after my funeral expenses are paid and the payment of any debts, the inheritance taxes, I realize will be quite heavy but believe that the assets of The Semagraph Company, (the capital stock of which I now own in its entirety), will be much more than sufficient to take care of this obligation without disturbing or in any way encumbering the controlling interest (57½%) I now have in The Observer Co. owner of The Charlotte Observer. . . .

"The 'residue' interest referred to on page 3 of this document is willed to my wife, Irving H. Johnson, for her use and benefit during her life and at her death the (57½%) Fifty seven and one-half stock interest in the Observer is to pass to my nephews in equal amounts, if then living and to their surviving children in the event of their death."

The court held and entered judgment to the effect that the dissent of the widow, Mrs. Irving Harding Johnson, from the will of her husband did accelerate the vesting of the interests of George Lee, Sam M. Lee, Jr., and Harry J. Lee, the three nephews of the deceased; and that Curtis B. Johnson did not die partially intestate.

The judgment also contains the following provisions:

"3. That the Executor provide out of the assets of the estate and after allotting to the widow her distributive share, for the payment to the defendant Mrs. Ida J. Lee of the annuity of $750.00 per month bequeathed to her during her lifetime in such way, manner and method as may be hereafter approved by this Court.

"4. That after the estate has been administered and after provisions have been made for the aforesaid annuity, all of the personal property then remaining in the hands of the Executor shall be paid over, transferred and delivered to defendants George Lee, Sam M. Lee, Jr., and Harry J. Lee, in equal shares and portions and in fee simple absolute."

This cause was retained for further orders in connection with additional questions that may arise in the administration of the estate.

The plaintiff and B. Irvin Boyle, guardian *ad litem,* appeal and assign error.

Helms & Mulliss for plaintiff, appellant.

B. Irvin Boyle, guardian ad litem for Susan A. Lee, Patricia D. Lee, Melinda Rex and the unborn children of George Lee, Sam M. Lee, Jr., and Harry J. Lee, appellants, In Propria Persona.

Cochran, McCleneghan & Miller and Tillett, Campbell, Craighill & Rendleman for Mrs. Irving Harding Johnson, appellee.

Taliaferro, Clarkson & Grier and Covington & Lobdell and J. W. Alexander, Jr., for George Lee, Sam M. Lee, Jr., and Harry J. Lee, appellees.

DENNY, J. The doctrine of acceleration is recognized and accepted in this jurisdiction. It has been applied in a number of cases where the widow rejected the life estate devised or bequeathed to her with remainder to devisees or legatees who could be definitely identified at the time of her dissent. *Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385; *Cheshire v. Drewry,* 213 N.C. 450, 197 S.E. 1; *Young v. Harris,* 176 N.C. 631, 97 S.E. 609, 5 A.L.R. 477; *University v. Borden,* 132 N.C. 476, 44 S.E. 47; *Wilson v. Stafford,* 60 N.C. 646; *Holderby v. Walker,* 56 N.C. 46; *Adams v. Gillespie,* 55 N.C. 244.

It is the general rule under the doctrine of acceleration that vested remainders take effect immediately upon the death of the testator where the life estate has failed prior to the death of the testator, or immediately after the determination of the life estate subsequent to the testator's death. This rule applies, however, only in the absence of an express or implied provision in the will to the contrary. 33 Am. Jur., Life Estates, Remainders, etc., section 154, page 620; *Neill v. Bach, supra; Thomsen v. Thomsen,* 196 Okla. 539, 166 P. 2d 417, 164 A.L.R. 1426; *Keen v. Brooks,* 186

Md. 543, 47 A. 2d 67, 164 A.L.R. 1292; *Ward v. Ward,* 153 Kan. 222, 109 P. 2d 68, 134 A.L.R. 657; *Elliott v. Brintlinger,* 376 Ill. 147, 33 N.E. 2d 199, 133 A.L.R. 1364. Likewise, in 31 C.J.S., Estates, section 82, page 96, it is said: "A vested remainder may be accelerated, although future contingent interests will thereby be cut off. . . . A remainder will not be accelerated if it is impossible to identify the remainderman, or if there is evidence of an intention to postpone the taking effect of the remainder; . . ."

The doctrine of acceleration rests upon the theory that the enjoyment of an interest having been postponed for the benefit of a preceding estate, upon determination of such preceding estate before it would ordinarily expire, ultimate takers should come into the immediate enjoyment of their property. *Young v. Harris, supra.*

In the case of *University v. Borden, supra,* where property was devised to the wife of the testator for life with remainder over, and the widow dissented, this Court said: "Mrs. Faircloth (the widow) having dissented from the will and claimed her dower in the realty and her distributive share in the personalty, we are of the opinion that there was an acceleration of the devises, the enjoyment of which under the will was postponed to the time of her death. The will, in so far as provision was therein made for her, operates in the same manner, as to the time of enjoyment by those entitled after her death, as if she had died prior to her husband."

In *Thomsen v. Thomsen, supra,* the Court said: "The general rule appears to be that where a testator creates a life estate in his widow, and the law gives the widow the right to elect whether to take under the will or under the statute, the law charges the testator with the knowledge of the right of the widow to so elect and it will be presumed that the intention of the testator was that the election of the widow to take her share of the estate under the intestate laws in lieu of the life estate given her in the will is, in legal contemplation, equivalent to her death."

It is clear from a perusal of the will now under consideration that the primary purpose of the testator in giving the residue of his estate to his wife for life, was to make available to her during her lifetime the entire income therefrom; and the distribution among ultimate takers was only postponed in order to effect the primary purpose. This primary purpose having been defeated by the widow's dissent, the ultimate takers are entitled to come into the immediate enjoyment of their rights under the will to the same extent as if the widow had died subsequent to the date of her dissent. *Young v. Harris, supra; University v. Borden, supra; Holderby v. Walker, supra.*

In our opinion, the judgment of the court below should be modified so as to direct the executor not only to pay over to George Lee, Sam M. Lee, Jr., and Harry J. Lee in equal shares, the assets remaining in the hands

of the executor after allotting to the widow her distributive share of the estate, and setting aside sufficient assets to pay the annuity of $750.00 per month to Mrs. Ida J. Lee during her lifetime, but upon the death of Mrs. Ida J. Lee to pay over to George Lee, Sam M. Lee, Jr., and Harry J. Lee in equal shares, if then living, otherwise to their next of kin, such assets as it may have retained and not expended in the payment of the annuity. The judgment is modified to this extent.

We are of the further opinion that the construction placed upon the will of Curtis B. Johnson by the trial judge, as set forth in the judgment entered below, as modified herein, carries out the intent of the testator as gathered from the four corners of his will, except as modified by the widow's dissent.

The judgment as modified will be upheld.

Modified and affirmed.

PARKER, J., took no part in the consideration or decision of this case.

THE UNION NATIONAL BANK OF CHARLOTTE, A NATIONAL BANKING CORPORATION, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF F. C. EASTERBY, DECEASED, v. RUTH GREEN EASTERBY, LIZZIE MARION EASTERBY, MATTIE EASTERBY, HUGH EASTERBY, HUGH EASTERBY, JR., DIANNE ELAINE EASTERBY, RICHARD TERRY EASTERBY, STEPHEN HUGH EASTERBY, FRANK CALHOUN EASTERBY, EARL THOMAS EASTERBY, EARL THOMAS EASTERBY, JR., MARY ELIZABETH EASTERBY, JOHN GINN EASTERBY, WILLIAM HENRY EASTERBY, B. M. THOMSON, JR., B. M. THOMSON III, CAMILLA THOMSON, JAMES H. THOMSON, JAMES H. THOMSON, JR., LAURIE THOMSON, STEWART DOUGLAS EASTERBY, JR., STEWART D. EASTERBY III, CAROLINE EASTERBY AND JOHN FRANCIS EASTERBY, AND ALL OTHER PERSONS WHOSE NAMES ARE UNKNOWN IN BEING, OR WHO MAY BE IN BEING AT THE TIME OF THE DEATH OF RUTH GREEN EASTERBY, AND WHO HAVE OR MAY HAVE ANY INTEREST IN THE ESTATE OR ASSETS OF F. C. EASTERBY, DECEASED.

(Filed 10 December, 1952.)

1. Wills § 40—

The right of a widow to dissent from the will is given by law, and she may exercise such right within the time fixed by statute without assigning any reason therefor. G.S. 30-1.

2. Same—

The fact that the widow's unconditional dissent from the will and election to take her statutory rights is based upon separate agreement with the vested remaindermen that they pay her a specified sum, does not affect the validity of the dissent, the dissent being valid unless she is induced to dissent in ignorance of her rights to her prejudice.

3. Same: Wills § 33k—Widow's dissent from will terminates her life estate thereunder and accelerates vesting of remainder.

Testator devised his property in trust for the use and benefit of his wife for life with direction that at her death the *corpus* be divided among named beneficiaries or their survivors, or if none of the said beneficiaries should be living at the death of the widow, then the estate to be distributed to testator's heirs as ascertained at the death of the widow. The widow dissented from the will. *Held:* It appearing from the instrument that the life estate to the wife was created solely for her benefit and in no sense for the independent purpose of postponing the final disposition of the estate, the dissent of the widow accelerates the vesting of the remainder in the beneficiaries named in fee simple absolute free of any contingent limitation over.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by guardians *ad litem* from *Hatch, Special Judge,* September Extra Civil Term, 1952, of MECKLENBURG.

This action was instituted by the plaintiff, executor and trustee under the last will and testament of F. C. Easterby, deceased, to obtain the advice and instruction of the court relative to certain questions that have arisen in connection with the administration of the estate.

F. C. Easterby, a citizen and resident of Mecklenburg County, North Carolina, died 5 February, 1952, leaving a last will and testament which was duly filed and admitted to probate in the office of the Clerk of the Superior Court in the aforesaid county, 13 February, 1952.

Under the terms of this will the residual estate was devised and bequeathed to the Union National Bank of Charlotte, as Trustee, for the use and benefit of Ruth Green Easterby, the testator's wife, for her life. At the death of the wife, the will directed that the *corpus* of the trust be delivered by the Trustee in equal portions to the testator's sisters, Lizzie Marion Easterby, Mattie Easterby, and his brother, Hugh Easterby. The will also provides:

"If, at the death of my wife, either of my above named two sisters or my aforesaid brother, Hugh, or two of them, should not be living, my Trust Estate shall be divided equally between such of my said two sisters and my said brother as may be living at the time of the death of my said wife. If, at the time of the death of my said wife, neither of my aforesaid two sisters nor my said brother, Hugh, is living, then my Trust Estate shall be distributed to my heirs and next of kin just as though I had died as of the time of the death of my wife intestate."

The estate involved in this appeal has a net value, before payment of inheritance taxes, of approximately $290,000.

On 25 June, 1952, the widow, Ruth Green Easterby, who had been contemplating exercising her right to dissent from the will of her husband, and Lizzie Marion Easterby, Mattie Easterby and Hugh Easterby, the

designated remaindermen in the will, entered into an agreement by the terms of which the widow agreed that she would dissent from the will of her husband in consideration of the agreement of the other parties that she should receive from the estate a widow's allowance of $18,000; that all Federal Estate taxes which might be assessed against the estate of F. C. Easterby would be paid from the share or shares of the estate that would be accelerated by reason of her dissent; and that in order to compensate the widow for the decrease in income available to her from the trust in the event she dissents, the sum of $25,000 might be charged against the shares of the remaindermen and paid to her, in addition to all other benefits and her statutory allowance.

Thereafter, on 1 July, 1952, the widow filed in the office of the Clerk of the Superior Court in Mecklenburg County, an unconditional dissent from the will of her husband, stating therein that she elected to share in his estate as provided by statute.

It appears from the record that the named defendants in this action include all persons in being who have an interest in the estate of F. C. Easterby, deceased, under his will, and include all persons now in being who could take upon the contingency set out in the will, except in the event all the named defendants and their descendants should predecease Ruth Green Easterby, and the persons who would take under that remote contingency are unknown.

Frank W. Snepp, Jr., was duly appointed guardian *ad litem* to represent the interests of unknown persons who might take an interest under the will, including those in being and those not in being, and the guardian *ad litem* duly filed an answer, properly presenting the contentions of such persons. Likewise, B. Irvin Boyle was duly appointed guardian *ad litem* for all minor defendants and in apt time filed an answer in their behalf, setting out the contentions available to them in this action.

It further appears from the record that all parties defendant had been duly served with summons and were properly before the court and subject to its jurisdiction when the matter came on for hearing below.

All the parties who were present in person or represented by counsel at the hearing, waived a trial by jury and agreed that the trial judge should find the facts, draw his conclusions of law, and enter judgment accordingly.

Upon the facts found by the court, the material parts of which are hereinabove set out, the court held that the dissent filed by the widow is legally effective as a dissent, and the widow is entitled to her statutory distributive share of the estate; that the dissent filed by the widow had the legal effect of accelerating the vesting, both in right and enjoyment, of the residue of the estate not allocated to the widow as her distributive share; and that Lizzie Marion Easterby, Mattie Easterby and Hugh

Easterby, upon the filing of the dissent, became entitled to the residue of the estate, free of the trust, and of any contingent interests of the heirs at law and next of kin of the testator, subject only to the rights of the widow, and entered judgment accordingly. Both guardians *ad litem* appeal and assign error.

Frank W. Snepp, Jr., guardian ad litem for unknown persons, in being and not in being, having an interest in the action, appellants. In Propria Persona.

B. Irvin Boyle, guardian ad litem for all minor defendants, appellants. In Propria Persona.

Robinson & Jones for plaintiff, appellee.

Tillett, Campbell, Craighill & Rendleman for Ruth Green Easterby, Lizzie Marion Easterby, Mattie Easterby, and Hugh Easterby, appellees.

DENNY, J. The appellants argue and contend that the dissent of the widow was induced by the terms of an agreement, the performance of which is conditioned upon the dissent resulting in the vesting of the estate of F. C. Easterby in the two sisters and brother of the testator, absolutely and in fee simple, subject only to the rights of the widow, and, therefore, such dissent was not a voluntary election on the part of the widow to take against the will of her husband as required by law in such cases.

We do not think the agreement entered into by and between the named beneficiaries in the will of F. C. Easterby has any bearing whatever on the validity or invalidity of the widow's dissent. The right of a widow to dissent from her husband's will is one given to her by law. And such right may be exercised by her at any time within the period fixed by statute. G.S. 30-1. Furthermore, in the exercise of such right, she is not required to assign any reason therefor. And in the absence of evidence that the widow was induced to dissent, without knowledge of her rights and to her prejudice, it will be presumed that she acted voluntarily and with full knowledge of her rights. In view of the facts as disclosed on this record, the contention of the appellants will not be upheld.

It is also contended by the appellants that the interests of Lizzie Marion Easterby, Mattie Easterby and Hugh Easterby are contingent upon their surviving the life tenant, and that the dissent of the widow did not accelerate their interests.

We do not concur in the view taken by the appellants. Any question relative to survivorship, vested or contingent remainders, in connection with the interests of the remaindermen, under the provisions of the will under consideration, was determined when the widow's dissent was filed. Her election to take under the statute in lieu of the life estate devised to her in the will, in so far as the remaindermen are concerned, was

equivalent to her death. *Trust Co. v. Johnson, ante,* 594; *Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385; *Cheshire v. Drewry,* 213 N.C. 450, 197 S.E. 1; *Young v. Harris,* 176 N.C. 631, 97 S.E. 609, 5 A.L.R. 477; *University v. Borden,* 132 N.C. 476, 44 S.E. 47. And what was said in *Trust Co. v. Johnson, supra,* with respect to the doctrine of acceleration, is applicable to the facts in this case and it is not necessary to repeat here what was said on the subject in that opinion.

A careful consideration of the will of F. C. Easterby, deceased, leads us to the conclusion that the testator devised a life estate to his wife solely for her benefit, and that such estate was not created in any sense for the independent purpose of postponing the disposition of his estate until the death of his wife in the event she should dissent from his will.

Therefore, the ruling of the court below to the effect that upon the filing of the widow's dissent Lizzie Marion Easterby, Mattie Easterby and Hugh Easterby became the absolute owners of the estate of F. C. Easterby, deceased, free of the trust and of any contingent interests of the heirs at law and next of kin of the testator, subject only to the rights of the widow, will be upheld. Such ruling is not only in accord with our decisions but with the decisions generally on the question of acceleration where the facts are similar to those in this case. *Thomsen v. Thomsen,* 196 Okla. 539, 166 P. 2d 417, 164 A.L.R. 1426; *Keen v. Brooks,* 186 Md. 543, 47 A. 2d 67, 164 A.L.R. 1292; *Ward v. Ward,* 153 Kan. 222, 109 P. 2d 68, 134 A.L.R. 657; *Elliott v. Brintlinger,* 376 Ill. 147, 33 N.E. 2d 199, 133 A.L.R. 1364; *Eastern Trust & Banking Co. v. Edmunds,* 133 Me. 450, 179 A. 716; *Christian v. Wilson's Ex'rs.,* 153 Va. 614, 151 S.E. 300; *Equitable Trust Co. v. Proctor,* 27 Del. Ch. 151, 32 A. 2d 422; *Schmick Estate,* 349 Pa. 65, 36 A. 2d 305; *Lowrimore v. First Svgs. & Tr. Co.,* 102 Fla. 740, 140 So. 887; *Union Trust Co. v. Rossi,* 180 Ark. 552, 22 S.W. 2d 370; *Young v. Eagon,* 131 N. J. Eq., 574, 26 A. 2d 180.

The judgment of the court below is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

HERBERT G. GOECKEL v. HARRY P. STOKELY, T/A THE HOUSE OF STOKELY.

(Filed 10 December, 1952.)

1. Contracts § 4: Evidence § 39—

To constitute a valid contract, the parties must assent to the same thing in the same sense, and when it appears that a term which either party desires included in the agreement is not contained in the written memorandum, there is no complete agreement and such term is subject to further treaty between the parties to complete the contract.

2. Master and Servant § 2b—

Where a letter offering employment states in detail the proposed terms of employment but makes no reference to the expense of moving the recipient's family to the place of employment, and the letter of acceptance states that the recipient would like to supplement the terms by including the expense of moving the recipient's family in accordance with prior verbal negotiations, *held* the item of the expense of moving was left open to further treaty between the parties, and the employee's testimony that the employer later verbally agreed to pay such expense takes to the jury the question of whether such expense was included in the contract of employment.

3. Appeal and Error § 39f—

Where the jury sets the amount of the recovery at less than that contended for by plaintiff in accordance with the court's instruction to fix the amount, the instruction cannot be held prejudicial on defendant's appeal upon his contention that plaintiff was entitled to recover the full amount or nothing at all.

4. Trial § 36—

The refusal of the court to submit an issue to the jury cannot be held for error when there is no evidence upon the trial in support of such issue.

5. Appeal and Error § 39e—

The exclusion of evidence cannot be held prejudicial when the record fails to disclose the purport of the excluded evidence.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Bobbitt, J.*, and a jury, 9 June Extra Civil Term, 1952, of MECKLENBURG.

Civil action to recover for alleged breach of employment contract.

Early in 1951 the plaintiff, then a resident of Bogota, New Jersey, was employed as a salesman by the defendant, a food and merchandise broker of Charlotte, North Carolina. There is no disagreement as to the terms of the contract, except in one particular, and that is, the plaintiff contends that the defendant agreed to pay the necessary expense of moving plaintiff's household and kitchen furniture from Bogota to Charlotte.

The plaintiff alleges that "The expense of moving this property . . . amounted to $580.62," which sum the defendant has failed and refused to pay.

The defendant by answer denies the alleged promise to pay this expense, and alleges by way of counterclaim: (1) That the plaintiff resigned and left the defendant's employ owing him the sum of $107.41 for advances made by the defendant; and (2) that the plaintiff, while serving as salesman for the defendant, turned in purported orders for goods which in fact had not been given by the customers, thus requiring the defendant, through other salesmen, to contact the customers and correct the errors so made, to the defendant's damage in the sum of $1,000.

It is disclosed by the plaintiff's evidence that after the initial interview between the parties in Charlotte, the defendant wrote the plaintiff a letter, dated 7 February, 1951, confirming the terms of the defendant's offer to employ the plaintiff. The letter contains these pertinent recitals: (1) "To confirm the position I have offered you, permit me to say . . ." (Then follows a detailed statement of the terms of employment as proposed by the defendant. The details are omitted as not being pertinent to decision. However, it is noted that the letter contains no reference to the matter of moving expense.) (2) ". . . and that you are to meet me in Chicago at the LaSalle Hotel on the P. M. of the 17th of February, and we will work that week together among the shippers at the convention, leaving there Friday P. M. and arriving back in Charlotte for the week-end in order to start the following week on the trade." (3) "Inclosed please find check for $100.00 advance expense money on which you please keep a record." (4) "I will appreciate your confirming receipt of this letter and your acceptance of the employment."

In reply to this letter, the plaintiff wrote the defendant under date of 13 February, 1950, stating in part: (1) "As I previously wrote you, I would like to supplement some of the remarks you made in your letter of February 7th as they were talked about and agreed upon on my visit to Charlotte." (2) "The other points in question about which I would like you to think about and which we can discuss in Chicago, would be the expense of moving and supporting my family in Bogota." (4) "I will be seeing you in Chicago, Saturday morning; . . ."

The plaintiff testified in part: "I thereafter met Mr. Stokely in Chicago. . . . We discussed the expenses of moving my family to Charlotte. Discussion was had several times, . . . and he promised me verbally . . . that he would pay my moving expenses when and if I moved to Charlotte, and thereafter I moved my furniture and personal belongings to Charlotte. . . . The Martin moving folks of Charlotte moved my furniture . . . and the bill was rendered . . . which I paid, in the sum of $580.62. As soon as I received the bill I went to Mr. Stokely with it, and he told

me he could not take care of it due to some other expenditures on his part, and we agreed to let it go until a little later date when he was able to pay me for it. . . . About a week before I turned in my resignation I talked to Mr. Stokely about my moving expenses, and he has not paid it."

The defendant went upon the stand and expressly denied that he agreed at any time to pay plaintiff's moving expense, and he was corroborated by the testimony of an office employee who said she heard the defendant tell the plaintiff "he would not pay his moving expenses." The defendant also testified that the total amount the plaintiff owes him for advances is $107.41, and it was stipulated by the plaintiff that this is the correct amount he owes for advances.

Issues were submitted to and answered by the jury as follows:

"1. Did the defendant, in the employment contract entered into between the plaintiff and the defendant, agree to pay the plaintiff's necessary expenses for the moving of his household furniture and equipment from Bogota, New Jersey, to Charlotte, North Carolina, as alleged in the complaint? Answer: Yes.

"2. If so, what amount, if any, is the plaintiff entitled to recover from the defendant on account thereof? Answer: $342.75.

"3. In what amount, if any, is the plaintiff indebted to the defendant on account of money advanced and expense items paid for the account of the plaintiff? Answer: $107.41. (Stipulated)."

From judgment entered on the verdict, the defendant appealed, assigning errors.

Alvin A. London and O. W. Clayton for plaintiff, appellee.
Elbert E. Foster and J. F. Flowers for defendant, appellant.

JOHNSON, J. The defendant's assignments of error challenge the action of the trial court in (1) overruling his motion for judgment as of nonsuit, (2) charging the jury on the second issue, and (3) limiting the defendant's counterclaim-recovery to $107.41.

1. *The refusal to nonsuit.*—The defendant takes the position that his letter of 7 February, 1951, to the plaintiff sets forth the terms of his offer of employment, and that the plaintiff after receiving the letter came to Charlotte and entered upon the work of the defendant. On these facts, the defendant contends the plaintiff accepted the terms of the employment as set out in the letter, and that since the asserted item of moving expense is nowhere mentioned in the letter, the plaintiff is precluded from recovering therefor.

The defendant's position is untenable. It fails to take into account (1) the plaintiff's letter of reply dated 13 February, 1951, indicating that the matter of "expense of moving" was being left open for further discus-

sion, and (2) plaintiff's testimony that when the matter was discussed in Chicago the defendant verbally agreed to pay this item of expense.

To constitute a valid contract the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, there is no agreement. *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171; *Kirby v. Stokes County Board of Education,* 230 N.C. 619, 55 S.E. 2d 322; *Sides v. Tidwell,* 216 N.C. 480, 5 S.E. 2d 316; *Federal Reserve Bank v. Manufacturing Co.,* 213 N.C. 489, 196 S.E. 848; *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735; *Wilson v. Lumber Co.,* 180 N.C. 271, 104 S.E. 531.

And where correspondence or written memoranda is relied on to establish a contractual relation, if, from the language used, it appears that some term which either party desires to be in the contract is not included, requiring further treaty between the parties, there is no completed agreement. 12 Am. Jur., Contracts, Sec. 23. See also *Richardson v. Storage Co.,* 223 N.C. 344, 26 S.E. 2d 897.

Here it is manifest from plaintiff's reply letter of 13 February that the minds of the parties did not meet on the proposals set out in the defendant's letter of 7 February and that further treaty between the parties was necessary in respect to whether the defendant was to pay the plaintiff's expense of moving. And the evidence *pro* and *con* as to whether this item was made a part of the employment contract as finally consummated presented a clear-cut issue of fact for the jury.

2. *The charge on the second issue.*—The defendant (1) points to the fact that the plaintiff has declared on a special contract whereby the defendant allegedly agreed to pay plaintiff's moving expense, and (2) urges that all the evidence tends to show the amount of this expense was $580.62. Upon this theory of the trial, so fixed by the pleadings and proofs, the defendant contends the plaintiff was entitled to recover all or none of this amount and that the trial court should have so instructed the jury. The defendant therefore contends it was error for the trial court to charge the jury to find and determine the amount, if any, the plaintiff is entitled to recover as "the reasonable amount of the expense necessarily incurred in connection with the removal of the plaintiff's household furniture and equipment from Bogota to Charlotte."

Conceding, without deciding, that the court should have instructed the jury in accordance with the defendant's contention, it is not perceived that the failure to so charge was prejudicial to the defendant. It would seem that the error, if any, was helpful to the defendant, as shown by the verdict for the lesser sum of $342.75.

3. *Limiting the defendant's counterclaim-recovery.*—Here the defendant assigns as error the failure of the trial court to submit to the jury the issue raised by defendant's second counterclaim in which he seeks to

recover for losses and damage allegedly caused by the plaintiff's turning in purported orders which in fact were not given by the customers.

However, an examination of the record discloses no evidence upon which to predicate recovery on this counterclaim. Therefore, the exceptions directed to the failure of the court to charge on the theory of this counterclaim are without merit.

The defendant further assigns as error the ruling of the court in excluding the transcript of the adverse examination of the defendant taken at the instance of the plaintiff. However, the transcript is not in the record, and we are unable to determine whether the defendant was prejudiced by its exclusion. Hence error has not been made to appear. *Martin v. Currie,* 230 N.C. 511, 53 S.E. 2d 447; *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907.

The other exceptions to the exclusion of testimony appear to be without merit. The proffered testimony was properly excluded as hearsay.

No error.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. JOHN RICHARD HUMPHREY.

(Filed 10 December, 1952.)

1. Bastards § 6—

Where there is testimony that notice to and demand upon defendant for support of his illegitimate child was made on defendant the month prior to the issuance of the warrant, the fact that a corroborating witness testifies that the demand was made during the month warrant was issued, does not justify nonsuit even though the corroborating testimony may imply that the warrant was issued prior to demand.

2. Criminal Law § 52a (4)—

Conflicts in the testimony of the State's witnesses cannot justify nonsuit, it being the province of the jury to resolve such conflicts.

3. Bastards § 6½—

The failure of the court to charge that there was no obligation upon defendant to support the child in question until he had been given notice that he was the father and demand made upon him for support, cannot be held prejudicial when there is evidence of notice and demand prior to the issuance of the warrant and the court categorically charges that in order to convict defendant the jury must be satisfied beyond reasonable doubt that defendant was the father of the child, and further that he knowingly, intentionally and with stubborn and willful purpose refused to support the child.

STATE *v.* HUMPHREY.

APPEAL by defendant from *Bone, J.*, June Term, 1952, of ROBESON. No error.

The defendant was charged with willfully neglecting and refusing to provide support for his illegitimate child in violation of G.S. 49-2.

The State's witness, the unwed mother, testified that the defendant was the father of her child which was born 18 December, 1950; that when the baby was 3 months old, and ill at the time, she went to the store where the defendant was employed and asked him for support for the child, asked him for help; that defendant said he knew it was his child but he was not going to give her a cent. The defendant was married about the time the child was born. He has done nothing to provide support for the child.

The mother of the State's witness testified that she went with her daughter to the store where defendant was employed, and that the child's mother told him she needed help for the baby, and the defendant said, "I know it is mine, but I am not giving her a cent." She said this was in May.

The defendant testifying in his own behalf denied he was the father of the child. Though he admitted he had been with the State's witness he denied ever having had sexual relations with her. He admitted she came to the store and asked for help but denied he admitted paternity.

The court charged the jury, among other things, as follows:

"Two things are necessary to be shown beyond a reasonable doubt in order to make out a case against this defendant and to justify the jury in convicting him: First, that he is the father of the illegitimate child of Ellen Jane Biggs, born December 18, 1950, and second, that he has wilfully neglected or refused to support and maintain the child.

"Of course, if you fail to find beyond a reasonable doubt that he is the father of the child, then he would be under no obligation to support it. But, if you do find beyond a reasonable doubt that he is the father of the child, then this law would require him to support the child; and if he is the father and has wilfully neglected or refused to support it, he would be guilty of the offense that he is charged with."

The jury returned verdict of guilty, and from judgment imposed the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Robert L. Emanuel, Member of Staff, for the State.

F. D. Hackett for defendant, appellant.

DEVIN, C. J. The defendant assigns error in the refusal of the trial court to allow his motion for judgment of nonsuit, chiefly on the ground that the State's evidence failed to show that before the issuance of the

warrant the defendant after notice and demand willfully failed and refused to support and maintain the child.

But we think the evidence sufficient to carry the case to the jury. The testimony of the child's mother tended to show not only that the defendant was the father of her child but also that after notice and demand for support of the child the defendant failed and refused to do so. The demand and refusal took place in March, 1951, two months before the warrant was issued. True, the witness' mother related the circumstances of the demand on the defendant and his refusal to comply, and testified that this was in May. As the warrant was issued 5 May, 1951, her testimony does not necessarily show that the demand upon the defendant for support of the child was made after the institution of the prosecution, but if it does have that implication it would only present a contradiction in the testimony which it was the province of the jury to resolve. The motion for judgment as of nonsuit was properly denied.

Defendant also assigns error in the portion of the charge hereinbefore quoted, on the ground that the court should have gone further and instructed the jury that there was no obligation upon the defendant to support the child until he was given notice that he was the father and demand made upon him for support, and that this was not supplied by evidence of a demand made subsequent to the indictment, citing *S. v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462; *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333; *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *S. v. Sharpe,* 234 N.C. 154, 66 S.E. 2d 655.

This is the same question presented on the motion for judgment as of nonsuit. The State's evidence warranted the finding by the jury under the court's charge that notification to the defendant that he was the father of the child was given, that he admitted paternity and refused support in March, 1951, before the warrant was issued. The court defined the meaning of the word "wilful" as used in the statute and charged the jury that they must be satisfied beyond a reasonable doubt that the defendant was the father of the child, and further that he knowingly, intentionally and with stubborn and willful purpose neglected or refused to support the child before they could return verdict of guilty.

We think the jury fully understood the nature and essential elements of the offense charged, and that the evidence warranted the verdict and judgment.

In the trial we find

No error.

IN RE WILLIAM J. STONER.

(Filed 10 December, 1952.)

1. Indictment and Warrant § 9: Habeas Corpus § 2—

Where the warrant sets out the charge of a criminal offense under the law but also refers to a statute not immediately pertinent, such defect is at most an irregularity which does not render the warrant and judgment void, and dismissal of petition for *habeas corpus* is without error.

2. Health § 5—

Where defendant has been found by a jury to be an active tubercular carrier in the infectious stage, and as such had willfully failed to take the precautions prescribed by the public health authorities, judgment that he be confined in the prison department of the North Carolina Sanatorium is in accord with statute, G.S. 130-225.2, and further provision of the judgment that he be released to a veterans' hospital if he could secure admission thereto is in his interest.

CERTIORARI to review order of *Nimocks, J.*, in *habeas corpus* upon petition of William J. Stoner, from CUMBERLAND. Affirmed.

R. Brookes Peters, General Counsel State Highway & Public Works Commission, and Laurence J. Beltman and E. W. Hooper, Associate Counsel, for appellee.

No counsel for petitioner.

DEVIN, C. J. This case comes to us upon a writ of *certiorari* issued by this Court under Rule 34 at the instance of William J. Stoner to review the judgment below dismissing the writ of *habeas corpus* and remanding petitioner to custody under the former judgment of the Superior Court.

The petitioner, William J. Stoner, was charged in the warrant with violation of the statute (General Statutes, Art. 19A, Chapter 130) enacted for the prevention of the spread of tuberculosis in failing "to take the health precautions prescribed by the Health Department to protect his family and the public from being infected with tuberculosis, he being an active tubercular carrier in the infectious stage." On appeal from the Recorder's Court of Lenoir County petitioner was tried before *Grady, J.*, and a jury, in the Superior Court, March Term, 1952, and upon verdict of guilty the following judgment was rendered:

"State *v.* William J. Stoner and Robert Herring.

"The above defendants were both charged in a warrant with violating Section 130-225.2 of the General Statutes for North Carolina, in that, being tuberculosis patients, they did willfully refuse to comply with the

provisions of said statute. The two cases were consolidated, by consent, and tried before a jury, which returned a verdict of guilty as to both defendants.

"The judgment of the Court, is that each one of the defendants, William J. Stoner and Robert Herring, be confined in the prison department of North Carolina Sanatorium, for a period of two years, or until and unless as soon as discharged by the governing body of said institution; said patients to be treated for tuberculosis under the provisions of said Statute.

"This March 18, 1952.

HENRY A. GRADY, Judge Presiding.

"As an additional part of the foregoing judgment, it is further ordered that in case the defendant, William J. Stoner, can secure admission into Oteen Hospital, then and in that event the Superintendent of North Carolina Sanatorium is hereby ordered to transfer the said defendant to Oteen Hospital for treatment as a Veteran.

HENRY A. GRADY, Judge Presiding."

From this judgment no appeal was taken, and commitment issued.

Thereafter petitioner applied for writ of *habeas corpus* to inquire into the lawfulness of his detention. This was heard by Nimocks, J., 14 June, 1952, and the writ dismissed.

From the petitioner's informal petition for *certiorari* it appears that the ground of his application is that his detention under the judgment committing him to the prison department of the North Carolina Sanatorium is unlawful, and that upon a review of his case the Court will find error.

Examining the record, we find that the warrant cites the statute under which it is drawn as G.S. 130-225.1 whereas that penal provisions of the statute for the prevention of spread of tuberculosis are contained in G.S. 130-225.2. But the warrant sets out the charge of a criminal offense under the law and the reference by its number to a statute not immediately pertinent would be regarded as surplusage. This at most would be an irregularity which would not render the warrant and judgment void and his detention unlawful. The judgment cites the statute as G.S. 130-225.2, and expressly states that he was charged in the warrant with being a tubercular patient and willfully refusing to comply with the provisions of the statute.

The judgment seems to be in accord with the remedial provisions of the statute, and the addendum to the judgment also conforms to the provisions of the statute and is in the petitioner's interest.

The statute was enacted with the wise and humane purpose of preventing the spread of tuberculosis, and the petitioner has been found by a jury of his countrymen to be an active tubercular carrier in the infectious stage, and that as such he has willfully failed to take the precautions prescribed by the public health authorities for the protection of his own family as well as the public.

None of his legal or constitutional rights have been violated by the judgment committing him for detention at the State Tubercular Sanatorium.

The judgment dismissing the writ of *habeas corpus* and remanding the petitioner is

Affirmed.

FRANK H. HARRIS v. G. R. CANADY.

(Filed 10 December, 1952.)

Sales § 27—

Where the sole defense to an action on a note for the purchase price of an article is breach of warranty in the sale of the article, the jury should be instructed to answer the issue as to the amount plaintiff is entitled to recover in the amount of the note, with damages on the counterclaim to be ascertained under a subsequent issue, but where under instructions of the court the jury applies the counterclaim to a reduction in the amount due on the note, and there is no error in the court's charge as to the measure of damages for breach of warranty, the result is not prejudicial and a new trial will not be awarded.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Carr, J.*, August Term, 1952, of NEW HANOVER. No error.

Plaintiff sued on a note in the sum of $350 with interest from 30 August, 1949.

The defendant admitted the execution of the note, but set up a counterclaim for damages for breach of warranty in the sale of a meat display refrigerator box for the purchase of which the note was given.

The defendant alleged and offered evidence tending to show that the plaintiff warranted the meat box to be in first-class condition, and that it would preserve fresh meat from spoiling; that he relied on this warranty and purchased the box for use in his retail meat business; that the box proved worthless for the purpose, and that in attempting to use it he lost a considerable quantity of meat and also incurred expense in the effort to make it usable. Defendant asked that he recover damages in sum of $500 for breach of warranty.

There was evidence *contra* on the part of plaintiff.

Issues were submitted to the jury and answered as follows:

"1. Did the defendant execute and deliver to the plaintiff the note in the sum of $350 as alleged in the complaint?

"Answer: YES.

"2. Did the plaintiff warrant the meat box sold by him to the defendant to be in first-class condition, and that it would preserve and keep from spoiling fresh meats placed in the same, as alleged in the answer?

"Answer: YES.

"3. Was there a breach of said warranty by the plaintiff, as alleged in the answer?

"Answer: YES.

"4. What amount, if any, is the plaintiff entitled to recover of the defendant?

"Answer: $250.

"5. What amount, if any, is the defendant entitled to recover of the plaintiff?

"Answer: NONE."

The court gave this instruction to the jury, to which defendant excepted.

"Now, if the damages you assess in the case is less than the amount due on the note, with interest, then you would credit the note with such damage, and answer that issue #4 in such amount as represents the difference between the damages and the amount due on the note, plus interest.

"But if you find the damage to be greater than the amount of the note, to-wit, $350.00, plus interest, which would be around $412.00 or $413.00, as the court calculates it, and you find the damages is greater than that amount, then you would answer the fourth issue 'nothing,' and as to the fifth issue—'What amount, if any, is the defendant entitled to recover of the plaintiff?'—you would fix the amount as the difference between the amount of the note, plus interest, and the damage you have assessed."

From judgment on the verdict the defendant appealed.

No counsel for plaintiff, appellee.
Clayton C. Holmes for defendant, appellant.

DEVIN, C. J. The defendant noted exceptions to portions of the judge's charge to the jury, and assigns error in the manner in which the case was submitted to the jury as tending to confuse the issues. He contends that as a result defendant's counterclaim was not understood and properly considered by the jury.

We think the jury should have been instructed to answer the issue addressed to the plaintiff's cause of action in the amount of $350 and

interest, and that then the evidence pertaining to the defendant's counterclaim for damages should have been correlated and under proper instructions submitted to the jury to be applied to issues of warranty, breach of warranty and damage.

However, there was no exception to the issues as submitted, and the court properly instructed the jury if they found the plaintiff warranted the meat box as alleged, and that there was a breach of such warranty, the measure of damages would be the difference between the value of the meat box as warranted and its value in the condition in which it was delivered, plus expense incurred in efforts to repair, and loss of meat resulting from the condition of the box when attempt was made to use it.

Under the court's charge the jury has determined the amount of damages which the defendant is entitled to have for breach of warranty and this amount has been applied to the reduction of the amount due on the note. Hence we do not perceive that harm has resulted to the defendant from the manner in which the case was submitted to the triers of the fact.

The result will not be disturbed.

No error.

PARKER, J., took no part in the consideration or decision of this case.

G. W. MORGAN AND WIFE, ALTA LEE MORGAN, v. HIGH PENN OIL COMPANY AND SOUTHERN OIL TRANSPORTATION COMPANY, INC.

(Filed 10 December, 1952.)

Appeal and Error § 2—

An order overruling a demurrer *ore tenus* is not appealable.

APPEAL by defendants from *Sink, J.*, at September Term, 1952, of GUILFORD.

Civil action based on an alleged private nuisance heard upon a demurrer *ore tenus* to the complaint.

These are the controlling facts in chronological order:

1. The plaintiffs, G. W. Morgan and his wife, Alta Lee Morgan, filed their complaint at the time of the issuance of the summons. The complaint alleges in detail that the plaintiffs own and occupy a tract of land worth $25,000 in Guilford County, North Carolina; that the defendants, High Penn Oil Company and Southern Oil Transportation Company, Inc., operate an oil refinery and an oil distribution center in permanent structures on adjoining premises owned by the defendant, Southern Oil

Transportation Company, Inc.; that the oil refinery and the oil distribution center are so constructed and so operated by the defendants as to cast large quantities of noxious fumes and gases onto the neighboring land of the plaintiffs, causing them to suffer great annoyance and discomfort in the enjoyment of their property and inflicting upon such property substantial damage; and that the continued maintenance of the resultant nuisance by the defendants will destroy both the usefulness and value of the land of the plaintiffs. The plaintiffs pray for a perpetual injunction enjoining the continuance of the alleged wrongful acts of the defendants, or for damages totaling $25,000 "in the event such an injunction is not granted."

2. The defendants filed a joint answer within the time appointed by law. The answer admits that the Southern Oil Transportation Company, Inc., owns the lands adjoining the tract claimed by the plaintiffs; that the Southern Oil Transportation Company, Inc., acting alone, maintains an oil distribution center on such premises; and that the High Penn Oil Company, acting alone, operates an oil refinery on such premises. It denies, however, that either of the defendants conducts its business in such a manner as to constitute a nuisance, or to cause injury to neighboring lands or landowners.

3. When the action came on to be heard at the September Term, 1952, of the Superior Court of Guilford County, the defendants interposed a demurrer *ore tenus* on the theory that the complaint does not state facts sufficient to constitute a cause of action because it "alleges a private nuisance and then alleges as the measure of damages . . . the difference between the fair market value of the property before the alleged acts and the fair market value after the alleged acts." Judge H. Hoyle Sink, who presided, entered an order overruling the demurrer *ore tenus,* and the defendants appealed, assigning such ruling as error.

Frazier & Frazier for plaintiffs, appellees.
Roberson, Haworth & Reese for defendants, appellants.

ERVIN, J. This question arises at the threshold of the appeal: Is an order overruling a demurrer *ore tenus* appealable?

The answer is "No." *Hood, Comr. of Banks v. Motor Co.,* 209 N.C. 303, 183 S.E. 529; *Griffin v. Bank,* 205 N.C. 253, 171 S.E. 71; *Mountain Park Institute v. Lovill,* 198 N.C. 642, 153 S.E. 114; *Chambers v. R. R.,* 172 N.C. 555, 90 S.E. 590; *Shelby v. Railway Co.,* 147 N.C. 537, 61 S.E. 377; *Hall v. Railroad,* 146 N.C. 345, 59 S.E. 879; *Burrell v. Hughes,* 116 N.C. 430, 21 S.E. 971; *Joyner v. Roberts,* 112 N.C. 111, 16 S.E. 917; *Sprague v. Bond,* 111 N.C. 425, 16 S.E. 412; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 676.

The reasons for the rule that an appeal does not lie from an order overruling a demurrer *ore tenus* were thus stated in *Joyner v. Roberts, supra:* "It is contended, however, that this is, in effect, a demurrer *ore tenus,* and that, therefore, an appeal lies. From the overruling of a formal demurrer an appeal does lie. But there is this protection against abuse, that if the demurrer is frivolous, judgment is at once granted the plaintiff. The Code, section 388. (Now G.S. 1-219.) But there is no such remedy on overruling this motion. . . . If an appeal lay in such cases, every defendant in every case could procure six or twelve months' delay by simply objecting to the jurisdiction or to the sufficiency of the complaint, no matter how plain the case or how utterly unfounded the grounds of the objection, since, as has been already said, judgment cannot be entered as when a frivolous demurrer is filed. To rule that an appeal lay in such case would be simply to establish a 'stay-law.' There is less excuse for an appeal in this particular respect, since the defendants cannot possibly be damaged by delaying the appeal till the final judgment, because, even though they should fail to note an exception, the objection to the jurisdiction and for failure of the complaint to state a cause of action can still be taken advantage of for the first time in this Court. Rule 27 of the Supreme Court. (Now Rule 21.) Those grounds of objection cannot be waived by proceeding to trial . . . The hardship, if any, is on the other side, who may find (if he has not a cause of action or the Court has not jurisdiction) that his victory is barren, and that he has the costs to pay for his bootless clamor. . . . There are some questions which, by the reiterated and uniform adjudications in regard to them, should be deemed settled. This is one of them."

Appeal dismissed.

STATE v. E. J. MOORE.

(Filed 10 December, 1952.)

Homicide § 25—

The State's evidence tending to show that defendant intentionally killed deceased with a deadly weapon takes the case to the jury on a charge of murder in the second degree notwithstanding defendant's evidence tending to show death by misadventure or possibly self-defense.

APPEAL by defendant from *Patton, Special Judge,* April Term, 1952, of GUILFORD. No error.

The bill of indictment charged the defendant with the murder in first degree of one Alton Brown, but the Solicitor announced he would ask only

for a verdict of guilty of murder in second degree or manslaughter as the evidence might warrant.

The State's evidence tended to show that about 9 p.m. on the evening of 9 February, 1952, the defendant and the deceased had some angry words at Bateman's Grill in Greensboro, and the defendant was observed backing toward his truck with an open knife in his hand threatening to kill the deceased if he came any closer. The deceased was unarmed. The defendant then left the scene in his truck, went to the home of a friend and borrowed a 22-caliber semi-automatic rifle, on pretext of going turkey hunting, and returned to Bateman's Grill. The deceased, who was then sitting in an automobile with two companions, got out and walked toward defendant's truck. According to the State's witness defendant was then standing at the left rear of his truck and was heard to say with an oath, "I told you I'd kill you," and immediately the rifle was discharged, fatally wounding the deceased. Defendant then threatened to shoot a companion of deceased but was prevented.

The defendant, however, offered evidence tending to show that at Bateman's Grill the deceased who had been drinking, approached defendant in a threatening manner, saying, "the time is coming when I'll get you"; that defendant then left and went to the home of a friend and borrowed a rifle for the purpose of going turkey hunting the following morning; that he returned to Bateman's Grill three-quarters of an hour later and was sitting in his truck when the deceased came out from the grill with a stick in his hand, came up to the truck and attempted to pull defendant out of his truck, tearing his coat; that defendant reached back in his truck for some weapon with which to defend himself and his hand caught hold of the rifle; that as he swung the rifle around it was accidentally discharged, killing the deceased. The defendant testified he and the deceased had been friends for years and frequently together.

The jury returned verdict of guilty of murder in the second degree, and from judgment imposing prison sentence the defendant appealed.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, for the State.

Hughes & Hines for defendant.

DEVIN, C. J. In the defendant's appeal the only error assigned in defendant's brief is the refusal of the court below to sustain his motion for judgment as of nonsuit. While the defendant's evidence tended to show death by misadventure or possibly self-defense, the State's evidence which was accepted by the jury fully warranted the verdict of murder in the second degree. The motion for judgment of nonsuit was properly denied.

Though there was no exception noted to the judge's charge, we have examined this and find that the jury was correctly instructed as to all pertinent phases of the case, and the defendant's defenses fairly presented. We have also examined the exceptions noted to rulings of the court during the trial and consider that none of them is of substantial merit.

The verdict and judgment will be upheld.

No error.

J. A. PEACE, R. A. PEACE AND WIFE, LONIE G. PEACE, v. CITY OF HIGH POINT.

(Filed 10 December, 1952.)

1. Appeal and Error § 2—

An appeal from the refusal of the court to dismiss the action is premature.

2. Appeal and Error § 1—

Where an appeal is dismissed, the Supreme Court in its discretion may nevertheless discuss the question sought to be presented.

3. Judgments § 4—

The unambiguous terms of a consent judgment must be given effect until such judgment is modified or set aside in a proper proceeding.

APPEAL by defendant from *Patton, Special Judge,* June Term, 1952, of GUILFORD (High Point Division).

Plaintiffs instituted this action to recover damages resulting from noxious odors on their premises caused by the dumping and burning of dead carcasses, garbage, decayed fruit, etc., by the defendant on its premises near the plaintiffs' property; thereby creating and maintaining a nuisance, allegedly in violation of the provisions of a consent judgment entered at the January Term, 1927, of the Superior Court of Guilford County, in an action by J. A. Peace *v.* City of High Point for permanent damages resulting from the dumping of garbage on the property of the city adjacent to that of the plaintiffs.

The present action involves 4½ acres of the 15.13 acres involved in the previous action.

The defendant filed an answer and moved to dismiss the action on the ground that the judgment in the former action constitutes a bar to the present action; that while counsel for defendant city purported to consent to the insertion of the portion of the judgment in the former action, upon which the present action is bottomed, such counsel were wholly without

authority on behalf of said city to consent to the insertion of such provisions, which read as follows:

"BY AND WITH THE CONSENT OF THE PARTIES HERETO, IT IS ORDERED AND ADJUDGED that the City of High Point shall not have the right hereafter to deposit or burn on the premises owned by it and described in the complaint animal matter such as dead carcasses; garbage, such as decayed fruit and vegetable matter, such as cabbage, potatoes, oranges, onions, etc., and automobile tires, with these exceptions, the City of High Point shall have a right to use the same as a general dumping ground as aforesaid and deposit or burn whatever it dumps thereon."

The motion was denied and the defendant appeals and assigns error.

James B. Lovelace and Frazier & Frazier for plaintiffs, appellees.

G. H. Jones for defendant, appellant.

PER CURIAM. This appeal is premature and must be dismissed. *Bargain House v. Jefferson,* 180 N.C. 32, 103 S.E. 922. Even so, in the exercise of our discretion, we will state that so long as the consent judgment in the previous action is not modified or set aside with respect to the above provisions, the fact that permanent damages were awarded therein will not constitute a bar to the present action. And a consent judgment may be modified or set aside only in the manner pointed out in *King v. King,* 225 N.C. 639, 35 S.E. 2d 893, and authorities cited therein.

Appeal dismissed.

JACK RIDER, RACHEL D. DAVIS AND BRAXTON NEWMAN, RESIDENTS AND TAXPAYERS OF LENOIR COUNTY, IN THEIR OWN INTEREST AND IN THE INTEREST OF ALL OTHER RESIDENTS AND TAXPAYERS OF LENOIR COUNTY, WHO MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. LENOIR COUNTY; B. C. LANGSTON, W. L. MEASLEY, MARK N. SMITH, HARRY SUTTON AND IKE WHITFIELD, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF LENOIR COUNTY, THE LAST NAMED BEING CHAIRMAN OF SAID BOARD OF COUNTY COMMISSIONERS.

(Filed 6 January, 1953.)

1. Elections §§ 6½, 28—

A primary election is merely a mode of choosing candidates of political parties, while a regular election is the final choice of the electorate. G.S. 163-117, *et seq.*

2. Elections § 9a: Taxation § 4—

A party primary is not an election within the purview of G.S. 153-93 proscribing the holding of a special bond election within one month of a regular election for county officers.

3. Same: Hospitals § 6½—

Ballot for a bond election for a county hospital stating that the proposed bond issue is to finance the erection of additions to and alterations and reconstruction of existing buildings comprising a named hospital implies the acceptance of the named hospital by the county from its private corporate owner in accordance with the plan theretofore repeatedly discussed in the public press, and the ballot is not objectionable for duplicity on this ground.

4. Taxation § 38a—

Action to enjoin issuance of hospital bonds and to restrain disbursement of county funds therefor on the ground of those irregularities in the bond order and form of ballot asserted in this case *held* precluded by G.S. 153-90 or G.S. 153-100 because not instituted until after thirty days subsequent to the statement of the result of such election.

5. Hospitals § 6½: Taxation §§ 4, 38a—Where bond order stipulates total sum to be expended, appropriation of large additional sum is unauthorized.

While a county may ordinarily expend unallocated nontax moneys for the public purpose of a county hospital even in those instances in which a bond order for the hospital does not specify that the proceeds of the bonds are to be used together with such unallocated nontax moneys, *held* where the bond order specifically specifies that the total maximum amount to be expended by the county for the hospital is not to exceed $465,000 the allocation of an additional supplemental appropriation of over $138,000 out of nontax moneys on hand is a material variance from the compact as set forth in the bond order, and the county should be restrained in a proper suit from issuing the bonds and disbursing county funds in accordance with hospital plans predicated upon such increased appropriation.

6. Same: Equity § 3—

Suit to restrain a county from issuing hospital bonds and from disbursing county funds in accordance with a plan for the enlargement and improvement of a county hospital on the ground of the inclusion in the plan for expenditures a sum greatly in excess of that approved in the bond election for the hospital *held* not barred by laches when instituted less than two months after the county's attempt to make the supplemental appropriation and less than one month after the county had let the contract for construction.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Burney, J.*, holding the courts of the Sixth Judicial District, at Chambers in Clinton, 11 September, 1952, from LENOIR.

Suit in equity by plaintiffs as taxpayers, against the defendants, members of the Board of County Commissioners of Lenoir County, and Lenoir County, to enjoin the issuance of hospital bonds and to restrain the disbursement of county funds and the performance of other acts proposed by the defendants in furtherance of the enlargement of a public hospital

located in the City of Kinston, heard below on return of the show-cause order and on motion of the defendants to vacate the temporary restraining order previously issued on *ex parte* application.

The hospital around which this controversy revolves was opened in 1929 by Eastern Carolina Hospital Corporation and, until conveyed to Lenoir County by deed of gift shortly prior to the commencement of this suit, it was operated by the parent corporation as a nonprofit hospital under the name of Memorial General Hospital. It was originally a 25-bed hospital, but by two enlargements it has been increased to present capacity of 69 beds, with nurses' home. The hospital and nurses' home are located on a 1.7 acre site on the east side of College Street between Rhodes and Warren Avenues in a built up residential section of Kinston.

In April, 1948, almost two years prior to the bond election here under attack, a special bond election was held in Lenoir County, in which there was submitted the question whether the voters should approve or disapprove the issuance of bonds in the amount of $950,000 for the purpose of building a public hospital on "a suitable, spacious, and adequate site to be chosen," the proceeds of which bonds, if approved and issued, were to be supplemented by State and Federal funds of approximately $1,000,000. In the election 2,109 votes were cast for the bond issue, with 687 votes being cast *contra*. However, at the time this election was held the then existing law provided that the vote should be against the registration, and inasmuch as there were 5,420 registered voters in Lenoir County, the election failed.

Thereafter and prior to the commencement of this suit, these events transpired in furtherance of a plan by which it was proposed that Memorial General Hospital be donated to Lenoir County and that, with the aid of State and Federal funds, the hospital be enlarged on its present site to 125-bed capacity:

1. On 6 September, 1949, the Board of Trustees of Eastern Carolina Hospital Corporation adopted a resolution offering to donate to Lenoir County its hospital, including land, buildings, and all other assets, amounting in value to about $300,000, provided the County maintain and operate the hospital as a public hospital. However, the resolution also stipulates that "in any expansion program for providing adequate hospital facilities for the people of Lenoir County according to their future needs the Board of Commissioners of Lenoir County may in their sound judgment and discretion abandon the present site and plant for hospital purposes, and construct an entirely new plant and facilities, and may utilize said present plant and facilities for any other needed county purposes or otherwise dispose of said properties as county property, as in their judgment may be deemed advisable and as provided by law; . . ."

2. On 7 November, 1949, the Board of County Commissioners adopted a resolution accepting the offer of the hospital corporation, subject to approval by a majority of the qualified voters of the county, to be expressed in a special bond election on the questions of approval by the voters of (1) the issuance of bonds to raise funds for the expansion, improvement, and modernization of the hospital facilities, (2) the levy of a tax to pay the bonds and interest thereon, and (3) the levy of a tax for the operation and maintenance of the hospital.

3. After the hospital corporation offered to donate the hospital property to Lenoir County, a proposed bond order was introduced at the regular meeting of the Board of Commissioners held on 1 May, 1950. This bond order proposed the issuance of $465,000 public hospital bonds, subject to approval by the voters of the county at a special election to be held for that purpose.

The bond order contains these pertinent recitals and stipulations:

"WHEREAS, the Board of Commissioners of the County of Lenoir deems it advisable that the County shall establish, operate and maintain a public hospital for the use of the inhabitants of said County and the Eastern Carolina Hospital Corporation has offered to convey to the County the existing hospital and hospital facilities known as the Memorial General Hospital now maintained by said corporation in the City of Kinston, provided the County will operate and maintain such existing hospital and hospital facilities as a public county hospital, and the Board of Commissioners desires to accept the conveyance of such existing hospital and hospital facilities and to expand and improve such existing hospital and hospital facilities: NOW THEREFORE,

"BE IT ORDERED by the Board of Commissioners of the County of Lenoir as follows:

"Section 1. The Board of Commissioners of the County of Lenoir has ascertained and hereby determines that, in order to provide adequate hospital facilities for the inhabitants of said County, it will be necessary to expand and enlarge the existing hospital facilities comprising such Memorial General Hospital, and that it will be necessary to expend for such purpose *not to exceed $465,000 in addition to any funds which may be contributed by the Federal Government or any of its agencies or by other persons or associations.*" (Italics added.)

The bond order was published in the 15 May, 1950, issue of the *Kinston Free Press,* a newspaper of general circulation, published and circulated in Lenoir County, together with notice of a public hearing to be held 5 June, 1950, on the question of the final adoption of the order, and on that date the bond order was unanimously adopted and approved by the Board of Commissioners "without change or amendment." (G.S. 153-78.)

4. On 5 June, 1950, the Board of Commissioners also adopted a resolution reciting the previous adoption of the bond order and calling a special election for 8 July, 1950, "for the purpose of submitting to the qualified voters of said county, for their approval or disapproval, (1) the bond order . . . and . . . the indebtedness to be incurred by the issuance of the bonds authorized by such bond order, and (2) the levy annually of a special tax of not exceeding ten cents on each $100 of assessed valuation of taxable property to finance the operation, equipment and maintenance of the public hospital described in said bond order." Notice of the special election so called was published in the *Kinston Free Press* in the issues of 6, 13 and 20 June, 1950. Also, the full text of the bond order was published again in the 13 and 20 June, 1950, issues of the *Kinston Free Press.* And in addition to this, "numerous editorials, news stories, articles, and advertisements relating to the question of whether said bond order should be approved or disapproved by the voters appeared in said newspaper subsequent to May 1, 1950 and prior to July 8, 1950."

5. The form of the ballot as prescribed by the resolution calling the special election and as used in the election submitted these two propositions:

"PROPOSITION No. 1. Shall the qualified voters of the County of Lenoir approve the bond order adopted by the Board of Commissioners of said County on the 5th day of June 1950, authorizing (1) the issuance of bonds of said County of the maximum aggregate principal amount of $465,000 to finance the erection of additions to and the alteration and reconstruction of the existing buildings comprising the Memorial General Hospital and the erection of an additional building or buildings for such hospital, including a nurses' home and health center, and the acquisition and installation of equipment required for such buildings, and the acquisition of any lands necessary for a site for such buildings, and (2) the levy of an annual tax sufficient to pay the principal of and interest on the bonds; and shall the qualified voters approve the indebtedness proposed to be incurred by the issuance of such bonds?"

"PROPOSITION No. 2. Shall the qualified voters of the County of Lenoir approve the levy of a special tax of not exceeding ten cents, annually, upon each $100 of assessed valuation of taxable property in said County to finance the cost of operating, equipping and maintaining a public hospital for the use of the inhabitants of said County?"

6. At the election held 8 July, 1950, the bond order and proposals to levy a tax to service the bonds were approved by a majority of the voters voting, as determined by statement of the official canvass of the returns made 31 July, 1950, duly published 2 August, 1950, the vote being 2,371 for the bond issue and related questions, and 1,324 *contra.* Proposition No. 2 also carried by a vote of 2,182 to 1,380 *contra.* (The total registration was 12,765.)

7. It is here noted that prior to the 8 July, 1950, election the law was amended so as to provide that future elections of this kind should be determined by a majority of the votes actually cast, rather than by vote against the total registration. (Chapter 497, Sections 2 and 8, Session Laws of 1949, ratified 22 March, 1949, now codified as G.S. 153-92 as amended and G.S. 153-92.1.)

8. On 19 December, 1950, the Board of County Commissioners adopted a resolution accepting the hospital and the deed conveying the property to the County. And at the same meeting a resolution was adopted appointing a Hospital Building Committee, composed of five citizens, who were authorized to employ architects and work out plans and specifications for the expansion and improvement of the donated hospital property, and this was done.

9. On 21 February, 1952, the plans and specifications, as approved by the Building Committee, were submitted to and approved by the Board of Commissioners. Thereafter approval was given by the North Carolina Medical Care Commission and the Federal Security Agency, U. S. Public Health Service, the North Carolina State Board of Health, and the City of Kinston building inspector.

10. On 27 March, 1952, bids for construction of the hospital property were received and publicly opened.

11. On 2 April, 1952, the Hospital Building Committee reported to the Board of County Commissioners (1) that in accordance with the lowest and best bids received the total cost of the project was $1,190,750; (2) that State and Federal funds allocated, together with the proceeds of the approved bond issue of $465,000, amounted to $1,052,036.20; and (3) that an additional $138,713.80 would be required to accept the bids. The committee recommended that acceptance of the selected low bids be approved and requested the additional appropriation of the necessary $138,713.80.

12. And on 2 April, 1952, the Board of County Commissioners attempted to comply with the recommendation of the hospital building committee, and entered a resolution appropriating for the purpose of paying the rest of the total cost of "planning, construction, remodeling, additions to and equipment of" the hospital the sum of $138,713.80 from "funds of Lenoir County on hand and available," theretofore unallocated and unappropriated. The court below found that these funds were derived from "profits on the operation of alcoholic beverage control stores within Lenoir County," and therefore from sources other than taxation.

13. On 25 April, 1952, contracts for construction were entered into in accord with bids accepted, and work was scheduled to begin on 19 May, 1952.

14. On 29 April, 1952, public hospital bonds in the amount of $465,000 were sold by the County.

The plaintiffs instituted this suit 15 May, 1952. In their complaint, consisting of eight separate causes of action, the plaintiffs set up numerous alleged irregularities and illegalities in the bond order, the bond election, and the acts and conduct of the defendants in connection with the hospital project.

On 17 May, 1952, a temporary restraining order was served on the defendants, enjoining the delivery of the bonds authorized at the bond election, and restraining the expenditure of any part of the proceeds of the bond moneys or of the supplemental appropriation of $138,713.80 for the proposed hospital project. The defendants filed answer denying the material allegations of the complaint, and alleging that the plaintiffs are not entitled to maintain any of their causes of action by reason of laches resulting from unreasonable delay and lack of diligence on their part.

When the cause came on for hearing below on return of the show-cause order and motion of the defendants to vacate the temporary restraining order, numerous affidavits were offered in evidence by both sides. At the conclusion of the hearing and after arguments of counsel, Judge Burney by consent took the case under advisement and later found facts, made conclusions of law, and entered judgment. The conclusions reached and the adjudications made by the judgment are adverse to the plaintiffs' contentions, and sustain all the defendants' material allegations, including their pleas of laches. The temporary restraining order was vacated and dissolved.

From the judgment so entered the plaintiffs excepted and appealed, assigning errors.

R. S. Langley, Matt H. Allen, and John G. Dawson for plaintiffs, appellants.

Chas. B. Aycock, R. A. Whitaker, and Thos. J. White for defendants, appellees.

Reed, Hoyt & Washburn of counsel for defendants, appellees.

JOHNSON, J. This appeal comes here on a printed record of 499 pages. The complaint covers 93 pages and the judgment 57. More than 30 assignments of error have been brought forward and argued in the briefs. All these have been duly considered and the entire record has been carefully examined. But necessarily we include in this opinion and the preliminary statement of facts only such references to the record as seem pertinent to decision. *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737.

The questions raised by the appeal fall into two classes: (1) those which relate to the validity of the bond order and bond election, and (2) those which challenge the legality of the proposed expenditures on the

ground that they are materially in excess of the amount approved and limited by vote of the people.

1. *Questions relating to the validity of the bond order and the bond election.*—The plaintiffs point to numerous alleged irregularities in both the bond order adopted by the Board of Commissioners and in the conduct of the election as held on 8 July, 1950. However, chief stress seems to be placed on the contention that the bond election, having been held within one month after the regular Democratic run-off primary election of 24 June, 1950, was held in violation of the provisions of this statute:

"G.S. 153-93. When election held.—Whenever the taking effect of an order authorizing the issuance of bonds is dependent upon the approval of the order by the voters of a county, the governing body may submit the order to the voters at an election to be held not more than one year after the passage of the order. The governing body may call a special election for that purpose, or may submit the order to the voters at the regular election for county officers next succeeding the passage of the order, *but no such special election shall be held within one month before or after a regular election for county officers.* Several orders or other matters may be voted upon at the same election. (1927, c. 81, s. 23)" (Italics added.)

The court below found, on uncontroverted evidence: "That one of the days on which the registration books were opened for the registration of voters in said special election to be held July 8, 1952, was Saturday, June 24, 1950. That on Saturday, June 24, 1950, there was held in Lenoir County and throughout the State of North Carolina, a primary election which was a 'second primary' or 'run-off' primary for the nomination of the Democratic candidate for the U. S. Senate, and in Lenoir County on said date, there was a second primary or run-off primary election for the nomination of the Democratic candidate for Sheriff of Lenoir County; that in Trent Township in Lenoir County on said date, there was a second primary or run-off primary for the nomination of the Democratic candidate for Constable in said township. That the last regular election for the election of County officers held in Lenoir County prior to said special election held on July 8, 1950, was held November 2, 1948. That the next regular election for County officers held in Lenoir County subsequent to said special election held July 8, 1950, was held November 7, 1950."

The defendants insist (1) that the Democratic run-off primary held 24 June, 1950, was not a "regular election for county officers" in contemplation of G.S. 153-93, and that this statute does not apply here; but (2) if it be held otherwise, then, in any event, the defendants insist that since the plaintiffs did not institute this suit within the 30-day limitation period prescribed by G.S. 153-100, the plaintiffs are precluded from attacking the bond election by the express terms of this latter statute.

As to this, the plaintiffs contend in effect that the 24 June, 1950, Democratic run-off primary was a "regular election for county officers," within the meaning of G.S. 153-93, and that the 8 July, 1950, bond election, held less than 30 days after the primary election, was held in violation of this statute, and that by reason thereof the bond election was utterly void and subject to attack at any time, irrespective of the 30-day limitation provisions of G.S. 153-100, upon the theory that in legal contemplation no bond election was held, and that the limitations imposed by G.S. 153-100 apply only to irregular or voidable elections, as distinguished from those which are utterly void. See *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311.

An examination of G.S. 153-93 in the light of these contentions *pro* and *con* discloses that when a bond election is required to be held, as in the instant case, the statute by express terms provides that "The governing body may call a special election . . ., or may submit the order to the voters at the regular election for county officers next succeeding the passage of the order, . . ." It thus appears that this statute does not declare as a matter of fixed legislative policy that a bond election must be held more than a month before or after any other election, on a day specially set apart for such election. Indeed, the statute leaves it for the Board of Commissioners to say whether in their discretion the bond proposition shall be submitted at a special election called for that purpose, or passed on by the voters at the "regular election for county officers next succeeding the passage of the (bond) order, . . ." It is only when the Board of Commissioners decide to call a special election that the statute inhibits holding the special election within one month "before or after a regular election for county officers."

Moreover, since the express language of the statute provides that in the discretion of the Commissioners the bond order may be submitted to the voters "at a regular election for county officers," it is manifest that the "regular election" contemplated is the regular election at which county officers are actually elected, as distinguished from a primary election held merely for the purpose of nominating candidates later to be voted on. See Constitution of North Carolina, Article VII, Section 1; Article II, Section 27; and Article IV, Sections 24 and 25; G.S. 163-4.

And if this be the legislative meaning of "regular election for county officers" when used first in the statute in conferring on the Board of Commissioners discretionary power either to call a special election or to submit the proposed proposition at a "regular election for county officers," then it would seem reasonable to infer that the Legislature placed the same meaning on the expression "regular election" when used the second time in the same statute in directing that when a special election is called it shall not be held within one month before or after a "regular election

for county officers." *Expressum facit cessare tactitum;* 50 Am. Jur., Statutes, Sections 243 and 247.

A contextual study of this statute leaves the impression that the Legislature did not intend to include within the inhibitions of the statute a party primary.

All the more would this seem to be so since there is a well-defined distinction between a primary election and a regular election. A primary election is a means provided by law whereby members of a political party select by ballot candidates or nominees for office; whereas a regular election is a means whereby officers are elected and public offices are filled according to established rules of law. In short, a primary election is merely a mode of choosing candidates of political parties, whereas a regular election is the final choice of the entire electorate. G.S. 163-117 to 147; 29 C.J.S., Elections, Section 1 (d) and (e); Words and Phrases, Permanent Edition, Vol. 36, p. 667 *et seq.*

It is also significant that at the time of the enactment of G.S. 153-93 in 1927 our Primary Law had been on the statute books about 12 years. (Chap. 101, Public Laws of 1915, now codified as G.S. 163-117 *et seq.*) Thus, the absence from the language of the statute at hand of any reference to primary elections negatives the idea that such an election was intended by the Legislature to be included in the term "regular election for county officers."

It is also relevant to note in this connection that Chapter 1084, Section i (f), now codified as 18-124 (f), which provides that no special election under the Wine and Beer Control Act shall be held within 60 days of certain designated elections, expressly names and places within the inhibited class these elections: "any general election, special election, or primary election in said county or any municipality thereof." See also G.S. 18-61.

We conclude that the term "regular election for county officers," as used in G.S. 153-93 does not include a party primary.

In this view of the case, we do not reach for decision the question whether a special bond election held within one month before or after a "regular election for county officers" amounts to such violation of G.S. 153-93 as to render the election wholly void and subject to attack at any time on the theory that no election was held, or merely voidable and subject to attack only within the 30-day period provided by the limitations imposed by G.S. 153-100.

The plaintiffs further contend (1) that the bond order as adopted by the Board of Commissioners is violative of G.S. 153-78 and invalid for duplicity in stating the purpose for which the bonds are or may be issued; (2) that the form of the ballot by which the question of the bond issue was submitted is likewise bad for duplicity; and (3) that the form of the

ballot was vague and did not present to the voters the question of acceptance of the offer of the hospital corporation to donate the hospital to the County. These and other alleged irregularities of the same type, challenging the validity of the bond order and bond election, we deem it unnecessary to discuss in detail. Suffice it to say, we think the ballot was sufficient in form to present the question of acceptance of the offer to donate the hospital. Proposition No. 1 set out on the ballot states that the purpose of the proposed bond issue "is to finance the erection of additions to and the alteration and reconstruction of the existing buildings comprising the Memorial General Hospital and the erection of an additional building or buildings for such hospital . . .," as authorized by the bond order of 5 June, 1950. We think it clearly implicit in this language that the County was to accept and take title to the hospital in the event of a favorable vote on the proposed bond issue.

As to the rest of the alleged irregularities, it is manifest that the plaintiffs, not having commenced this suit within 30 days after publication of the statement of results of the bond election, are now precluded from asserting any right of action based thereon by virtue of the provisions of one or the other of these statutes:

"G.S. 153-90. Limitation of action to set aside order.—Any action or proceeding in any court to set aside a bond order, or to obtain any other relief, upon the ground that the order is invalid, must be commenced within thirty days after the first publication of the notice aforesaid and the order or supposed order referred to in the notice. After the expiration of such period of limitations, no right of action or defense upon the validity of the order shall be asserted, nor shall the validity of the order be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. (1927, c. 81, s. 20)."

"G.S. 153-100. Limitation as to actions upon elections.—No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of such statement of result as provided in Sec. 153-99. (1927, c. 81, s. 30.)"

We conclude that as to both the bond order and the bond election no irregularity now open to challenge has been made to appear. It follows, then, that the court below correctly held that the bond election is in all respects valid.

2. *The question of limitation on the amount to be expended on the hospital project.* Here the plaintiffs, treating the bond election as valid, challenge the legality of the supplemental appropriation of $138,713.80 from surplus nontax funds on the ground that this additional appropriation materially varies the terms of the bond order and the proposition submitted to and approved by the voters.

It may be conceded that the enlargement of a county hospital is a public purpose for which a county ordinarily may expend unallocated nontax moneys on hand without vote of the people. G.S. 131-126.23; *Adams v. City of Durham,* 189 N.C. 232, 126 S.E. 611; *Nash v. City of Monroe,* 198 N.C. 306, 151 S.E. 634; *Mewborn v. City of Kinston,* 199 N.C. 72, 154 S.E. 76; *Burleson v. Board of Aldermen of Town of Spruce Pine,* 200 N.C. 30, 156 S.E. 241.

And it may be conceded also that where such public funds are to supplement bond moneys, it is not required that the bond order specify, or the voters be advised, that the proceeds of the proposed bond issue are to be used with, or in addition to, a sum of money on hand or otherwise available for the proposed improvement. G.S. 153-78. See also *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484.

However, under the statutory procedure prescribed for submitting a bond proposal to the voters, as in the instant case, the bond order, required to be adopted by the Board of Commissioners and published prior to the election, is the crucial foundation document which supports and explains the proposal to be submitted. (G.S. 153-78, 86, 87, 89), and material representations set out in the bond order ordinarily become essential elements of the proposition submitted to the voters.

Accordingly, where the bond order contains a stipulation definitely fixing the maximum amount of county funds to be expended on a proposed project, such stipulation, treated as a compact, becomes a limitation upon subsequent official acts based on a favorable vote and may not be materially varied. 64 C.J.S., Municipal Corporations, Sec. 1865, p. 408; *Moore v. Central City,* 118 Neb. 326, 224 N.W. 690; *Raff v. Philadelphia,* 256 Pa. 312, 100 A. 815. See also *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263; *Teer v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359; Anno.: 117 A.L.R. 892, 895.

In the case at hand it is noted that the bond order stipulated in effect that the proposed hospital project will require "not to exceed $465,000" of county funds. It now turns out that the amount so limited is not enough to complete the project according to present plans, and in order that the contracts for construction may be let, it appears necessary for the County to appropriate an additional sum of $138,713.80.

A study of this record impels the conclusion that the proposed supplemental appropriation of $138,713.80 of county funds works a material variance of the proposition submitted to and approved by vote of the people in the 8 July, 1950, election, and is therefore invalid. It necessarily follows that since the total county funds now proposed to be spent on the hospital project is materially in excess of the maximum amount authorized by vote of the people, the defendants are without authority of

law to disburse the funds here involved or proceed further with the hospital project pending further proceedings below. (See G.S. 159-49.1.)

As to this phase of the case, the lower court's conclusion that the plaintiffs are not entitled to relief because of laches is without adequate factual support. The facts found below disclose that the Board of Commissioners did not attempt to make the proposed supplemental appropriation until 2 April, 1952, nor attempt to let the contract for construction until 25 April, 1952. This suit was instituted 15 May, 1952. These findings do not support the conclusion that the plaintiffs are barred by laches.

For the errors indicated, the judgment below is reversed and the cause remanded for entry of judgment and further proceedings below in conformity with this opinion, and the defendants, if so advised, may (1) consider the feasibility of conforming the proposed project to the limits authorized by the voters, or (2) submit another or other proposals to the voters. Meanwhile, the temporary restraining order will be deemed and treated as in force and effect to the extent of staying disbursement of funds in furtherance of the proposed hospital enlargement project and preventing further action on the part of the defendants in furtherance of the construction project, except in conformity with this opinion.

Error and remanded.

PARKER, J., took no part in the consideration or decision of this case.

MRS. M. E. GODWIN v. MARK NIXON, ISHAM NIXON AND W. ED NIXON, TRADING AS NIXON BROTHERS, AND W. C. PRATER.

(Filed 6 January, 1953.)

1. Negligence §§ 17, 19b (1)—

Plaintiff in an action to recover for negligent injury must show failure on the part of defendant to exercise due care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty, acting in continuous sequence, produced the injury, and that such result could have been reasonably foreseen by a man of ordinary prudence under the existing conditions. Nonsuit is proper if plaintiff's evidence fails to establish any one of these essential elements.

2. Negligence § 19a—

What is negligence is a question of law, and when the facts are admitted or established, the court may say whether negligence does or does not exist and, if so, whether it was the proximate cause of the injury.

3. Negligence § 19d—

Where it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of any outside agency or responsible third person, defendant's motion to nonsuit is properly sustained.

4. Automobiles §§ 8d, 18d, 18h (4)—Evidence held to disclose intervening negligence insulating any negligence in parking on highway.

In this action by a passenger in an automobile to recover for injuries received when the car in which she was riding collided with the rear of a tractor-trailer which was standing because of a disabled motor and blocking the right-hand traffic lane at a street intersection, *held* the evidence discloses that the negligence of the driver of the car in failing either to keep a proper lookout or to keep his automobile under such control as to be able to stop within the range of his lights was such intervening negligence on the part of the driver of the car as to insulate any negligence in parking the tractor-trailer in violation of statute, or in failing to put out flares, and therefore motion to nonsuit by the owner and operator of the tractor-trailer was properly allowed.

5. Automobiles §§ 8d, 18h (2)—

In this action by a passenger in an automobile to recover for injuries received when the car in which she was riding collided with the rear of a tractor-trailer which was standing and blocking the right-hand traffic lane at a street intersection, *held* the evidence is sufficient to be submitted to the jury as to the negligence of the driver of the car in failing to keep a proper lookout or in failing to keep his car under such control as to be able to stop within the range of his lights, and motion to nonsuit by the owner and operator of the car was improvidently granted.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Godwin, Special Judge,* at February Term, 1952, of JOHNSTON.

Civil action for recovery of damages for personal injuries allegedly suffered and resulting to plaintiff from actionable negligence of defendants when automobile owned and operated by defendant W. C. Prater, in which plaintiff was riding, as it traveled south along Pollock Street on U. S. Highway 301, in a residential district in the town of Selma, North Carolina, came into collision with the rear end of a tractor-trailer of defendants Nixon Brothers, standing on right or west side of said street and highway at the intersection thereof with Preston Street.

(NOTE: This action was consolidated for purpose of trial with two others against Nixon Brothers,—one by Jane Prater and the other by W. C. Prater. Motions of defendants Nixon Brothers for judgment as of nonsuit made at close of evidence for plaintiffs were allowed. And motion of W. C. Prater for judgment as of nonsuit made at same time in the present action was allowed. Only the plaintiff, Mrs. M. E. Godwin,

appeals. The case on appeal apparently contains all the evidence offered by each of the three plaintiffs, including the separate testimony of each.)

The acts of negligence alleged against defendants Mark Nixon and Nixon Brothers as the proximate cause or one of the proximate causes of the injuries sustained by plaintiff in the collision are these: That the said Mark Nixon parked the tractor-trailer and semi-trailer (a) "upon a public highway where it was expressly forbidden to park by the rules and regulations of the State Highway and Public Works Commission";

(b) "in a manner contrary to the laws and statutes of North Carolina as set out in the General Statutes in that he parked the said truck and trailer with the right front wheel of the cab about two (2) feet from the curbing and left the trailer parked in a diagonal direction with the rear of said trailer in the middle of the highway, failing to leave room for the passage of traffic on the left side of said highway";

(c) "in the night time on a public highway without flares or lights showing that said tractor truck and semi-trailer was so parked";

(d) "in an unlawful and illegal manner for more than an hour on a public highway, as she is informed and believes, and hence alleges, after having been ordered by a State Highway Patrolman and a peace officer of the County of Johnston to move said truck and trailer, and . . . failed and refused to move the same or to take any precaution to save the traveling public from harm";

(e) "in direct violation of the statutes by failing to set the brake on the said truck so that the 'Stop' light on said truck would be illuminated and would thus show that said truck and trailer was parked and was not moving"; and

(f) "with no lights of any kind on the rear of said trailer except two small clearance lights, one on each of the extreme outside edges, and said lights were barely visible at a very short distance and the said lights being below the dark load of cotton, and the said trailer being parked diagonally in said street, the said lights merely appeared as the rear lights of a moving vehicle"; and

(g) "wilfully, wantonly and negligently and with a total disregard for the rights of the traveling public, refused and failed to move the truck and trailer from its dangerous position and failed and refused to put out any warning signals or flares so that the traveling public could protect itself."

The acts of negligence alleged against defendant Prater as the proximate, or one of the proximate causes of the injury sustained by plaintiff in the collision are these: That the said W. C. Prater failed "(a) . . . to keep his car under proper control so that he was unable to stop when he had placed himself in a dangerous position by passing a truck traveling in the same direction and found himself at or near the parked truck and

trailer of Nixon Brothers, and as a result collided with the rear of the trailer so parked;

"(b) . . . to keep a proper lookout when passing an overtaken vehicle and thereby failed to see that he could not pass the same in safety and as a result collided with the rear of the parked truck and trailer belonging to Nixon Brothers; and

"(c) . . . to slow down and ascertain that he could safely pass a truck traveling in front of him in the same direction, and as a result collided with the rear of the trailer belonging to Nixon Brothers as set out before," although he knew the dangerous conditions which existed on Highway 301 because of the heavy and continuous traffic through the town of Selma, particularly at the point of the collision, and (d) that W. C. Prater "drove his automobile in a careless and reckless manner, without due regard to the condition of the traffic and traveling public on a highly congested and dangerous highway, attempting to pass an overtaken vehicle without taking proper and due precaution, and failing to keep his car under proper control and thereby collided with the rear of said truck and trailer as set out before."

The defendants Nixon Brothers, answering the complaint, deny in material aspect the allegations thereof, except as to those uncontradicted facts hereinafter recited. They particularly deny the allegations charging them with acts of negligence. And they aver that such injuries as plaintiff sustained are the sole and proximate result of the negligence of the defendant W. C. Prater in specific detail; that the acts of negligence of defendant W. C. Prater superseded any negligence on the part of defendants Nixon Brothers, if any they committed, and without which negligence plaintiff's injuries would not have occurred; that plaintiff was a co-adventurer in the risks of W. C. Prater; and that by her own negligence she contributed to her injuries in manner specified.

And the defendant W. C. Prater, answering the complaint of plaintiff, denies all allegations charging him with negligence and liability therefor, but admits or does not deny other allegations.

These facts appear to be uncontroverted: About 8:10 o'clock on night of 16 February, 1950, W. C. Prater and his wife, Jane Prater, and the plaintiff, Mrs. M. E. Godwin, entered his automobile and started from his home on Anderson Street in the town of Selma, North Carolina, on a trip to some point beyond Smithfield on the Smithfield-Angier highway No. 210, where a friend of Mrs. Godwin lived. The route of the proposed trip was easterly about two blocks along Anderson Street to U. S. Highway No. 301, which is the same as Pollock Street in said town, then southerly along this highway through a residential section within the corporate limit of the town and on to, and through the town of Smithfield,

and then on beyond, and along the Smithfield-Angier highway No. 210 to the destination—which was known only to Mrs. Godwin.

En route, traveling southly from the Anderson-Pollock Street intersection, the Southern Railway line is crossed at end one block, and Wilson Mill Road at end two blocks, and Preston Street at end four blocks. There was a stop light at the intersection with Wilson Mill road, and another at Preston Street intersection.

Pollock Street is straight approximately one-half mile each way from Preston Street. It is paved and approximately 30 feet 8 inches wide from curb to curb at Preston Street.

The truck-trailer of the Nixon Brothers was standing headed in southerly direction, and the Prater automobile was traveling in same direction. The collision occurred at the Preston Street intersection.

Upon the trial in Superior Court the testimony of plaintiff and the Praters,—in respect to the purpose of the trip, tends to show these facts: Plaintiff, a widow, was a guest in the Prater home on 16 February, 1950. And the subject of going to see a man friend of hers, who lived on Highway No. 210, was discussed among the three of them. Mrs. Prater testified: "I know I didn't ask to go to see him first and I don't recall who mentioned it first . . . My husband was told the man we were going to see lived beyond Smithfield. Mrs. Godwin said he lived out on 210 highway. I don't know her exact words. The truth is that Mrs. Godwin wanted my husband to take her to see the man and he was going to be her friend. We took her because she was a guest at our home and she asked me to go . . . This was Mrs. Godwin's first visit to our home . . . After supper on this night we all were going out for a ride to see a friend of Mrs. Godwin's who lived south of Selma."

And in same connection plaintiff testified: "After supper Mr. and Mrs. Prater and I talked it over and decided to go to ride and we got into the car,—decided to see a man who lived out on the Angier highway west of Smithfield . . . I had no particular reason for going out there, but I had known back in the past he was sick and I was down there visiting and we just decided to ride around and we would ride out to see if he was at home. I do not recall who suggested it. At the time of the collision I . . . had been going around with him. I did not especially want to see him, but I thought we would ride out and see how he was getting along . . . I went to see if he was sick or had gotten well . . . Well, I had no purpose whatever to go to see him . . . no reason . . . I do not know how the Praters found out I wanted to go for I did not tell them. The Praters did not know the name of the man until yesterday. I talked about going out there . . ."

And the evidence shown in the record on this appeal tends to show in summary the following: They, Prater, his wife, and plaintiff, started

on the trip. Prater was driving the automobile, Mrs. Prater was sitting in the middle on front seat, and plaintiff, Mrs. Godwin, on the right on front seat. They traveled along Anderson Street to, and turned south on Pollock Street—Highway 301, crossed the railroad at one block, and came to the stop light at intersection of Wilson Mill Road and Pollock Street—Highway 301, at end of two blocks, and two blocks north of the Preston Street intersection. The traffic light there was on red and a large tractor-trailer (not the one involved in the collision) had stopped. The Prater automobile also stopped. Then when the light changed to green the traffic moved forward. Prater pulled his automobile out, and ran around the tractor-trailer, and turned back into the right lane about the middle of the first block at a point "about a block and a half," or "about 510 feet," or "some over 500 feet" from and north of the Preston Street intersection. The Prater automobile was then and there leading the southbound traffic. No other vehicle was between it and the Nixon truck. It proceeded along its right-hand side of the street to, and collided with the Nixon truck at Preston Street.

But, after passing the tractor-trailer and pulling back in line, as above stated, the Prater automobile was meeting traffic—several cars "that had bright lights" going north. Mrs. Prater testified: "The cars that we were meeting were on the south side of the truck when we first saw them. The Nixon truck was setting there between us and at least three other cars which had their lights on and meeting us . . . Two of those three cars met us and the third was passing when I saw the red light."

And in this connection Prater testified: "Just before I saw the reflectors on that truck (Nixon's) I met a car which blinded me and as quick as that car went by there was another car coming up there opposite the Nixon truck . . . I said I saw the reflectors . . . when I met the last car. All three of those cars were in line. There was one even with the truck at the time I hit the truck,—that was the third one. I had already passed two. I was blinded by the last car that met me before I hit the truck. I said all three cars had bright lights . . . I saw the lights of three cars coming down the road and saw two pass the truck. I saw the light of these coming right straight down the street meeting me and I dimmed my lights when I passed the truck at the stoplight. At the time I passed these cars they were beyond the parked truck I hit. I could see them approaching after I crossed the Southern Railroad tracks, a distance of 400 or 500 yards for the road is straight and level. After I pulled back in line . . . I was blinded by the lights of the oncoming traffic when I was close enough on the parked truck . . . All I know is that I was blinded until I didn't have time to go around the truck,—I would say 25 or 30 feet. After I became blinded by the glare of the lights I was blinded until after the cars went by." And to these questions

Prater answered as shown: "Q. Were you blinded after the car (you were meeting) went by? A. I was before it went by. Q. . . . How far did you travel while you were blinded? A. Long enough to pass the car. I cannot say what distance I traveled. I don't know just how short a distance but all the time he was passing me. There were two cars coming and one even with the truck about the time I hit the truck. Q. So you were blinded by the bright lights of three cars? A. Yes, sir. I was a little farther away from the parked truck than 30 feet. I was so close to it that I picked up the reflectors on the back of the truck. I was 25 or 30 feet away then. I applied my brakes and skidded my wheels. The skid marks were not 55 feet long. I didn't put on my brakes until I saw the truck . . . ."

And, in this connection, plaintiff testified: "I don't remember any lights blinding me or any automobile meeting us." And again, "Mr. Prater says he was meeting traffic . . . I said we were 40 or 50 feet away from the parked truck when Prater applied his brakes."

And Mrs. Prater testified: "My husband applied his brakes before the truck was struck . . . The tires skidded and they squealed all the way into the back of the truck. We were not more than 50 feet away when that squealing noise began."

As to speed of the Prater automobile: Prater testified that he was driving his automobile at 25 miles per hour. Mrs. Prater testified to like effect. And plaintiff puts the speed at 25 or 30 miles per hour. But she testified: "I say he failed to slow down, he must have or he would not have hit that truck." And then she concluded by saying: "I can't understand why I allege that 'Mr. Prater failed to keep a "proper lookout."' I must have meant that he was driving too fast, the only thing I can think of . . . I just don't know. I can't answer anything else."

As to skid marks: The evidence is that the skid marks on the pavement immediately behind the Prater automobile measured fifty-five feet in length—from where the marks started to where the front wheels stopped under the truck; and that they were in the right-hand lane of the highway going south at estimated distance of 3½ or 4 or 5 feet from the curb,—nearly straight down the highway, as one witness testified, until about 10 or 15 feet behind the truck, where they turned left, as another testified. This is borne out by the testimony of Deputy Sheriff Lamm, Policeman Ryal and Highway Patrolman Carter—who state that they saw the skid marks, and measured, or saw them measured.

As to brakes on the Prater automobile: Prater testified: "I put on my brakes but my car didn't stop before it struck Nixon's truck. I was running 25 miles per hour with perfect brakes—hydromatic brakes. All I had to do was to hit my brakes and my car responded immediately to the brake."

As to damage to Prater automobile: Prater testified: "My car went under the truck body so far that the truck body was against the cowl of my car. The right-hand side of the hood, right-hand fender and front part of my automobile was rammed up under the truck body and the left side wasn't under the truck." And there is testimony of officers, in this respect, and to the effect that the automobile was smashed up in front and the windshield broken,—that the whole front of it was damaged—hood, grill and radiator.

And the evidence shows that plaintiff was thrown out the front door of the Prater car, and sustained severe and serious injuries to her face and other parts of her person.

As to the location and disablement of the Nixon tractor-trailer: There is testimony of officers to the effect: That the Nixon Brothers truck became disabled, and was pulled over against the curb at the southwest corner of the intersection between Pollock Street—Highway 301, and Preston Street; that before the collision the tractor portion of it was against the curb, and the back end of trailer was setting out some; that the front of it was near the curb at some angle; that the back "could have been 3 or 4 feet" from the curbing that turned back at Pollock Street; and that the trailer was eight feet wide. Patrolman Carter testified: "When I came up behind the Nixon truck, I pulled along side it. So I was about the middle of the street when I was talking to Nixon" the driver.

And there is evidence that the trailer was loaded with cotton; that the cotton was "of a dark color," the top of the bales were "8 to 10 feet from the ground," in opinion of one witness, and "approximately 11 feet high from the truck body and 15 feet from the ground," as estimated by another; and that a large street light, 200, 300 or 400 watts, with reflector, suspended over the intersection, was burning over the cotton,—casting its rays fifty feet around over the entire intersection; Mrs. Prater testified that "the street light was burning over the tractor part of the truck but not over the trailer part."

Also there is testimony that the man in charge of the truck told officers he hoped to get the motor started and soon to be on the move; that it was not many minutes thereafter that the collision in question took place; and that the officer asked the man about putting out some flares, and "he said he was only going to be there a minute because he had called ahead and someone from the shop was coming either to pull him in or help fix the truck . . . He said the truck had just knocked off on him."

And there is testimony that after the collision the tractor-trailer was in substantially the same position as before, except that the front wheel of the tractor was up on the curb; that the rear wheels of the trailer were 18 to 20 inches from the curb had it been extended; that the left rear

wheel would have been ten feet from the curb, if the truck was 8 feet wide; and that there would remain 20 feet from the left-hand edge of the truck to the curb on the opposite side of the street.

As to lights on the Nixon trailer: There is testimony from W. C. Prater, Mrs. Prater and plaintiff that they saw no lights on the trailer until they had gotten within distances, variously estimated to be 20, 30, 40 or 50 feet from it, when the lights of the Prater car picked up two red reflector lights on the rear of the trailer. There is also testimony of an officer traveling north who stopped at the tractor-trailer about 8 o'clock to the effect that he did not see any lights on the rear of the trailer, but that he had no occasion to look back to see. And there is testimony of the State Highway Patrolman Carter to the effect that he traveling south approached the rear of the Nixon trailer around 8 o'clock; that he stopped and talked a minute with the driver, and left; that he had not gone from the scene more than five minutes when he had information as to the collision here in question. He testified: "I am definite when I say I saw lights on the truck when I first went there. I saw two reflectors on the back of the truck . . . There were, I know, four or five lights burning on the back of the truck, all in a row, and two reflectors. There were six or seven lights in all burning including the reflectors . . . There was a clearance light on the side of the truck, indicating the right rear, and there was a clearance light here indicating the left rear, but reflectors were on this location (indicating). I am sure there were three lights together in the center of the truck and that they were burning red. There were red clearance lights. I could see the truck and the lights on the rear of the truck visible 600-700 feet from the rear . . . I saw two red lights burning. They were visible for 500 feet to the rear of the truck. I saw the truck a long ways down the street as I approached it from the rear. The lights were burning on it."

The weather: Prater testified that the weather on this occasion was misty—but not raining. Patrolman Carter testified that the weather was dry and fair—and the hard-surface dry.

No parking signs: Deputy Sheriff Lamm testified: That while there were two or three signs put up by the State Highway Commission about a half block south of the point of collision in front of a tavern, there was no sign prohibiting parking along the street where the collision occurred and never had been so far as he knew; and that there were no "No parking" signs north of the point of the collision.

Plaintiff, Mrs. M. E. Godwin, appeals to the Supreme Court and assigns error.

Leon G. Stevens and E. Craig Jones, Jr., for plaintiff, appellant.
Wellons, Martin & Wellons for defendant Prater, appellee.
Hooks & Spence for Nixon Brothers, defendants, appellees.

WINBORNE, J. This appeal challenges the ruling of the trial court in sustaining the motions of defendants for judgment as of nonsuit in so far as the appealing plaintiff is concerned. This raises the question as to whether or not the evidence offered upon the trial below, as shown in the case on appeal, taken in the light most favorable to plaintiff, is sufficient to make out a case of actionable negligence against either the defendants, Nixon Brothers, or the defendant Prater. Considering the evidence in such light, this Court agrees with the ruling and judgment of the trial court in so far as the defendants Nixon Brothers are concerned, but holds that there is error in the ruling and judgment as it relates to defendant Prater.

In an action for recovery of damages for injury resulting from actionable negligence of defendant, plaintiff must show: (1) That there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed. And (2) that such negligent breach of duty was the proximate cause of the injury,—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Ramsbottom v. R. R.*, 138 N.C. 38, 50 S.E. 448; *Whitt v. Rand*, 187 N.C. 805, 123 S.E. 84. See *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849; and *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845, where the authorities are assembled.

If the evidence fails to establish either one of the essential elements of actionable negligence, judgment of nonsuit is proper. *Thomas v. Motor Lines*, 230 N.C. 122, 52 S.E. 2d 377, and *Mintz v. Murphy, supra*, and cases there cited.

And the principle prevails in this State that what is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does or does not exist. "This rule extends and applies not only to the question of negligent breach of duty, but also to the feature of proximate cause," *Hoke, J.*, in *Hicks v. Mfg. Co.*, 138 N.C. 319, 50 S.E. 703; *Russell v. R. R.*, 118 N.C. 1098, 24 S.E. 512; *Lineberry v. R. R.*, 187 N.C. 786, 123 S.E. 1; *Mintz v. Murphy, supra*, and cases cited.

In *Lineberry v. R. R., supra*, in opinion by *Clarkson, J.*, this Court said: "It is well settled that where the facts are all admitted, and only one inference may be drawn from them, the court will declare whether an act was the proximate cause of the injury or not." See also *Nichols v. Goldston*, 228 N.C. 514, 46 S.E. 2d 320. *Mintz v. Murphy, supra*, and cases cited.

Furthermore, it is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit under the provisions of

G.S. 1-183 when, among other grounds, "it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of any outside agency or responsible third person . . .," *Stacy, C. J.*, in *Smith v. Sink*, 211 N.C. 725, 192 S.E. 108, and cases cited in respect to such principle. See also *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88; *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808; *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412; *Riggs v. Motor Lines*, 233 N.C. 160, 63 S.E. 2d 197; *Mintz v. Murphy, supra.*

In *Smith v. Sink, supra,* it is also said: "We had occasion to examine anew this doctrine of insulating the conduct of one, even when it amounts to passive negligence, by the intervention of the active negligence of an independent agency or third party, as applied to various fact situations, in the recent cases of *Beach v. Patton*, 208 N.C. 134, 179 S.E. 446," and others cited. Then the opinion continues: "These decisions are in full support and approval of Mr. Wharton's statement in his valuable work on Negligence (Sec. 134): 'Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.'" Then there follows, to like effect, a quotation from *R. R. v. Kellogg*, 94 U.S. 469. See also *Butner v. Spease, supra; Riggs v. Motor Lines, supra; Mintz v. Murphy, supra; Clark v. Lambreth*, 235 N.C. 578, 70 S.E. 2d 828.

In the light of these principles, applied to the case in hand, if it be conceded that the defendants Nixon Brothers failed in the performance of statutory obligations imposed upon them in any respect alleged in the complaint, the evidence fails to show that such failure was a proximate cause of the injury to plaintiff. On the other hand, it is manifest from the evidence that the injury of which plaintiff complains was "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person." In so far as Nixon Brothers are concerned, there would have been no injury to plaintiff but for the intervening wrongful act, neglect or default of the driver of the automobile in which she was riding, in failing either to keep a proper

lookout for hazards of the road, such as disabled vehicles, or, in the exercise of due care, to keep his automobile under such control as to be able to stop within the range of his lights. In this respect the case comes within the principle applied in *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237, and numerous other cases cited in *Morris v. Transport Co., supra.* This exculpates Nixon Brothers. *Powers v. Sternberg, supra.*

Now as to defendant Prater: The evidence shown in the record appears to be sufficient to take the case to the jury on an issue of actionable negligence. Therefore, since there must be a retrial between plaintiff and defendant Prater, and the evidence then may not be the same as it now is, the Court declines to pass upon the question as to whether or not plaintiff and Prater were engaged in a joint enterprise at the time of the collision in question. This subject has been recently treated in *James v. R. R.*, 233 N.C. 591, 65 S.E. 2d 214.

Hence the judgment below:

As to defendants Nixon Brothers is

Affirmed.

As to defendant Prater is

Reversed.

PARKER, J., took no part in the consideration or decision of this case.

H. L. HAWES v. ATLANTIC REFINING COMPANY AND THOMAS Q. GORDON.

(Filed 6 January, 1953.)

1. Trial § 22a—

On motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom.

2. Automobiles § 8a—

The operators of motor vehicles must exercise the care that an ordinarily prudent man would exercise under like circumstances, which includes the duty to keep his vehicle under control, to keep a reasonably careful lookout, and to anticipate the presence of others on the highway, which duties are mutual and each may assume that others on the highway will comply therewith.

3. Same—

The driver of a car is not under duty to anticipate negligence on the part of others, but is entitled to assume and act on the assumption that others will obey the law of the road and exercise due care for their own safety.

4. Automobiles § 8i—

The failure of a driver along a servient highway to stop before entering an intersection with a dominant highway is not contributory negligence *per se*, but is to be considered with other facts in evidence in determining the issue. G.S. 20-158 (a).

5. Same—

A driver of a vehicle along a dominant highway is not under duty to anticipate that a driver along the servient highway will fail to stop as required by statute before entering the intersection, and in the absence of anything which gives or should give notice to the contrary, may assume and act on the assumption, even to the last moment, that the operator along the servient highway will stop in obedience to the statute.

6. Same—

While the driver of an automobile along a servient highway is required to stop before entering an intersection with a through highway and must yield the right of way to vehicles along the dominant highway, and may not enter the intersection until he ascertains, in the exercise of due care, that he can do so with reasonable assurance of safety, he is not required to anticipate that a driver along the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. G.S. 20-141 (a) (b) (c).

7. Automobiles § 18h (2)—Evidence held for jury on issue of negligence of driver on dominant highway in approaching intersection at excessive speed.

Plaintiff's evidence tending to show that he was driving along a servient highway in a heavy rain, stopped before entering an intersection with a dominant highway, looked in both directions, and seeing no vehicles approaching, started across the intersection in low gear, and that his car was struck on its left door by defendant's car which approached from his left at excessive speed, "balling the jack" along the dominant highway, *is held* sufficient to take the issue of negligence to the jury notwithstanding defendant's evidence in contradiction, it being a permissive inference from the evidence that at the respective speeds of the vehicles the defendant's automobile could have come from beyond the range of vision of one stopping at the intersection, and therefore was not in view when plaintiff started across the intersection.

8. Evidence § 30a—

Photographs of the scene, when properly identified as accurate, are competent for the restricted purpose of explaining or illustrating the testimony of witnesses, but are not substantive proof.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Morris, J.*, at May-June Term, 1952, of NEW HANOVER.

Civil action to recover for personal injuries, and damage to personal property, allegedly resulting from actionable negligence of defendants.

This action arises out of a collision at the intersection of Central and Burnett Boulevards in the City of Wilmington, North Carolina, between an automobile owned by plaintiff H. L. Hawes, operated by him, and in which his wife, Irene Hawes, was riding,—proceeding in a westerly direction on Central Boulevard, a designated servient highway of two lanes with plaza between them, and an automobile owned by defendant, Atlantic Refining Company, and operated by its servant, agent and employee, the defendant, Thomas Q. Gordon, in due course of his employment, proceeding in northerly direction on Burnett Boulevard, a designated dominant highway. The collision occurred about 11 o'clock on the morning of a rainy day.

Plaintiff alleges in his complaint, briefly stated, that the collision was the result of actionable negligence of defendant Thomas Q. Gordon in driving defendant's automobile into the intersection and colliding with the left side of plaintiff's automobile when it had already entered and was in process of traversing said intersection.

The specific acts of negligence alleged are these: That Thomas Q. Gordon operated his automobile (a) without regard to the safety of persons traveling upon the streets and without keeping a proper lookout for persons and vehicular traffic upon said streets; (b) carelessly and heedlessly; (c) at a speed that was unreasonable, imprudent and unlawful; (d) in such manner as to be incapable of stopping within a reasonable distance, because of inadequate and defective brakes; and (e) without decreasing the unlawful speed of his automobile upon approaching said intersection, in compliance with traffic laws of the State of North Carolina.

The defendants, answering, deny in material aspect the allegations of the complaint, and for further answer and defense, and as a bar to any recovery by plaintiff against them, aver that the collision was the direct result of, and was solely and proximately caused by the negligence of plaintiff, H. L. Hawes, in that, briefly stated, he failed (1) to observe the stop sign on Central Boulevard and to stop before entering intersection of Central and Burnett Boulevards; (2) to give the right of way to defendant's automobile; (3) to keep a proper lookout; and (4) to exercise due caution under the circumstances and conditions then and there existing. And they aver that his negligence was at least a contributing cause of the collision and consequent injury and damage of which complaint is made.

Further, as counterclaims and for affirmative relief, defendant Thomas Q. Gordon avers that he sustained personal injury, and defendant Atlantic Refining Company avers that its automobile was damaged by the actionable negligence of plaintiff H. L. Hawes in the manner stated.

And defendants pray judgment in accordance with the averments of their answer.

Plaintiff, replying, denies the averments of the defendants as above related.

Upon trial in Superior Court plaintiff H. L. Hawes testified in pertinent part: "I was driving my automobile on or about March 19, 1951 . . . My wife was the only passenger in the car at the time of the accident. I was going west on Central Boulevard toward the river. When I got to the intersection of Burnett Boulevard and Central Boulevard, I drove up to the stop sign and stopped and I didn't see anybody coming. I looked both ways, then I started across in low gear, and when I got about half-way, Mr. Gordon came along and hit me right in the middle. The left side of my car at the door was struck. The front end of the Refining Company's car was damaged . . . I brought my car to a complete stop prior to attempting to cross Burnett Boulevard. After I had stopped, I looked to the south to my left, and I could see . . . half a block. At the time I started off in low gear, I did not see Mr. Gordon; I didn't see him until he hit me. I was about the white line in the center of the highway when he struck me.

"On this day it was raining hard. I had my parking lights on. It was dark some when it rained . . . it was about 11 o'clock in the daytime. I had my windshield wipers on . . . My car traveled about 20 feet after the impact. It knocked my wife out of the car on the pavement. I was injured . . . My automobile was damaged . . ."

Then on cross-examination, Hawes continued: "I am familiar with the intersection where the accident occurred. I have been on that street before, a lot of times . . . I was familiar with the fact there was a stop sign there . . . and knew the stop sign required me to stop . . . I would say I was about five feet from the edge of the pavement of Burnett Boulevard when I stopped. From that point I could look south and see about half a block. I saw a good piece, you know about how much a half block is, it's 100 yards . . . I looked again south and did not see anybody . . . I know I stopped 4 or 5 feet from the edge of the pavement . . . I would say I stopped thirty or forty seconds at the edge of Burnett Boulevard before I started up. I got half-way into Burnett Boulevard before I was struck, I would say 10 feet or a little more . . . As to obstructions to my view looking to the south, when I stopped there were some hedges way up there about 50 feet that you could not see all the way down that road. I could see half a block . . ."

And Mrs. Irene Hawes, as witness for plaintiff, testified in pertinent part: "My husband . . . owned a 1949 two-door . . . automobile. I was riding in that automobile on March 19, 1951. My husband was driving it. I was just sitting on his right-hand side . . . I had nothing to do with the operation of it. As I approached the intersection of Burnett Boulevard on that date . . . around 11 o'clock . . . nobody else was

in my husband's automobile at that particular time . . . in the morning. It was raining. It had been raining pretty hard. The windshield wipers on my husband's car were working . . . We were headed west . . . I remember well whether or not my husband stopped before entering Burnett Boulevard. He pulled up as close as he could get without going in Burnett Boulevard and stopped. That would be the eastern line of Burnett Boulevard. He looked both ways after he stopped and then put the car in low gear and proceeded on across. I would say he was going about five miles an hour. He got in the middle of Burnett Boulevard . . . After he got to the middle, I saw Mr. Gordon bearing down on us, coming at a high rate of speed, and before I could say 'look out,' he had hit us. We were in the intersection at the time. Mr. Gordon's car was just before entering the intersection when I saw it. He was traveling 50 or 55 miles per hour, I would say . . . The front of Mr. Gordon's car struck the left side of our car about middleway . . . and he ran into us."

Then on cross-examination, Mrs. Hawes continued: ". . . I do not own any interest in that automobile. Title was in my husband's name. I did not pay any part of the purchase price . . . I knew Burnett Boulevard was a through street, and knew it was my husband's duty to stop at the intersection before entering Burnett Boulevard. He did stop. I am positive of that . . . his car . . . was straddle the center line at the time of the impact . . . I looked both ways when he stopped. I didn't see any car coming either way . . . I remember looking well. When I first saw Mr. Gordon's car, he was . . . I would say 35 feet or more from the point I was in my husband's car. At the time . . . my husband had driven out into the intersection of Burnett Boulevard . . . almost to the center . . . fixing to cross the center . . . I didn't see Mr. Gordon's car prior to that time . . . it was almost immediately at the time of the impact. It just happened that quick. In fact, he was 'balling the jack.' He was coming so fast, and it was raining too, and just time I saw him I said, 'look out,' and about that time he hit us."

And on re-direct examination, Mrs. Hawes concluded by saying: "Mr. Gordon was not on his right-hand side of the street, but running down the middle of the road. If he had been on his right-hand side I think we could have made it and not been hit."

On the other hand, defendants, reserving exception to the denial of their respective motions for judgment as of nonsuit, made when plaintiff first rested his case, offered evidence sharply in conflict with that offered by plaintiff, and tending to wholly exculpate them of negligence in connection with the collision.

Motions of defendants, respectively, renewed at the close of all the evidence, for judgment as of nonsuit, were denied, and each excepted.

The case was submitted to the jury upon these issues, which the jury answered as shown:

"1. Was the plaintiff injured by the negligence of the defendants? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his injury? Answer: No.

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendants? Answer: $1500.00.

"4. Was the defendant Thomas Q. Gordon injured by the negligence of the plaintiff? Answer: No.

"5. If so, what amount of damages is the defendant Thomas Q. Gordon entitled to recover on his counterclaim? Answer:

"6. Was the automobile of the defendant Atlantic Refining Company damaged by the negligence of the plaintiff? Answer:

"7. If so, what amount of damages, if any, is the defendant Atlantic Refining Company entitled to recover of the plaintiff on its counterclaim? Answer: "

From judgment in accordance therewith defendants appeal to Supreme Court and assign error.

Poisson, Campbell & Marshall and Elbert A. Brown for plaintiff, appellee.

James & James for defendants, appellants.

WINBORNE, J. Appellants present for decision on this appeal two questions: (1) Did the trial court err: (1) In overruling defendants' motions aptly made for judgments as of nonsuit under G.S. 1-183? (2) In charging the jury in the respects covered by exceptions thereto?

As to the first question: Appellants, the defendants, contend, in their brief, that nonsuit should have been allowed for that plaintiff was not only negligent, but that his negligence was the sole proximate cause of the collision and such resulting injury and damage as he may have sustained. But taking the evidence shown in the case on appeal, in the light most favorable to plaintiff, and giving to him the benefit of every reasonable intendment and inference to be drawn therefrom, tested by pertinent statutes of this State, and decisions of this Court, we hold that the evidence is not so clear in meaning as to sustain defendants' contention.

In this connection it is appropriate to consider the legal rights and obligations of the respective parties at the time, and under the circumstances of the collision here involved.

The speed statute, G.S. 20-141, as rewritten in Section 17, Chapter 1067 of 1947 Session Laws of North Carolina, in so far as pertinent to case in

hand, declares: "(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing:

"(b) Except as otherwise provided in this Chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

"1. Twenty miles per hour in any business district;

"2. Thirty-five miles per hour in any residential district;

"3. . . .

"4. Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars . . .

"(c) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection . . . or when special hazard exists with respect to . . . other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements or the duty of all persons to use due care."

And this statute also provides in Subsection (e) that: "The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident."

And it is a general rule of law, even in the absence of statutory requirement, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty requires that the operator be reasonably vigilant, and that he must anticipate and expect the presence of others. And, as between operators so using a highway, the duty of care is mutual, and each may assume that others on the highway will comply with this obligation. 5 Am. Jur., Automobiles, Sections 165, 166, 167. *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d 239; *Tarrant v. Bottling Co.*, 221 N.C. 390, 20 S.E. 2d 565; *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211; *Cox v. Lee*, 230 N.C. 155, 52 S.E. 2d 355; *Bobbitt v. Haynes*, 231 N.C. 373, 57 S.E. 2d 361.

Furthermore, "one is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption that others will exercise care for their own safety." 45 C.J. 705. *Hobbs v. Coach Co., supra; Bobbitt v. Haynes, supra,* and cases there cited.

Moreover, the statute, G.S. 20-158 (a), prescribes that the State Highway and Public Works Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers to come to full stop before entering or crossing such designated highway, and that wherever any such signs have been so erected, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. And the same section, G.S. 20-158 (a), also declares that "no failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence." See *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539; *Reeves v. Staley, supra; Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320; *Lee v. Chemical Corp.,* 229 N.C. 447, 50 S.E. 2d 181; *Bobbitt v. Haynes, supra; Johnson v. Bell,* 234 N.C. 522, 67 S.E. 2d 658.

Indeed, the operator of an automobile, traveling upon a designated main traveled or through highway and approaching an intersecting highway, is under no duty to anticipate that the operator of an automobile approching on such intersecting highway will fail to stop as required by the statute, and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the operator of the automobile on the intersecting highway will act in obedience to the statute, and stop before entering such designated highway. *Reeves v. Staley, supra; Johnson v. Bell, supra.*

On the other hand, the operator of an automobile traveling upon such intersecting highway and traversing a designated main traveled or through highway, is under no duty to anticipate that the operator of an automobile, upon such designated highway, approaching the intersection of the two highways, will fail to observe the speed regulations, and the rules of the road, and, in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption that the operator of the automobile on such designated highway will act in obedience to such regulations and the rules of the road.

And in this connection in *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361, in opinion by *Justice Devin,* now *Chief Justice,* it is said: "Generally when the driver of an automobile is required to stop at an intersection he must yield the right of way to an automobile approaching on the intersecting highway . . . and unless the approaching automobile is far enough away to afford reasonable ground for the belief that he can

cross in safety he must delay his progress until the other vehicle has passed." See also *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532.

In the light of these statutes, and principles of law, applied to the evidence in hand, controverted questions arise: Did plaintiff come to a full stop before entering or attempting to cross such designated highway? If so, did he, before entering such highway, in the exercise of due care determine that he could do so with reasonable assurance of safety? Plaintiff's evidence is that he did stop; that he did so at a point from which he could see up and down, north and south, along the designated highway; that the view to the south was for a distance of half a block—100 yards; that no vehicle was in sight; that then he proceeded with his automobile in low gear at speed of five miles per hour, and was struck amidship after traveling ten feet or a little more; and that defendant's car approached at speed of 50 to 55 miles per hour,—"balling the jack" in opinion of Mrs. Hawes.

"Ball the jack," as defined in Wentworth's American Dialect Dictionary, p. 41, means "To move swiftly," as "the car certainly did ball the jack." And Berry and Van den Bark's "The American Thesaurus of Slang," a "dictionary of unconventional speech," says that "Ball the jack" is used in relation to motion, travel and transportation to indicate "swiftness, speed—drive fast." See the Index p. 857. At any rate, as used by Mrs. Hawes, it may be inferred that the phrase is the antithesis of careful and prudent operation of an automobile under the conditions then existing and of decrease in speed within the meaning of the statute, G.S. 20-141, as rewritten, *supra,* duties which plaintiff had the right to assume the operator of an automobile upon the designated highway would observe.

Moreover, applying mathematics to the rate of speed at which the evidence of plaintiff tends to show the two automobiles were traveling, it is not unreasonable to infer that while plaintiff's automobile was starting and traveling ten feet or more, the automobile of defendant could come from beyond the range of vision of one stopping at the intersection, whereas if traveling at a prudent rate of speed it would not be expected to do so. In other words, the case does not come within the purview of those cases where the evidence tends to show that the driver failed to see what was in clear view.

Attention is given to photographs sent up as parts of the case on appeal. They were admitted in the trial court only for purposes of illustrating the testimony of witnesses. They may not be admitted as substantive evidence. But, where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in contro-

versy. See *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824, where authorities are assembled. See also *Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909. As an example, the photographs here show houses along the streets. But there is no testimony that scene of the collision was a business district, as defined in G.S. 20-38 (a), or a residential district, as defined in G.S. 20-38 (w) 1, to which the speed statute G.S. 20-141, as amended, relates.

Now as to the second question: A reading of the charge in the light of the pleadings and evidence offered leads to the conclusion that prejudicial error is not made to appear.

Hence, in the judgment below we find

No error.

PARKER, J., took no part in the consideration or decision of this case.

IRENE HAWES v. ATLANTIC REFINING COMPANY AND THOMAS Q. GORDON (AND H. L. HAWES, ADDITIONAL PARTY-DEFENDANT).

(Filed 6 January, 1953.)

APPEAL by defendants Atlantic Refining Company and Thomas Q. Gordon from *Morris, J.,* at May-June Term, 1952, of NEW HANOVER.

Civil action against defendants Atlantic Refining Company and Thomas Q. Gordon, to recover for injuries to person, to which action, on motion of these defendants, H. L. Hawes, as an alleged joint tort-feasor, was made an additional defendant.

This action arose out of the same collision of automobiles as that involved in the case of H. L. Hawes, husband of present plaintiff, against Atlantic Refining Company and Thomas Q. Gordon,—and is based upon similar allegations of actionable negligence as are alleged in the complaint in that action.

Defendants, answering here, deny in material aspect the allegations of the complaint.

And for further defenses, and as a bar to any recovery by plaintiff against them, defendants aver, briefly stated, that the collision in question and any consequent injury to plaintiff were caused solely and proximately by the negligent, careless and reckless manner in which the automobile in which plaintiff was riding was being operated by her husband H. L. Hawes, as specifically alleged; and that if the negligent, unlawful and reckless conduct on the part of said H. L. Hawes were not the sole and

exclusive proximate cause of the collision and consequent injury to plaintiff, it was at least a contributing cause, and, hence, if they, the original defendants, were negligent, H. L. Hawes is a joint tort-feasor along with them. Therefore they aver that H. L. Hawes should be joined as a party defendant, etc.

Accordingly, H. L. Hawes was made a party defendant, and served with process as directed. Thereupon he filed reply to the further defense and further answer of defendants, and denied the material averments thereof; and he filed answer, admitting all allegations of plaintiff's complaint.

The action, having been consolidated with that of H. L. Hawes, for purpose of trial, and being so tried, the statement of evidence offered, and of procedure followed in course of trial, set out in the opinion in the H. L. Hawes case, *ante,* is here referred to, and, in so far as pertinent, is made a part of such statement on this appeal.

The case was submitted to the jury upon these issues which the jury answered as shown:

"1. Was the plaintiff, Irene Hawes, injured by the negligence of the defendants, Atlantic Refining Company and Thomas Q. Gordon? Answer: Yes.

"2. If so, what amount of damages, if any, is the plaintiff, Irene Hawes, entitled to recover of the defendants, Atlantic Refining Company and Thomas Q. Gordon? Answer: $5,000.00.

"3. Was the defendant H. L. Hawes jointly and concurrently negligent with the defendants Atlantic Refining Company and Thomas Q. Gordon in causing the injury to the plaintiff, Irene Hawes? Answer: No."

From judgment signed in accordance therewith, defendants Atlantic Refining Company and Thomas Q. Gordon appeal to Supreme Court and assign error.

Poisson, Campbell & Marshall and Elbert A. Brown for plaintiff, appellee.

James & James for defendants Refining Company and Gordon, appellants.

WINBORNE, J. The questions brought up for decision on this appeal are similar to those presented and decided in the case of H. L. Hawes *v.* Atlantic Refining Company and Thomas Q. Gordon, *ante.* The decision there is controlling here. Hence, in the judgment from which this appeal is taken, we find

No error.

PARKER, J., took no part in the consideration or decision of this case.

WACHOVIA BANK & TRUST COMPANY AND MARION GREEN JOHNSTON, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF GAY GREEN, DECEASED, AND MARION GREEN JOHNSTON, INDIVIDUALLY, *v.* EFFIE M. GREEN, OTTIS GREEN, JR.; AILEEN MOREL JOHNSTON AND JOHN DEVEREAUX JOHNSTON, JR., MINORS, REPRESENTED HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM, JOHN DEVEREAUX JOHNSTON; LAURA ADELAIDE GREEN, MARY VIRGINIA GREEN AND MICHAEL JOSEPH GREEN, MINORS, REPRESENTED HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM VIRGINIA F. GREEN; ALL PERSONS NOT NOW IN ESSE WHO MAY HEREAFTER ACQUIRE AN INTEREST IN THE ESTATE OF GAY GREEN, DECEASED, REPRESENTED HEREIN BY THEIR DULY APPOINTED GUARDIAN AD LITEM, JOHN C. CHEESBOROUGH; MARS HILL COLLEGE, A CORPORATION, BREVARD COLLEGE, INC., A CORPORATION, AND ELIADA ORPHANAGE, A CORPORATION (ORIGINAL PARTIES DEFENDANT); AND AILEEN MOREL JOHNSTON (ADDITIONAL PARTY DEFENDANT).

(Filed 6 January, 1953.)

1. Wills § 40—

Upon dissenting from her husband's will, the widow has the same rights and estates as if the husband had died intestate, G.S. 30-2, and takes such share as is provided for her by the statute of distribution, G.S. 28-149.

2. Wills § 34g—

The ultimate incidence of the federal estate tax is a matter of state law, and no provision of a federal statute can have the effect of controlling the state's statutes, power in this respect not having been granted the Federal Government but being reserved to the states. Tenth Amendment to the Constitution of the United States.

3. Constitutional Law § 8a—

Public policy is a matter for the legislative branch of the government and not for the courts.

4. Wills §§ 34g, 40—

The federal estate tax should be paid before allotting the widow dissenting from her husband's will her statutory share of the estate notwithstanding that this precludes the application of the marital deduction provision of U.S.C.A. Title 26, sec. 812 (3), since the estate tax is a "debt" within the meaning of G.S. 28-105 and must be paid under state law prior to the distribution of the surplus, G.S. 28-149, the ultimate incidence of the federal estate tax being determinable under state law unaffected by any federal statutory provisions.

5. Same—

The widow's dissent from her husband's will is a rejection of it as far as her rights are concerned, and having elected to treat it as a nullity, she may not assert any benefits thereunder, even in regard to direction in the will for the payment of estate taxes.

APPEAL by plaintiffs and defendant Effie M. Green, from *Gwyn, J.*, October Term, 1952, of BUNCOMBE. Affirmed.

Petition by plaintiffs as executors and trustees of the estate of Gay Green, deceased, for advice and direction as to the allocation of the federal estate tax liability of decedent's estate.

The parties of record stipulated and agreed as to the facts pertinent to the question presented. These facts may be briefly summarized as follows:

Gay Green, a resident of Buncombe County, North Carolina, died 8 June, 1951, leaving a last will and testament wherein he appointed Wachovia Bank & Trust Company and Marion Green Johnston executors and trustees. The decedent was survived by his widow Effie M. Green, who within the time and in the manner prescribed by G.S. 30-1 dissented from the will. No child was born of the marriage. Under the terms of the will a large part of the estate valued at more than four million dollars was conveyed to the named executors in trust for the ultimate benefit of testator's niece Marion Green Johnston and nephew Ottis Green, Jr., and their children. Certain real property was devised to Mars Hill College, and Brevard College and Eliada Orphanage were given legacies of $100,000 each. There were also bequests to certain others named in the will.

The testator made certain provisions for his wife, but because of her dissent these were nullified, and she became entitled to her distributive share of one-half the personal estate. She is now 83 years of age.

Following her dissent, Mrs. Effie M. Green notified the executors and trustees of her contention that she was entitled to have one-half share of the personal estate of her husband allotted to her before payment of the federal estate tax, and that her share should not be chargeable with any part of the tax. Marion Green Johnston and Ottis Green, Jr., and other beneficiaries and legatees, signified their opposition, contending that the share of the widow in the personal property of the estate should be allotted to her after payment of all taxes, including the federal estate tax. Thereupon the executors and trustees being uncertain as to their duty and deeming the question one for the decision of the Court instituted this action for advice and direction.

It was agreed that if the statutory share of the defendant Effie M. Green in the personal property of the estate be computed after payment of debts but before payment of the federal estate tax, on the basis of the valuation used by the executors in filing state inheritance tax return, the total federal estate tax would be $915,282.84, and that the net personal property receivable by the widow and qualifying for marital deduction in federal estate tax return would be $1,041,600.81, and the entire tax of $915,282.84 would be payable out of the remaining one-half of the personal estate passing to the next of kin and beneficiaries, $888,185.15,

which would exhaust their share and require $27,097.69 to be paid from the realty to complete the payment of the federal estate tax due.

On the other hand, if the share of the widow be computed after payment of federal estate tax the total tax liability would be increased to $1,181,780.38, of which the widow would be charged with one-half or $590,890.19, and she would receive for her share $450,710.62, and the next of kin would receive $297,299.96.

All persons interested or who would by any possibility become entitled to an interest in the estate, including those not *in esse,* have been made parties and are properly before the Court.

Upon the facts stipulated and found by the court it was adjudged that the statutory share of the widow Effie M. Green be computed in the personal property of the estate after payment of all debts, costs of administration and taxes, including the federal estate tax.

The plaintiffs, executors and trustees, and the defendant Effie M. Green excepted and appealed.

George H. Wright for Wachovia Bank & Trust Company and Marion Green Johnston, Executors, appellants.

Harkins, Van Winkle, Walton & Buck for defendant, appellant, Effie M. Green.

Hudgins & Adams for defendants, appellees, Aileen Morel Johnston, and John Devereaux Johnston, guardian ad litem for John Devereaux Johnston, Jr.

Williams & Williams for defendants, Ottis Green, Jr., and Virginia F. Green, guardian ad litem of Laura Adelaide Green, Mary Virginia Green and Michael Joseph Green.

John C. Cheesborough, guardian ad litem for persons not now in esse who may hereafter acquire an interest in the estate of Gay Green, deceased.

DEVIN, C. J. Gay Green died in June, 1951, leaving an estate valued at more than four million dollars, all of which he disposed of according to the terms of his will. He was survived by his widow Effie M. Green, who elected not to take under the will, and, within the time and in the manner provided by law, signified her formal dissent therefrom. There were no children born of the marriage and the next of kin and principal beneficiaries under the will were a niece and nephew. Consequent upon her dissent the widow became entitled to "the same rights and estates in the real and personal estate of her husband as if he had died intestate." G.S. 30-2. No question as to the real property of the decedent is presented. In case of intestacy of the husband the North Carolina statute of distribution, G.S. 28-149 (3), makes this provision for the surviving

widow: "If there is no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate."

The question here presented for decision is whether in the administration of the estate of Gay Green the statutory share of the dissenting widow in the personal property of the decedent under the facts agreed should be allotted to her after the payment of the federal estate tax, or whether the widow's share should be allotted undiminished by this tax.

The court below was of opinion, and so adjudged, that the share of defendant Effie M. Green in the personal estate of her deceased husband should be computed in the personal property remaining after the payment of all debts and taxes including the federal estate tax. Counsel for the appellant Effie M. Green argued with much earnestness that this Court should take into consideration the effect of the 1948 amendment to the Federal Revenue Act (U.S.C.A. Title 26, sec. 812 (e)) and adopt the view which would permit the application of the marital deduction provision of the statute to this case, and thereby reduce the value of the decedent's gross estate by that passing by operation of law to his widow and free that share from the impact of the federal estate tax.

The pertinent portions of this amended section upon which the appellant Effie M. Green relies may be stated as follows: "For the purpose of the tax, the value of the net estate shall be determined in the case of a citizen or resident of the United States by deducting from the value of the gross estate . . . (A) In general. An amount equal to the value of any interest in property which passes or is passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. . . . (E) Value of interest passing to surviving spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this sub-section. . . . (i) there shall be taken into account the effect which a tax imposed by this Chapter on any estate, succession, legacy or inheritance tax has upon the net value to the surviving spouse of such interest."

This means that for the purpose of the tax the value of the decedent's net estate should be determined by deducting from the value of the gross estate the value of the interest which passes from the decedent to the surviving spouse, but only to the extent such interest is included in determining the value of the gross estate. All the property up to 50% of the adjusted gross estate of the decedent which passes to his widow as owner is treated as a marital deduction, and this marital deduction is deducted from the value of the estate to be taxed. That is, the basis for the incidence of the federal estate tax would be diminished by reason of and to the extent of the marital deduction which she is permitted to have free from

the tax. It was argued by appellant that the widow should not be required to contribute to the federal estate tax for the reason that this tax is an excise tax upon the transfer of the estate at death of the owner rather than a tax imposed upon the interest received, and the interest of the owner in one-half of his personal estate ceased at his death, his widow then becoming the owner thereof. The federal statute does not tax this interest because the decedent could not control its devolution. It should be considered as that part of the husband's estate which ceased at his death.

It is urged that by adopting and promulgating this view as the basis of decision in this case this Court would give effect to the manifest purpose of the amendment of 1948 which was to equalize the federal estate tax in common law states with that imposed in those states where marital community of property is in effect. Appellant points out that if the ruling of the court below be upheld and the share of the personal estate passing to the widow be held chargeable with its proportionate part of the federal estate tax, the marital deduction otherwise allowable would be reduced accordingly, and the amount of the tax would be increased, while the widow's share would be materially reduced. The epitome of the appellant's argument is that the federal statute as amended has now opened the way to permitting the widow, a resident of this State, to receive the benefit of the full marital deduction whereby the burden of the tax would be lessened and the inequality suffered by citizens of this State removed. Hence this Court is urged to reverse the judgment below and authorize the executors of the Gay Green estate to allot to the widow her statutory share in the decedent's personal estate before payment of the federal estate tax.

Persuasive as these arguments would seem to be, we are constrained to hold that under the North Carolina statutes, and in the light of the decisions of this Court relating to the question presented, the one-half share of the dissenting widow in the personal estate of the decedent should be paid to her by the executors after the payment of all taxes including the federal estate tax.

The judicial determination that the share of the estate of the husband dying intestate which passes by operation of law to his surviving spouse should be untouched by the federal estate tax is usually made to rest upon the premise that during the marriage the accumulation of property has been by the joint effort of both husband and wife, subject to the husband's control, and when the marriage is dissolved by the death of the husband his control ceases, and the wife resumes possession and control of that part of the estate which was her own. The federal estate tax is not an inheritance tax, nor is it imposed upon the property itself but upon its transition, and the share allotted to the widow out of her husband's estate

is regarded not as part of the decedent's estate upon which the tax is computed but as the separate property of which she is the owner. Hence this property neither creates nor adds to the tax.

However, the doctrine of marital community of property is not recognized in North Carolina, nor do we have any statute which has the effect of bringing the administration of estates and the method of distribution into conformity with that principle. The federal tax statute as amended which makes provision for marital deduction does not have the effect of controlling the state statutes as to the administration of decedent's estate. Power in this respect has not been granted to the Federal Government, and the right of state control is reserved (10th Amendment). The Supreme Court of the United States has repeatedly declared the Federal Government is concerned only with the collection of the tax, leaving it to the states to determine how the burden shall be distributed and upon whom the impact shall fall. *Y. M. C. A. v. Davis,* 264 U.S. 47; *Riggs v. Del Drago,* 317 U.S. 95; *Fernandez v. Wiener,* 326 U.S. 340. "Although the share of the surviving spouse is subject to the lien and the tax must be paid out of the estate as a whole, the federal statute leaves it to the states to determine how the tax burden shall be distributed among those who share in the taxed estate." *Fernandez v. Wiener, supra.* See also note in 1 A.L.R. (2) 1107. The ultimate incidence of the federal estate tax is a matter of state law. *Re Zahn's Estate,* 300 N.Y. 1.

The public policy of the state is a matter for the legislative branch of the government and not for the courts. Whether any change should be made in the manner of distribution to the widow of her interest in the estate of her husband, in view of the provision for marital deduction contained in the federal statute, is a matter for the General Assembly.

The statute now in force in this State prescribes that the dissenting widow shall receive one-half the personal estate of her departed spouse as her distributive share, and directs the personal representative, in case of intestacy, after payment of debts in the order prescribed by G.S. 28-105, to distribute the surplus in the manner set out in G.S. 28-149. The word surplus means the personal property left after payment of the debts of the deceased and the costs of administration. Douglas Administration of Estates, sec. 222. It means the balance for distribution after all expenses of administration and debts including taxes have been paid. *Weinberg v. Safe Deposit & Trust Co.,* 85 A. (2) 50; *Hunter v. Husted,* 45 N.C. 97.

In *Hunter v. Husted, supra,* it was said that "in case of dissent, the amount of the widow's share is to be ascertained precisely as if the husband had died intestate; that is, in this case, upon settlement, ascertain the value and amount of the whole personal estate after payment of debts, and one-third of that is the amount of the widow's share."

The word "debts" as used in the statute G.S. 28-105 prescribing the order of their payment would seem to include the federal estate tax. The statute specifically names "Dues to the United States" as debts of the decedent which must be paid, and concludes with the all-embracing clause "all other debts and demands." *Leggett v. College,* 234 N.C. 595, 68 S.E. 2d 263; *Guilford v. Georgia Co.,* 112 N.C. 34, 17 S.E. 10; *Mayer v. Reinecke,* 130 F. (2) 350; *Camden v. Coal Co.,* 106 W. Va. 312, 61 A.L.R. 584; 51 A.J. 42. The obligation to pay taxes is regarded as a personal debt due the United States. *Billings v. U. S.,* 232 U.S. 261 (287).

In *Leggett v. College, supra,* in the settlement of claims against an insolvent corporation it was held unpaid income taxes due the United States were debts entitled to priority of payment out of the fund. In *Mayer v. Reinecke,* 130 F. (2) 350 (decided 19 July, 1952), in a case involving the federal estate tax, under the Illinois statute which provided for the computation of the widow's share in her deceased husband's personalty after payment of all debts, it was held that the words "all debts" included the debts of the estate as well as those of the decedent, and that the value of the widow's share should be included in the gross estate for the purpose of the federal estate tax.

The decisions in other states where the principle of marital community of property prevails or where there are statutes authorizing apportionment of this tax are not helpful to us in this case in determining the incidence of the federal estate tax as it affects the share of the widow who has dissented from the will.

In the recent case of *Florida Nat. Bank & Trust Co. v. Fuchs,* 60 So. (2) 536 (decided 18 July, 1952), it was held that under a Florida statute, declaring a policy of equitable apportionment, the Legislature intended to exempt from the impact of the tax those assets of decedent's estate not included in the taxable "net estate" and the transfer of which did not add to the burden of the estate's federal estate tax.

In *In re Peters' Will,* 89 N.Y.S. (2) 651 (decided in 1949), it was held that construing sec. 812 (e) of the federal statute with the New York state statute, in arriving at the value of the net estate to which the widow was entitled, the marital deduction should be allowed.

The appellant's position finds support in a Kentucky case, *Lincoln Bank & Trust Co. v. Huber,* 240 S.W. (2) 89 (decided May, 1951), where without the aid of an apportionment statute the Court held the dissenting widow should receive her share of the estate undiminished by any federal estate tax. It seems, however, that the Court had "developed and maintained a rule of equitable apportionment relative to the imposition of the federal estate tax, and that under this rule the widow's share in the present case should not bear any portion of the estate tax." The Court stated the grounds upon which the decision rested as follows: "Under the

authority of *In re Peters* above, we conclude that if the marital deduction is a deductible item before arriving at the net taxable estate, and since that item does not add to the tax, it cannot be burdened with any portion of the federal estate tax. The surviving spouse, therefore, should receive her share undiminished by any federal estate tax."

The appellant also calls our attention to a recent Ohio case, *Miller v. Hammond,* 156 Ohio St. 475 (decided January, 1952), where it was held that the dissenting widow under the Ohio statutes of distribution was entitled to the marital deduction provided by sec. 812 (e) of the federal statute and to have her share of the decedent's estate free of the federal tax. One Justice dissented.

However, in Illinois a different conclusion was reached. In *First National Bank of Chicago v. Hart,* 383 Ill. 489, it was said, "In the absence of statutory enactment directing otherwise, the federal tax must be considered as a charge against the whole estate and not against the individual shares, unless otherwise specifically directed by the testator." And in the recent case of *Northern Trust Co. v. Wilson,* 344 Ill. App. 508 (decided 21 November, 1951), it was held that, notwithstanding the federal statute of 1948, under appropriate state statutes the dissenting widow took her statutory share of her husband's estate after deduction of the federal estate tax.

In Maryland, in the case of *Weinberg v. Safe Deposit & Tr. Co.,* 85 A. (2) 50 (decided December, 1951), it was held that a state statute which provided for apportionment of this tax antedated the federal statute of 1948, and that the widow's share in her husband's estate should be allotted to her after payment of taxes, including the federal estate tax. In the opinion in that case *Chief Justice Marbury* discussed the decisions in other jurisdictions in which the marital deduction was allowed, but concluded that the reasoning in those cases could not be applied in the face of state statutes which seemed to direct otherwise.

In Arkansas where a state statute permits apportionment of the burden of federal estate tax among beneficiaries, it was held in *Terral v. Terral,* 212 Ark. 221, that the term "beneficiary" included the widow's share in her husband's estate, and that the tax should be paid out of the estate as a whole, and that the manner of distribution and the determination of the ultimate impact of the tax were governed by state law. See also *McLaughlin v. Green,* 136 Conn. 138, 15 A.L.R. (2) 1210.

The precise question here presented has not heretofore been decided by this Court, but in *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222, and in *Craig v. Craig,* 232 N.C. 729, 62 S.E. 2d 336, it was held the federal estate tax should be paid out of the general funds of the estate, and that in the absence of testamentary provision the ultimate burden of the tax would fall upon the residuary estate. This would seem to indicate the

view that the federal estate tax should be regarded as a charge against the whole estate, to be paid from the residuary estate in the same manner as debts and expenses of administration. "The residue of an estate . . . is that part of the *corpus* of the estate left by the testator which remains after the payment of specific legacies, taxes, debts and costs of administration." *Trust Co. v. Grubb,* 233 N.C. 22, 62 S.E. 2d 719. Residue means that which remains after a part is taken. *Hager v. Becker,* 310 Ky. 340. In *Y. M. C. A. v. Davis,* 264 U.S. 47, it was held the charities named in the will should receive what was left after payment of funeral expenses, debts of decedent and taxes.

In *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651, the question here debated was not presented. In that case the testator specifically directed the payment of the federal estate tax by the executor.

In this case the widow having dissented from the will is entitled to exactly the same share in her husband's estate she would have received if he had died intestate. So far as her property rights in her husband's estate are concerned there is no will. G.S. 30-2. In all other respects the will remains and the executors are controlled by its terms. *Baptist Female University v. Borden,* 132 N.C. 476, 44 S.E. 1007. The testator Gay Green in his will directed that "all estate, inheritance or succession taxes of every kind which may be assessed against my estate or against any beneficiary thereunder in connection with my estate, shall be paid by my executors as debts of my estate, out of the general assets thereof, without diminishing any specific devise or bequest contained herein by reason hereof." But the appellant Mrs. Green cannot find support for her position from this provision in the will as she has by her dissent rejected the will, and elected to treat it as a nullity so far as her interests are concerned. Hence she will not be permitted to take benefit from the will she has declined to accept. *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183; *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29. She cannot now bring herself within the classification of devisee or legatee under the will or become entitled to any right or benefit therein prescribed. All she is entitled to passes to her by operation of law.

Though the plaintiffs as executors and trustees have taken no position on the question debated between the defendant Mrs. Effie M. Green and the devisees and legatees under the will, they have joined in the appeal for the purpose of obtaining the decision of this Court for their guidance in the administration of decedent's estate.

After consideration of the facts agreed, and the excellent briefs of appellants and appellees, we reach the conclusion that the judgment below should be affirmed and that the statutory share of the dissenting widow in the personal estate of her late husband should be computed after the

payment of all debts, costs of administration and taxes, including the federal estate tax.

Judgment affirmed.

WALTER F. LOVETTE v. G. D. LLOYD AND M. G. COPELAN, INDIVIDUALLY AND TRADING AS LLOYD & COPELAN PLUMBING CO. (ORIGINAL DEFENDANTS); AND CLAIBORNE BYRD AND F. L. BYRD, CO-PARTNERS, TRADING AS CONSOLIDATED PAINTERS; AND U. S. FIDELITY & GUARANTY CO (ADDITIONAL DEFENDANTS).

(Filed 6 January, 1953.)

1. Master and Servant § 41: Parties § 10a—

An action in behalf of an injured employee against a third person tort-feasor is governed by G.S. 97-10 and not the code of civil procedure.

2. Master and Servant § 41—

A right of action exists in behalf of an injured employee against the third person tort-feasor causing the injury even though the injury is compensable under the Compensation Act and the employee has actually received compensation therefor under the Act.

3. Same—

The employer or insurance carrier who has paid or become obligated to pay compensation to the injured employee has initially the exclusive right to maintain an action in its own name or the name of the employee against the third person tort-feasor, but if neither institutes action within six months from the date of the injury the right of action passes to the employee.

4. Same—

Where the plaintiff is the party authorized by G.S. 97-10 to maintain the action against the tort-feasor, he is entitled to prosecute same to final judgment, and the court may not interfere with this privilege by the joinder of wholly unnecessary additional parties.

5. Same—

In an action on behalf of the injured employee against the third person tort-feasor, plaintiff, regardless of whether the suit is maintained by the employer, the employee, or the insurance carrier, is entitled to recover the full amount of damages, since judgment in the action bars any other person from thereafter maintaining an action on the same cause of action, and it is the duty of the court, without a jury, to order the disbursement of the funds among the parties entitled to share in the recovery in the event of a favorable verdict.

6. Same: Pleadings § 31—

Contributory negligence of the injured employee constitutes a complete defense to an action against a third person tort-feasor, and may be pleaded

and proved by such third person irrespective of whether the action is instituted by the employer, the insurance carrier, or the employee.

7. Same—

Independent negligence of the employer, as distinguished from negligence of the injured employee imputed to the employer under the doctrine of *respondeat superior*, may be pleaded and proved by the third person tort-feasor as a bar, complete if the sole proximate cause of the injury, or, if constituting concurring negligence, *pro tanto* against the recovery of compensation paid or payable by the employer or the insurance carrier, even though the action be prosecuted by the injured employee alone.

8. Same: Torts § 4: Negligence § 8—

Liability for contribution under G.S. 1-240 or for indemnity under the doctrine of primary and secondary liability cannot be invoked except among joint tort-feasors, and the Workmen's Compensation Act not only abrogates all liability of the employer to the employee under the law of negligence but also limits the liability of the employer to the employee to the payment of compensation under the Act, and therefore in an action against the third person tort-feasor by the employee, the defendant is not entitled to join the employer or the insurance carrier for contribution or to set up the defense that its liability is secondary and that of the employer primary.

9. Negligence § 16—

In an action for negligence, the defendant may show under a general denial that the sole proximate cause of the injury in suit was the negligence of some third person, and therefore an allegation to that effect, while ordinarily surplusage, is harmless.

10. Negligence § 8—

Primary and secondary liability for negligent injury is based on active and negative negligence of joint tort-feasors, and where an answer contains no factual averments tending to show that the negligence of the pleader was negative in character, it is insufficient to call the doctrine into play.

11. Master and Servant § 41: Parties § 10a—

In an action instituted by the employee alone more than six months after the injury, against the third person tort-feasor, defendant is not entitled to the joinder of the employer and the insurance carrier, except in extraordinary circumstances, since defendant ordinarily may plead all available matters in defense and mitigation in regard to them notwithstanding that they are not parties.

12. Appeal and Error § 2: Master and Servant § 41—

While ordinarily an order providing for the joinder of additional parties is not appealable, in an action by an injured employee against a third person tort-feasor, in accordance with the provisions of G.S. 97-10, an order joining the employer and insurance carrier affects the substantial right of the employee to prosecute the action to a final determination without the presence of wholly unnecessary parties, and therefore is appealable. G.S. 1-277.

LOVETTE *v.* LLOYD.

APPEALS by plaintiff and additional defendants from *Grady, Emergency Judge,* at May Term, 1952, of DURHAM.

Civil action by an injured employee against alleged negligent third parties to recover damages for an injury compensable under the Workmen's Compensation Act heard upon motions to strike allegations of the third parties and to vacate an order of court impleading the employer and the insurance carrier.

For ease of narration, the original defendants G. D. Lloyd and M. G. Copelan, who trade as Lloyd & Copelan Plumbing Co., are called the Plumbing Company; the additional defendants Claiborne Byrd and F. L. Byrd, who trade as the Consolidated Painters, are designated as the Consolidated Painters; and the additional defendant U. S. Fidelity & Guaranty Co. is referred to as the Guaranty Company.

The essential facts are stated in chronological order and in ultimate terms in the numbered paragraphs set forth below.

1. The plaintiff Walter F. Lovette and his employer, the Consolidated Painters, have accepted the provisions of the North Carolina Workmen's Compensation Act. The Consolidated Painters are insured against liability for compensation with the Guaranty Company.

2. On 16 October, 1950, the plaintiff sustained an injury by accident arising out of and in the course of his employment by the Consolidated Painters. He claims his injury was caused by actionable negligence of the Plumbing Company.

3. No action has been brought against the Plumbing Company by either the Consolidated Painters or the Guaranty Company for the recovery of damages suffered by the plaintiff on account of his injury.

4. On 11 January, 1952, the plaintiff commenced this action against the Plumbing Company in the Superior Court of Durham County. His complaint states in detail that his injury was caused by the actionable negligence of the Plumbing Company, and that he has suffered damages totaling $39,000 on account of his injury. He prays judgment against the Plumbing Company for that sum.

5. On 12 April, 1952, the Clerk of the Superior Court of Durham County entered an order in the cause making the Consolidated Painters and the Guaranty Company additional party defendants, and directing that summons be issued against them. The order was entered at the instance of the Plumbing Company, and without notice to the plaintiff, or the Consolidated Painters, or the Guaranty Company.

6. At the time of the entry of the order, the Plumbing Company filed its answer, which admits that on 16 October, 1950, the plaintiff suffered an injury by accident arising out of and in the course of his employment by the Consolidated Painters, and denies that the plaintiff's injury was caused by any negligent act or omission on the part of the Plumbing

Company. The answer contains fifteen additional paragraphs designated as a "further answer and defense . . . and request for affirmative relief" and lettered from A to O, both inclusive, which plead contributory negligence on the part of the plaintiff as a complete defense to the action, and state the other new matter summarized in the next paragraph of this statement.

7. Paragraphs B, C, and D allege in detail that the Guaranty Company is the insurance carrier for the Consolidated Painters; that the Consolidated Painters and the Guaranty Company have become obligated to pay compensation to the plaintiff for his injury; and that as a consequence the Consolidated Painters and the Guaranty Company "are subrogated to the rights of the plaintiff in . . . any cause of action alleged in the complaint" to the extent of the compensation "for which they may be liable." Paragraph K asserts in detail that the sole proximate cause of the plaintiff's injury was independent negligence on the part of his employer, the Consolidated Painters. Paragraph L and its prayer for relief, *i.e.,* Prayer No. 7, lay hold on the doctrine of primary and secondary liability; aver that "if it should be found that there was any negligence on the part of these defendants, which is denied, then these defendants allege that any negligence on their part was secondary to the negligence on the part of Claiborne Byrd and F. L. Byrd, trading and doing business as Consolidated Painters of Durham, and such negligence on the part of the Consolidated Painters is the primary negligence and these defendants would in any event be secondarily liable only"; and demand "that . . . any judgment . . . awarded the plaintiff . . . be awarded primarily against Claiborne Byrd and F. L. Byrd and their insurance carrier, the U. S. Fidelity & Guaranty Company." Paragraph M and Prayer No. 8 invoke the provisions of G.S. 1-240 authorizing contribution between joint tort-feasors; states (1) "that if the injury complained of by the plaintiff resulted from any negligence of these defendants, which negligence is denied, . . . the negligence of Claiborne Byrd and F. L. Byrd, trading as Consolidated Painters, concurred with any negligence . . . of these defendants and proximately caused the damage and injuries alleged to have been sustained by the plaintiff" and (2) that "these defendants are entitled to judgment over and against the said Claiborne Byrd and F. L. Byrd, trading as Consolidated Painters, as joint tort-feasors for contribution in any amount which the plaintiff might recover"; and demand "judgment over and against Claiborne Byrd, F. L. Byrd, and U. S. Fidelity & Guaranty Company. . . for full contribution as joint tort-feasors . . . if recovery is allowed against these defendants for any amount." Paragraphs N and O and Prayers Nos. 1, 2, and 6 allege that the Consolidated Painters and the Guaranty Company "are necessary and proper parties to this action."

8. On 17 April, 1952, summons was served upon the Consolidated Painters and the Guaranty Company.

9. The plaintiff, the Consolidated Painters, and the Guaranty Company thereupon filed the following motions in the cause: (1) Motion to vacate the order of 12 April, 1952, making the Consolidated Painters and the Guaranty Company parties to the action; and (2) motions to strike from the answer of the Plumbing Company "all the allegations contained in paragraphs B, C, D, K, L, M, N, and O, and prayers for relief numbered 1, 2, 6, 7, and 8, together with the portions of the caption referring to Claiborne Byrd and F. L. Byrd, co-partners, trading as Consolidated Painters, and U. S. Fidelity & Guaranty Company."

10. The motions were heard by Judge Grady at the May Term, 1952, of the Superior Court of Durham County. He entered an order denying all of the motions in all respects, and the plaintiff, the Consolidated Painters, and the Guaranty Company appealed, assigning all rulings on all motions as error.

Albert W. Kennon for plaintiff, appellant.

Victor S. Bryant, Ralph N. Strayhorn, and Ruark, Ruark & Moore for the original defendants, G. D. Lloyd and M. G. Copelan, individually and trading as Lloyd & Copelan Plumbing Company, appellees.

Fuller, Reade, Umstead & Fuller for the additional defendants, Claiborne Byrd and F. L. Byrd, co-partners, trading as Consolidated Painters, and U. S. Fidelity & Guaranty Company, appellants.

ERVIN, J. This case is governed by the North Carolina Workmen's Compensation Act, and not by the Code of Civil Procedure. In consequence, *Burgess v. Trevathan, ante,* 157, 72 S.E. 2d 231, has no application to it.

The controlling provisions of the Workmen's Compensation Act appear in the statute codified as G.S. 97-10. This somewhat prolix enactment establishes the rules enunciated below to govern the conduct of civil actions against third persons who negligently inflict personal injuries upon workmen subject to the Workmen's Compensation Act.

1. G.S. 97-10 prescribes in express terms that compensation shall be paid in accordance with the provisions of the Workmen's Compensation Act in any case where the injured employee may have a right to recover damages for his injury from any person other than his employer. Under this provision, the right to maintain a common law action still exists in behalf of an employee against a third party through whose negligence he is injured, even though the injury is compensable under the Act, and even though the employee actually receives compensation for it under the Act.

2. G.S. 97-10 specifies how the liability of the negligent third party to the injured employee is to be enforced. The employer or the insurance carrier, who has paid or become obligated to pay compensation to the employee injured by the negligent third party, has the exclusive right in the first instance to commence an action "in his own name and/or in the name of the injured employee" against the third party for the damages suffered by the employee on account of the injury. If neither the employer nor the insurance carrier commences the action against the negligent third party within six months from the date of the injury, the right of action passes to the injured employee, and the injured employee thereafter has the right to bring the action in his own name against the third party for the damages suffered by him on account of his injury. These statutory provisions plainly imply that the employer, or the insurance carrier, or the employee who brings the original action against the third party is to have the exclusive privilege to prosecute his action to a final determination, and that the court is not to interfere with the exercise of this exclusive privilege by making additional parties unless extraordinary circumstances compel it to do so. Another necessary implication of the statutory provision specifying how the liability of the third party to the injured employee is to be enforced is that a judgment in an action prosecuted by either the employer, or the insurance carrier, or the employee in conformity with the statute is a bar to a subsequent action on the same cause of action by any other person, 71 C.J.S., Workmen's Compensation Act, Section 1602.

3. G.S. 97-10 clearly contemplates that the action against the third party is to be tried on its merits as an action in tort, and that any verdict of the jury adverse to the third party is to declare the full amount of damages suffered by the employee on account of his injury, notwithstanding any award or payment of compensation to him under the provisions of the Workmen's Compensation Act. *Rogers v. Construction Co.*, 214 N.C. 269, 199 S.E. 41. To this end, it enacts that "the amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible in evidence in any action against a third party." A necessary implication of this provision of the statute is that in the event of a verdict for the plaintiff in the action against the third party, the trial court, sitting without a jury, is to determine the amount of compensation paid or payable to the injured employee under the Workmen's Compensation Act on the basis either of a stipulation of the interested persons or of evidence submitted to it, and after so doing enter a judgment safeguarding the rights of any person entitled to share in the recovery, regardless of whether or not such person is a party to the action. *Mickel v. New England Coal & Coke Co.*, 132 Conn. 671, 47 A. 2d 181, 171 A.L.R. 1001.

4. G.S. 97-10 requires the recovery in the action against the third party to be disbursed in a specific manner, irrespective of whether the plaintiff in the action is the employer, or the insurance carrier, or the employee. It directs that the recovery be applied to these objects in this order: (1) To pay court costs; (2) to pay attorney fees approved by the Industrial Commission; and (3) to reimburse or indemnify the employer or the insurance carrier for all compensation paid or payable by him. Any excess of the recovery then remaining is to be paid to the injured employee. A necessary implication of the statutory requirement respecting the disbursement of the recovery is that the action against the third party is prosecuted in behalf of any person entitled to claim a share in the recovery, regardless of whether he is a party to the action.

5. The contributory negligence of the injured employee constitutes a complete defense to the action against the third party, and in consequence may be pleaded and proved by the third party as such, irrespective of whether the action is prosecuted by the employer, or the insurance carrier, or the employee. *Poindexter v. Motor Lines,* 235 N.C. 286, 69 S.E. 2d 495; *Brown v. R. R.*, 204 N.C. 668, 169 S.E. 419; 71 C.J., Workmen's Compensation Act, section 1610.

6. It is contrary to the policy of the law for the employer, or his subrogee, the insurance carrier, to profit by the wrong of the employer. *Brown v. R. R., supra.* For this reason, where the negligence of the third party and independent negligence on the part of the employer concur and proximately cause the injury to the employee, the third party may plead and prove the independent concurring negligence of the employer as a bar, *pro tanto,* to the recovery of the compensation paid or payable by the employer or the insurance carrier. *Poindexter v. Motor Lines, supra; Essick v. Lexington,* 233 N.C. 600, 65 S.E. 2d 220; *Eledge v. Light Co.,* 230 N.C. 584, 55 S.E. 2d 179; *Brown v. R. R., supra.* The third party may interpose this plea even though the plaintiff in the action against him is the injured employee rather than the employer or the insurance carrier. This is true because the action is prosecuted for the benefit of the employer or the insurance carrier as well as for the benefit of the employee. The term "independent negligence" denotes negligence of the employer other than that imputable to him under the doctrine of *respondeat superior* on account of the acts or omissions of the injured employee. *Poindexter v. Motor Lines, supra.*

7. The Workmen's Compensation Act is designed to secure to the employee at the hand of his employer a certain compensation against loss of earning power through injury by accident arising out of and in the course of his employment, irrespective of how such injury occurs or what brings it about. As a recompense for his acceptance of the new and comprehensive liability to pay his employee compensation on account of

injury by accident, G.S. 97-10 grants to the employer in express terms complete relief from any and all other liability to his employee "at common law, or otherwise, on account of such injury." This statutory provision abrogates all liability of the employer to the employee as a tort-feasor under the law of negligence for an injury by accident in the employment. In consequence, the third party, who is sued for damages for negligently inflicting a compensable injury upon the employee, cannot hold the employer liable for contribution under the statute embodied in G.S. 1-240 or for indemnity under the doctrine of primary and secondary liability even where the injury is the result of the joint or concurrent negligence of the employer and the third person. *Essick v. Lexington,* 232 N.C. 200, 60 S.E. 2d 106; *Brown v. R. R.,* 202 N.C. 256, 162 S.E. 613. This is necessarily so for the very simple reason that one party cannot invoke either the statutory right of contribution or the doctrine of primary and secondary liability against another party in a tort action unless both parties are liable to the plaintiff in such action as joint tort-feasors. Even apart from these sound considerations, any notion that the third party, who is sued for damages for negligently inflicting a compensable injury upon the employee, can require the employer to pay a part of such damages by way of contribution under G.S. 1-240 or all of them by way of indemnity under the doctrine of primary and secondary liability is absolutely incompatible with the plain provision of G.S. 97-10 relieving the employer from all liability to the employee on account of the injury except that of paying compensation to him in accordance with the provisions of the Workmen's Compensation Act. *Ita lex scripta est.*

When the rules created by G.S. 97-10 are applied to the instant action, it becomes manifest that the rulings of the presiding judge on the motions to strike are sound as to Paragraphs B, C, and D and the first allegation of Paragraph M, and unsound as to Paragraphs L, N, and O, the second allegation of Paragraph M, and Prayers Nos. 1, 2, 6, 7, and 8.

The motions to strike Paragraph K and the rulings thereon are inconsequential from any viewpoint. Since the fact that the sole proximate cause of the injury in suit was the negligence of some third person may be shown by a defendant under a general denial, an allegation by a defendant to that effect ordinarily constitutes surplusage and has no place in a technically perfect answer. 65 C.J.S., Negligence, Section 197. By the same token, however, its inclusion in an answer is harmless to plaintiff.

When Paragraphs B, C, and D, the first allegation of Paragraph M, and Paragraphs A, F, and I are construed as connected statements with much liberality toward the Plumbing Company, they make this permissible plea: That negligence of the Plumbing Company and independent negligence on the part of the employer, the Consolidated Painters, con-

curred and proximately caused the injury to the plaintiff, and as a legal result the amount of compensation paid or payable to the plaintiff is not recoverable of the Plumbing Company for the benefit of the employer or the insurance carrier. *Eledge v. Light Co., supra.*

Paragraph L, which lays hold on the doctrine of primary and secondary liability, and the second allegation of Paragraph M, which invokes the statutory right of contribution, and their corresponding prayers for relief serve no legitimate function in the case at bar, and must be expunged from the answer because of their prejudicial tendencies.

An all-sufficient ground for the expunction of these allegations and prayers is that they lay claim to relief not legally available to the Plumbing Company in this action for reasons detailed in Paragraph 7 of this opinion. There are other valid causes for their expungement. The answer ignores the significant circumstance that the doctrine of primary and secondary liability in tort actions is bottomed on active and negative negligence of joint tort-feasors. *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648; 65 C.J.S., Negligence, section 102. It does not contain any factual averments indicating that the negligence charged against the Plumbing Company was negative in character, or supporting the mere conclusion of Paragraph L that any negligence on the part of the Plumbing Company was secondary to that of the Consolidated Painters. Consequently the averments of the answer would be insufficient to call the doctrine of primary and secondary liability into play even if such doctrine were legally available to the Plumbing Company. Since the Guaranty Company was not an actor in the events resulting in personal injury to the plaintiff, it has committed no tort against him, and cannot be adjudged liable to the Plumbing Company as a joint tort-feasor for either contribution or indemnity. Moreover, it may be observed that while the Guaranty Company has bound itself to pay limited compensation to the employees of the Consolidated Painters under the Workmen's Compensation Act, it has not assumed any responsibility for the payment of unlimited judgments against the Consolidated Painters in common law actions for negligence.

The irrelevancy of Paragraphs N and O and Prayers Nos. 1, 2, and 6 becomes apparent on a consideration of the assignments of error directed to the refusal of the presiding judge to vacate the order making the employer and the insurance carrier parties to the action.

What has already been said renders it obvious that the legally insupportable desire of the Plumbing Company to claim contribution and indemnity from the employer and the insurance carrier furnishes no basis for the order making them parties. Moreover, the order is not needed for the protection of the Plumbing Company. It has full liberty to plead all available matters in defense and mitigation. Since the employee is prose-

cuting the action in strict accord with the relevant statute, the judgment in it will bar any subsequent suit against the Plumbing Company by either the employer or the insurance carrier on the same cause of action. Furthermore, the order is not to be justified on the theory that either the Plumbing Company or the court is under an obligation to bring the employer and the insurance carrier into court against their will and afford them an opportunity to claim a share in any recovery by the employee. Indeed, the Plumbing Company affirmatively asserts by its plea of independent concurring negligence on the part of the employer that neither the employer nor the insurance carrier has any such claim. Under G.S. 97-10, any rights of the employer or the insurance carrier will be enforced by the judgment, notwithstanding they are not parties to the action.

These things being true, there is no warrant in law for the order making the Consolidated Painters and the Guaranty Company parties to the action.

Ordinarily no appeal lies from an order providing for the joinder of additional parties. *Burgess v. Trevathan, supra; Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669. The plaintiff, however, has brought his action under G.S. 97-10, which clearly implies that he is to have the exclusive privilege to prosecute his action to a final conclusion without the presence of either the employer or the insurance carrier unless extraordinary circumstances require their joinder. No such circumstances exist in the instant case. We are constrained to hold that the refusal of the presiding judge to vacate the *ex parte* order making new parties is appealable under G.S. 1-277 because it immediately affects a substantial right of the plaintiff, *i.e.,* his statutory privilege to prosecute his action to a final determination without the presence of wholly unnecessary parties.

For the reasons given, the rulings on the motions to strike are modified to conform to this opinion, and the rulings on the motion to vacate the order making new parties are reversed.

On the motions to strike,

Modified and affirmed.

On the motion to vacate order making additional parties,

Reversed.

THERON DEAN BROADAWAY v. KING-HUNTER, INC.

(Filed 6 January, 1953.)

1. **Municipal Corporations § 14a—**

A contractor constructing a sewer line along a city street under contract with the municipality is under substantially the same duty to the traveling public as the municipality would be if it were doing the work itself.

2. **Same—**

In excavating a ditch along a street for a sewer line, the contractor, though not an insurer of the safety of travelers, is under a legal duty to exercise care commensurate with the surrounding dangers and circumstances to warn travelers of the existence of an open ditch and otherwise protect them against injury therefrom.

3. **Same—**

Evidence tending to show that a contractor excavating a ditch along a dirt street in a city, placed flares at a distance so great from each other as to afford no light or warning at the place in question, and erected no other barricade, danger signal or sign, although municipal ordinance required any street obstruction to be protected with a sufficient number of red lights, and although its contract with the city required it to maintain all necessary barricades and sufficient red lights and danger signals, *is held* sufficient to be submitted to the jury on the issue of negligence of the contractor.

4. **Same—Evidence held not to disclose contributory negligence as matter of law on part of pedestrian falling into open ditch along street.**

The evidence tended to show that plaintiff walked from an intersection where no street light was maintained along a dirt street or alley some 125 feet to the beginning of a ditch in the middle of the street, that a flare at a compressor wagon marked the beginning of the ditch and that plaintiff walked around the ditch and sewer pipe lying on the ground and continued some 25 feet beside the ditch to the house of his destination, but that upon leaving the lighted house some time later to retrace his route, he could not see, and was feeling his way with his feet, when he stumbled over the pipe and fell into the open ditch at a place where no light was afforded by any flares or warning signals. The evidence further tended to show that plaintiff had no knowledge of any other route. *Held:* The evidence does not establish contributory negligence as a matter of law but raises conflicting inferences upon the issue for the determination of the jury.

5. **Trial § 23a—**

Where permissible conflicting inferences are supported by the evidence the issue is for the jury and not the court.

APPEAL by plaintiff from *Pless, J.*, April Term, 1952, of GUILFORD (Greensboro Division).

Civil action to recover damages for personal injuries alleged to have been sustained by the plaintiff, when at night he fell into a ditch dug by

the defendant pursuant to a contract it had entered into with the City of Greensboro for the laying of a sewer line in Brice Street in said city.

At the close of the plaintiff's evidence the defendant's motion for judgment of nonsuit was allowed—the judgment stating that the plaintiff is guilty of contributory negligence as a matter of law. From the judgment based on such ruling the plaintiff appealed, assigning error.

H. L. Koontz and Shuping & Shuping for plaintiff, appellant.
Jordan & Wright and Perry C. Henson for defendant, appellee.

PARKER, J. On 15 September, 1949, the defendant was engaged in the construction of a sewer line on Brice Street for the City of Greensboro. Brice Street is an unpaved public street in the city not wider than 15 feet, though wider at some places than others. The street had no sidewalks; its surface was uneven, and had the appearance of a rather rough and unimproved alley. The street runs in a general east-west direction. For the purpose of installing the sewer line the defendant on 15 September, 1949, had dug a ditch about 8 feet deep on Brice Street. The ditch was dug in about the middle of the street. From the intersection of Warren and Brice Streets to the entrance of the Bynum home is a distance of about 150 feet. The ditch extended east of the Bynum driveway about 25 feet and west of the Bynum home. The easterly 125 feet of Brice Street from Warren Street to a compressor wagon was unexcavated. The city had no street lights on Brice or Warren Streets.

On 15 September, 1949, about dusk dark the plaintiff arrived at the intersection of Warren and Brice Streets, where Daniel Womack lived, on his way to the home of Virginia Bynum on Brice Street to take lessons from her in sewing and tailoring. He was walking. Daniel Womack told the plaintiff there was a ditch down there. The plaintiff laughed, and said: "Yes, he'd be careful, he see'd it." When the plaintiff entered Brice Street he saw a compressor wagon across the ditch about 124 feet from the intersection of Brice and Warren Streets. On the east side of this wagon was a little flare light, a black pot with the flare sticking up. Sewer pipes were lying in the street along the south side of the open ditch to the Bynum home in an irregular manner. A little dirt was lying on that side. A great pile of dirt was on the north side of the ditch. The ditch was cut through some rock and some big rocks were thrown out in the street. In going down the hill on Brice Street there was sufficient light for the plaintiff to see the open ditch, and he walked around, about and over the pipes. There were no lights of any sort on or along or about the open ditch except the flare pot east of the wagon and a flare pot along the ditch below the Evans home west of the Bynum home on Brice Street. This flare pot cast no light at the point where the plaintiff fell in the

ditch, or along the street where he was walking before he fell in. From the street intersection to the Bynum driveway there was a wire fence along the south side of Brice Street for about 125 feet, and then a rock wall about 2½ or 3 feet high to the Bynum driveway. From the edge of the ditch to the fence was about 5 or 6 feet. The plaintiff walked down the street to the Bynum home entering by the driveway.

The plaintiff was in the Bynum house until about 10:00 p.m. doing close work with a needle and thread under a bright light. He left then to return home carrying in his hand the suit he was making in a bundle. He left by the side door and driveway—the way he entered. No lights were burning on the outside of the Bynum house. The plaintiff saw it was "awfully dark out there." He did not ask the Bynums for a light of any kind. He struck no matches—not remembering whether he had any in his pocket or not. When he came out of the Bynum home, there were no lights along the ditch betweeen the Bynum home and the wagon. He could not see the ditch or the light east of the wagon. He knew the open ditch and pipes were there, and tried to feel his way around with his feet and get out by going along in that manner. He bumped against a pipe with his feet and then bumped up against another pipe and finally fell in the ditch receiving the injuries he alleges in his complaint.

The plaintiff had been to the Bynum's before, but he did not know the ditch was there that night until his arrival. There is a walkway from the back of the Bynum home to Poe Street. Poe Street comes to the Bynum woodhouse on the back of their lot. The plaintiff did not know anything about there being any such way in and out of the Bynum's. That night he made no inquiry as to a way out.

There is no evidence that the defendant erected and maintained any barricade, danger signal or sign, except the flare pot east of the wagon and the flare pot west of the Bynum home below the home of one Evans.

On 15 September, 1949, the following ordinance of the City of Greensboro was in full force and effect: Chapter 45, Section 8, of the Code of the City of Greensboro is as follows: "Protection of Obstructions. Every person causing or allowing any obstruction to remain on any street or sidewalk at night shall protect the same with a sufficient number of red lights."

The following is a part of the contract between the City of Greensboro and the defendant for the construction of water and sewer improvements on Brice Street: "The contractor shall provide, erect, and maintain all necessary barricades, suitable and sufficient red lights, danger signals and signs, provide a number of watchmen and take all necessary precaution for the protection of the work and safety of the public."

This Court has said in *Presley v. Allen & Co.*, 234 N.C. 181, at page 184, 66 S.E. 2d 789: "It seems to be conceded, and rightly so, that the

defendant, being in charge of the excavation project, was under substantially the same legal duty to the travelling public as would the Town if it had been in direct charge of making the excavation for some purpose of its own. *Kinsey v. Kinston,* 145 N.C. 106, 58 S.E. 912. See also McQuillin, Municipal Corporations, 3rd Ed., Vol. 19, Sec. 54-42, pp. 148 to 150."

The defendant was not an insurer of the safety of travelers upon Brice Street. *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424; *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571. The defendant contractor was under a legal duty to exercise ordinary care, *i.e.,* care commensurate with the surrounding dangers and circumstances, to warn travelers of the existence of the open ditch, and otherwise to protect them against injury therefrom. *Evans v. Construction Co.,* 194 N.C. 31, 138 S.E. 411; *Ramsbottom v. Railroad,* 138 N.C. 38, 50 S.E. 448; 25 Am. Jur., Highways, Sec. 400, pp. 697 and 698.

Considering the evidence in the light most favorable to the plaintiff we are of the opinion that the evidence is sufficient to go to the jury upon an issue as to whether the plaintiff was injured by the negligence of the defendant as alleged.

The next question presented by this appeal is whether the plaintiff was guilty of contributory negligence as a matter of law, which was the decision of the trial court.

The plaintiff knew the open ditch with pipes and dirt and rocks from its excavation was there when he walked down Brice Street to enter the Bynum home. But this knowledge does not *per se* establish negligence on his part. *Russell v. Monroe,* 116 N.C. 721, 21 S.E. 550; *Darden v. Plymouth,* 166 N.C. 492, 82 S.E. 829; *Tinsley v. Winston-Salem,* 192 N.C. 597, 135 S.E. 610.

The plaintiff made no effort to obtain a light and was feeling his way along with his feet to go the 25 feet from the Bynum driveway to the compressor wagon where the ditch ended. Does that and his other acts there that night make him guilty of contributory negligence as a matter of law? Our decisions seem to answer the question No. In *Beard v. R. R.,* 143 N.C. 137, 55 S.E. 505, the plaintiff, a railroad conductor, was going with a lighted lantern from the freight office to take charge of his train, the night was dark and stormy and the wind blew his lantern out. He did not return to light it, but continued along the platform, feeling his way with his feet, and fell down the steps which were cut in the platform about three feet, which he knew were there. There was no light on the platform, nor railing around the steps. Upon these facts the defendant contended that the plaintiff was guilty of contributory negligence as a question of law. This Court said on that question: "In passing upon this question his Honor was compelled to take into consideration

the whole evidence and fix the standard of duty, applying the legal test of prudence. It cannot, we think, be said that, using his senses, members, and knowledge of surrounding conditions, as described by plaintiff, he was manifestly regardless of his safety. Common observation teaches us that many persons, clearly within the pale of ordinary prudence, feel their way along steps in the dark. We can hardly think that by doing so they can be said to be clearly and obviously negligent. While it may have been wise for the plaintiff to return and relight his lantern, yet, in view of the fact that the train of which he was ordered to take charge was ready to move, and the time for its departure had arrived, that it was late at night and that the same wind which blew out his lantern would probably do so again, we think that he was entitled to have his conduct, in this respect, submitted to the jury."

In *Darden v. Plymouth,* 166 N.C. 492, 82 S.E. 829, this is a fair summary of the evidence. For more than two months the defendant had permitted building material to obstruct the sidewalks on both sides of the street. The plaintiff was injured by stumbling and falling upon some loose brick or building material rendering the sidewalk uneven, as she was going to her home at night. The obstruction would not permit two persons to pass abreast of each other. The obstruction was in a shadow cast by a street light from a shed that extended across the sidewalk. The plaintiff said that she was mindful of the pile of lumber, and was doing what she could to avoid being hurt. This court said in that case: "According to *feme* plaintiff's account, she was going from her work place to her home, along the street that was provided; that she was mindful of the lumber pile and the conditions attendant and was doing what she could to avoid a fall, but the place was rendered too dark to observe fully by the shadow of the building and the shed overhead, and notwithstanding her care, she slipped and fell. Upon these facts, if established, we must hold, as stated, that the question of contributory negligence on the part of plaintiff must be referred to the jury."

In *Tinsley v. Winston-Salem,* 192 N.C. 597, 135 S.E. 610; *S. c.,* 194 N.C. 808, 140 S.E. 192, the city had dug ditches for drainage or sewer pipes in the street and sidewalk in front of the residence of the plaintiff. The open ditches in the streets were safeguarded at night, but not the one across the sidewalk. The plaintiff for fifteen or twenty years had used a sidewalk or pathway there in going from and to her home. She used it every day; it was the only one she had. The path at this place was narrow. In the street about thirty feet from the ditch nearest the plaintiff's home was a small electric light, the rays of which were obstructed by a shade tree. There was no light on the sidewalk at this place, nor other warning. The plaintiff knew the ditch was there. About ten o'clock at night the plaintiff fell into the ditch, and was injured. There

was evidence in contradiction—evidence that the plaintiff's injury was caused solely by her own negligence. This Court held that a nonsuit was error, and that the case must be left to the decision of a jury.

Boswell v. Town of Tabor, 196 N.C. 196, 145 S.E. 17, is a similar case. The chief of police of the town with some men moved a house against the plaintiff's bakery shop to make room for paving sidewalks. A sill used in moving the house was left projecting and resting upon the back step of plaintiff's shop. The plaintiff saw the house moved, saw the sill left there, and used the steps by stumbling over the sill. She made no complaint. Four days after the sill had been left there the plaintiff after dark having forgotten the sill, was injured by catching her toe thereon as she was going out the steps. There was no light to see by. In paving the street the front steps had been taken down, and the only ingress and egress was a side door. Issues of negligence, contributory negligence and damages were submitted to the jury, and all answered in favor of the plaintiff. No evidence was offered by the defendant. On appeal to this Court the defendant contended that the plaintiff should have been nonsuited. This Court said: "From a careful reading of the testimony, as appears in the record, we cannot hold that the court below was in error. The case is analogous to *Tinsley v. City of Winston-Salem,* 192 N.C. 597."

In *Walker v. Reidsville,* 96 N.C. 382, 2 S.E. 74, a case relied upon by the defendant, the town dug a deep and wide pit between West Market Street and the east front of the town hall and market house. The edge of the pit next to the market house was 15 feet from the front of this building; the edge of it next to the street mentioned was 56 feet from the sidewalk of the street next to it. The plaintiff knew of the pit and where it was. There was ample room for him to pass out of the market house without going near the edge of the pit, and he did not pass out through the door he usually passed through in going to and from his business. In going home to supper he made his way through a crowd of persons in the aisle of the building to the front door on the east, facing West Market Street. He walked on, not thinking where he was going, but looking down. He fell into the pit and was severely injured. The facts are clearly distinguishable, and a nonsuit was proper. Walker knew the dangerous character of the pit; where it was; and of the pass-way fifteen feet broad between it and the market house out of which he passed. He did not need to go near it at all—he went out of his usual way in doing so. "If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence." *Dunnevant v. R. R.,* 167 N.C. 232, 83 S.E. 347; *Fulghum v. R. R.,* 158 N.C. 555, 74 S.E. 584; 29 Cyc. 520; *Whalen v. Gas Light Co.,* 45 N.E. 363; *Johnson v. Willcox,* 19 Atl. 939; *Groome v. Statesville,* 207 N.C. 538, 177 S.E. 638.

The defendant also relies on *Dunnevant v. R. R.*, 167 N.C. 232, 83 S.E. 347, in which a nonsuit was granted. The plaintiff was lawfully on a platform of the defendant, at night, with a lighted lantern near him which he had used in going there. The plaintiff had been to the station often in the daytime, and was familiar with the depot and its surroundings. The plaintiff started to leave the platform, but instead of going down the steps at the southwest corner nearest him, and across which his lantern was shining or taking his lantern with him, with full knowledge of the conditions, he went into the dark towards the steps at the southeast corner. He then went around on the platform east of the waiting room, a distance estimated from 1½ feet to several steps, and fell off the platform. The facts are different from the instant case, for Dunnevant had two ways to use, one safe and the other dangerous, and chose the dangerous way with knowledge of the danger.

The defendant also relies upon *Groome v. Statesville,* 207 N.C. 538, 177 S.E. 638. The facts again are different from the instant case. The evidence tended to show that the plaintiff in recrossing a street at an intersection in a slightly diagonal course by the same route used by her in crossing the street a short time before, slipped on ice and snow along the gutter on the south side of the street and fell. There was evidence tending to show that the plaintiff could have avoided the ice and snow by crossing directly at the intersection, and the defendant pleaded her failure to have so avoided the hazard as contributory negligence. This Court ordering a new trial said: "We have examined the charge, and while it appears to be a correct statement of the law of contributory negligence . . . it does not, either in words or substance present to the jury the principle advanced by the instruction requested that a person to whom two courses of conduct are open, one dangerous and the other safe, is required to exercise due care in choosing which course to pursue." The *Groome case* was here again 208 N.C. 815, 182 S.E. 657.

We have carefully examined the other cases set forth in the defendant's brief, and they are distinguishable from the facts of the instant case.

In this case the conflicting contentions of the plaintiff and the defendant as to whether or not the plaintiff was guilty of contributory negligence as a matter of law arise from different interpretations of the evidence. It would seem that the contentions of both are supported by permissible inferences from the evidence, with neither compellable as a matter of law. These inferences are for the jury, not for the court. The right of trial by a jury dispassionate and indifferent is a priceless heritage handed down to us by our forefathers, and should be carefully guarded against infringement.

There is error, and the judgment of nonsuit must be set aside, and the case submitted to the jury.

Reversed.

IN THE MATTER OF THE WILL OF ANNIS S. KEMP.

(Filed 6 January, 1953.)

1. **Wills § 23b—**

The striking of testimony of a witness that deceased, who was a friend, failed to recognize him when he met her on the street shortly after the date of the script, will not be held for prejudicial error justifying a new trial when the record contains the further testimony of the witness that during the course of the conversation immediately ensuing she did recognize him.

2. **Same—**

Testimony that a brother of deceased had been treated at a hospital for a mental disorder is incompetent on the issue of deceased's mental capacity when the evidence further shows that the mental disorder with which he was suffering was not hereditary in character.

3. **Same—**

Lay witnesses who have had reasonable opportunity for observation may express their opinions as to the mental capacity of the alleged testator in a caveat proceeding, and may also detail observed facts about deceased's conduct or language upon which their opinions are based.

4. **Same: Evidence § 13—**

In a caveat proceeding, the attorney who drew the script for deceased is competent to give his opinion that deceased was of sound mind at the time of the execution of the script, and may detail the basis for his conclusion, the testimony not being within the rule of privileged communications between attorney and client.

5. **Attorney and Client § 7—**

Where the attorney who drew the script withdraws from the caveat proceedings, he is competent to testify for propounder in regard to the mental capacity of deceased, and his act in so doing does not violate either the letter or spirit of the rules and regulations of the State Bar.

6. **Wills § 23b: Evidence § 22—**

Objections to questions which amount only to argument with the witness are properly sustained.

7. **Wills § 23b—**

The paper writing purported to dispose of deceased's property to a named hospital. In this caveat on the ground of mental incapacity, the cross-examination of witnesses for propounder in regard to whether the hospital had any public funds was properly excluded as irrelevant.

8. **Appeal and Error § 39c—**

The exclusion of testimony will not be held prejudicial when it appears that the answer of the witness could have no material bearing on the issue.

9. **Wills § 25—**

The inadvertent use of the words "will" and "testatrix" in the charge of the court in a caveat proceeding will not be held for reversible error when

the charge construed as a whole is not prejudicial and the jury is emphatically instructed that it was the sole judge of the facts.

10. Appeal and Error § 6c (6)—

Asserted inaccuracies in the court's statement of the contentions of the parties must be brought to the trial court's attention in apt time to afford opportunity for correction in order to be considered on appeal.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by caveators from *Halstead, Special Judge,* and a jury, at January Term, 1952, of RANDOLPH.

Caveat to script propounded for probate as an attested will.

These are the essential facts:

1. Annis S. Kemp, an unmarried woman of the age of 69 years, died on 8 January, 1949, while domiciled in the Town of Asheboro, in Randolph County.

2. On 21 January, 1949, Seth B. Hinshaw presented the script in controversy to the Clerk of the Superior Court of Randolph County, asserted that it was executed by Annis S. Kemp as her attested will in conformity to G.S. 31-3, and asked that it be legally established as such. The Clerk thereupon admitted the paper to probate in common form as the last will of Annis S. Kemp. The document bears date 21 December, 1945, names Seth B. Hinshaw executor, and contains this dispositive clause: "I give and devise all my property, both personal and real, to the Trustees of the Randolph County Hospital, Asheboro, N. C., for the use, benefit, and treatment of orphan children under twenty-one years of age, it being my desire and purpose in making this will to carry out the wishes of my deceased brother, D. J. Kemp, to give our property to the use and benefit of the unfortunate orphan children of Randolph County who need medical care and hospital treatment."

3. On 6 June, 1950, Wilsie Carraway, Etha Glasgow Hall, Roy Z. Pugh, Vernie J. Pugh, Bertha T. Ragsdale, Hazel P. Sawyer, Carl Trogdon, J. F. Trogdon, Lola T. Underwood, and H. O. Williams, Jr., appeared before the Clerk of the Superior Court of Randolph County, and entered a caveat to the probate of the script, alleging that "said paper writing . . . is not the last will . . . of . . . Annis S. Kemp . . . for the reason that at the time of the purported execution of said . . . writing . . . she was . . . not capable of executing a . . . will . . ., and was not of sound mind and disposing memory." The Clerk forthwith transferred the caveat proceeding to the trial docket of the Superior Court for trial by jury at term upon the issue of *devisavit vel non.* Marvin Brown, Jewell Glasgow Cox, Eli J. Kemp, Myrtle Pugh, and Marie Williams were afterwards made additional parties to the proceeding.

The caveators assert that the persons named in this paragraph would take the property of Annis S. Kemp if the script should be rejected.

4. The proceeding was tried on its merits at the July Term, 1951, of the Superior Court of Randolph County, and the trial resulted in a verdict and judgment in favor of the propounder. The caveators appealed to the Supreme Court and were awarded a new trial for error in the charge. *In re Will of Kemp,* 234 N.C. 495, 67 S.E. 2d 672.

5. The proceeding was heard a second time on its merits by Judge Halstead and a jury at the January Term, 1952, of the Superior Court of Randolph County. The propounder and the caveators offered much testimony at that time in support of their respective claims.

Judge Halstead submitted these issues to the jury: (1) Was . . . the paper writing offered for probate as the last will and testament of Annis S. Kemp made and executed according to law? (2) Did Annis S. Kemp at the time of the execution of said paper writing have sufficient mental capacity to make a will? (3) Is . . . the paper writing offered for probate, and every part thereof, the last will and testament of Annis S. Kemp? The jury answered all of the issues in the affirmative, and Judge Halstead entered judgment establishing the script as the will of the decedent. The caveators excepted and appealed, assigning errors.

Hugh R. Anderson and H. M. Robins for the propounder, appellee.
L. T. Hammond and Ottway Burton for the caveators, appellants.

ERVIN, J. The caveators assert that the trial judge erred to their prejudice in excluding and receiving evidence, and in charging the jury.

The assignments of error based on rulings upon evidential matters are reviewed in the numbered paragraphs set forth below.

1. E. J. Burkle, a witness for the caveators, testified, in part, that he was a friend of Annis S. Kemp; that he met her unexpectedly in the business section of Asheboro some three months subsequent to the date of the script; that he forthwith greeted her by name; that she did not recognize him when he first addressed her; but that she recalled his identity during the course of a conversation which immediately ensued. The propounder moved to strike out the statement of the witness to the effect that Annis S. Kemp did not recognize him when he first hailed her, and the trial judge sustained the motion. The caveators excepted to this ruling. We take it for granted for the purpose of this particular appeal that the stricken testimony was merely a "short-hand" statement of the opinion of the witness as to the mental state of Annis S. Kemp at the time of their encounter, and that the trial judge committed error in striking the testimony out. Even so, his ruling must be adjudged harmless to the caveators on the present record. The stricken statement was virtually without

probative value because the testimony of the witness showed that Annis S. Kemp fully recalled his identity after a fleeting instant of nonrecognition. It is not conceivable that this negligible bit of testimony would have affected the verdict of the jury in any degree had it remained in evidence on the trial of the proceeding in the Superior Court. Its exclusion, standing alone, certainly does not compel us to inflict upon the parties, the taxpayers, and the witnesses the monstrous penalty of a new trial of this twice-tried proceeding. *Freeman v. Ponder,* 234 N.C. 294, 67 S.E. 2d 292.

2. The caveators offered to prove that Eli J. Kemp, a brother of Annis S. Kemp, had received custodial and medical care at two state hospitals for a mental disorder. The propounder objected, the trial judge sustained the objection, and the caveators excepted. The proffered evidence was rightly rejected. The offer of proof itself affirmatively disclosed that the mental affliction of the brother of the decedent was not hereditary in character, but, on the contrary, was occasioned by "the hardening of the arteries in his brain." In consequence, the proffered testimony had no logical tendency to show that the testamentary capacity of the decedent had been impaired by hereditary insanity. *S. v. Cunningham,* 72 N.C. 469; *S. v. Christmas,* 51 N.C. 471; *In re Meyer's Will,* 184 N.Y. 54, 76 N.E. 920; *Reichenbach v. Reichenbach,* 129 Pa. 564, 18 A. 432; Stansbury on North Carolina Evidence, Section 97; Wigmore on Evidence (2d Ed.), section 232; Annotation: 6 A.L.R. 1486.

3. The propounder called to the stand two general practitioners of medicine and surgery and numerous lay witnesses who were permitted to express their opinions as to the testamentary capacity of the decedent. The caveators assign the admission of this evidence as error. Each of these witnesses had had a personal acquaintance with the decedent, and based his opinion as to her mental capacity on his own observations. Their opinions were given in response to questions framed in accordance with approved precedents. *In re Will of Tatum,* 233 N.C. 723, 65 S.E. 2d 351; *In re Will of York,* 231 N.C. 70, 55 S.E. 2d 791; *In re Will of Stocks,* 175 N.C. 224, 95 S.E. 360; *In re Broach's Will,* 172 N.C. 520, 90 S.E. 681; *In re Rawlings' Will,* 170 N.C. 58, 86 S.E. 794. These things being true, the testimony of these witnesses was rightly received under the rule that a witness, who has had a reasonable opportunity for observation, may express his opinion as to the mental capacity of the alleged testator in a caveat proceeding, even though he is not an expert in mental disorders. *In re Will of Tatum, supra; In re Will of York; supra; Winborne v. Lloyd,* 209 N.C. 483, 183 S.E. 756; *In re Will of Hargrove,* 206 N.C. 307, 173 S.E. 577; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; *In re Craig,* 192 N.C. 656, 135 S.E. 798; *Hyatt v. Hyatt,* 187 N.C. 113, 120 S.E. 830; *In re Will of Stocks, supra; In re*

Broach's Will, supra; In re Rawlings' Will, supra; In re Will of Parker, 165 N.C. 130, 80 S.E. 1057; *Stewart v. Stewart,* 155 N.C. 341, 71 S.E. 308; *Horah v. Knox,* 87 N.C. 483; *Bost v. Bost,* 87 N.C. 477; *Clary v. Clary,* 24 N.C. 78. Moreover, it was proper for these witnesses to detail observed facts about the decedent's conduct or language upon which their opinions were based. *In re Will of Tatum, supra; In re Will of Brown, supra; In re Staub's Will,* 172 N.C. 138, 90 S.E. 119.

4. The script propounded for probate was drawn by A.I. Ferree, a distinguished member of the Randolph County bar, who served as legal adviser to the decedent during the twenty years next preceding her death, and who was retained as an attorney for the propounder in the caveat proceeding. Counsel for the propounder became convinced that it was essential to the ends of justice for Mr. Ferree to testify in court in behalf of his client. As a consequence, Mr. Ferree left the trial of the caveat proceeding to other counsel, and took the stand as a witness for the propounder. As such, he expressed the opinion that the decedent was of sound mind at the time of the execution of the script, and detailed as a basis for his opinion communications made to him by the decedent while the relation of attorney and client subsisted between them. The caveators reserved exceptions to the admission of this evidence. It is obvious that the receipt of Mr. Ferree's testimony did not contravene the common law rule making confidential communications between attorney and client privileged communications. *Guy v. Bank,* 206 N.C. 322, 173 S.E. 600; *McNeill v. Thomas,* 203 N.C. 219, 165 S.E. 712; *Jones v. Marble Co.,* 137 N.C. 237, 49 S.E. 94; *Carey v. Carey,* 108 N.C. 267, 12 S.E. 1038; *Hughes v. Boone,* 102 N.C. 137, 9 S.E. 286; *Michael v. Foil,* 100 N.C. 178, 6 S.E. 264; 6 Am. S. R. 577. This is true because "it is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and so, where the controversy is to determine who shall take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards the communications of deceased with his attorney." 70 C.J., Witnesses, section 587. See, also, in this connection: 70 C.J., Witnesses, section 567, and Wigmore on Evidence (2nd Ed.), section 2329. The caveators insist, however, that Section 19 of Article X of the Rules and Regulations of the North Carolina State Bar renders a lawyer incompetent to testify for his client, and that the testimony of Mr. Ferree ought to have been excluded on this ground. The invalidity of this position is made manifest by a reading of this particular regulation, which is couched in this language: "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument or the like, he should leave the trial of the case to other counsel. Except when essen-

tial to the ends of justice, a lawyer should avoid testifying in court in behalf of his client." This regulation expressly recognizes the rule that a lawyer is a competent witness for his client. *Brunswick County v. Woodside,* 31 N.C. 496; *Slocum v. Newby,* 5 N.C. 423. It merely prescribes a rule of professional conduct to be observed by the lawyer before he testifies in behalf of his client concerning things other than mere formal matters. Mr. Ferree obeyed both the letter and the spirit of the rule by withdrawing as counsel for the propounder in the caveat proceeding before becoming a witness in his behalf.

6. Counsel for the caveators put these unanswered questions to witnesses for the propounder on cross-examination: (1) "If the executors and lawyers can't tell in what manner she wanted to dispose of it, how do you suppose she had mentality sufficient to do it?" (2) "If you knew Annis Kemp represented or allowed another person to represent to the public that some of her property belonged to another person, would that change your opinion about her knowing the nature and extent of her property?" (3) "In your opinion, isn't the listing of personal property the act of a normal individual?" The trial judge sustained the objections of the propounder to these questions, and the caveators noted exceptions to these rulings. These questions sought to elicit the answers of the witnesses to argumentative statements presented to them by counsel for the caveators. As a consequence, they were properly excluded under the evidential rule that a question which is in the nature of a mere argument with a witness should not be allowed. 70 C.J., Witnesses, section 676.

7. The caveators assign as error the refusal of the trial judge to permit witnesses for the propounder to answer the following questions put to them by counsel for the caveators: (1) "Is there any public money you know of in that hospital?" (2) "Do you know where he is?" (3) "Was there any announcement made there whose property was being sold?" These assignments of error are untenable. The first and second questions were designed to elicit evidence wholly foreign to the issues in the caveat proceeding, and the witness to whom the third question was directed would have given this answer had he been allowed to reply: "I never heard any announcement . . . at all as to whose property it was."

This brings us to the exceptions to the charge, which occupies 47 pages of the record on appeal. The caveators assign as error several portions of the charge in which the trial judge inadvertently called the script "the will" and the decedent "the testatrix." Since the trial judge instructed the jurors in most emphatic language in other parts of the charge that they were "the sole judges of the facts" and that they were not to consider "anything the court may have said or done during the progress of this proceeding" as the expression of any opinion on the facts, we are satisfied that these trivial lapses of the judicial tongue did no injury to the cavea-

tors. *In re Will of McDowell,* 230 N.C. 259, 52 S.E. 2d 807. Exceptions 140, 141, and 142 cover portions of the charge in which the trial judge stated the contentions of the parties arising on the evidence. These exceptions are without value to the caveators because they did not call any supposed inaccuracies in them to the attention of the trial judge during the course of the trial and thus afford him an opportunity to make corrections before the proceeding was submitted to the jury. *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608. The remaining exceptions to the charge harmonize with approved precedents and require no elaboration.

The caveators have failed to show prejudicial error. In consequence, the judgment establishing the script in controversy as the last will of Annis S. Kemp must be upheld.

No error.

PARKER, J., took no part in the consideration or decision of this case.

FAY S. CADDELL v. D. B. CADDELL.

(Filed 6 January, 1953.)

1. Divorce and Alimony § 14—

A wife is entitled to alimony without divorce under G.S. 50-16 if the husband separates himself from her and fails to provide her with necessary subsistence according to his means, but the husband in defense may show that in point of fact and legal contemplation the wife separated herself from him.

2. Same: Appeal and Error § 8—

Where a suit for alimony without divorce is tried in the lower court on the theory of abandonment, the record and exceptions on appeal will be considered in the light of this theory.

3. Divorce and Alimony § 14—

Abandonment within the meaning of G.S. 50-7 (1) as ground for alimony without divorce under G.S. 50-16 is not subject to any all-embracing definition and must be determined in large measure upon the facts of each case, but generally one spouse is not justified in withdrawing from the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, or self-respect, and constitute ground in itself for divorce at least from bed and board.

4. Same—

In an action for alimony without divorce on the ground of abandonment, an instruction that plaintiff had the burden of proving that the defendant's separation was wrongful, without charging upon what phase or phases of

the evidence defendant's separation would be wrongful, and without defining wrongful except in abstract terms, is insufficient.

5. Same—

In an action for alimony without divorce on the ground of abandonment, an instruction that the wife had the burden of showing that the husband's separation from her was free of fault on her part and that she was blameless, is erroneous.

6. Appeal and Error § 47—

Where a case has been tried under a misapplication of the pertinent principles of law, the verdict and judgment ordinarily will not be amended, but a new trial will be ordered.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Crisp, Special Judge,* and a jury, at 18 February, 1952, Extra Civil Term, of MECKLENBURG.

Civil action by wife for alimony without divorce under G.S. 50-16.

The plaintiff's complaint as originally filed alleges: (1) marriage of the parties on 1 December, 1931, and (2) "4. That on or about October 27, 1949, the defendant separated himself from the plaintiff and the children of the marriage, and ever since said time has lived separate and apart from the plaintiff and said children. 5. Since the defendant separated himself from the plaintiff he has failed to provide her and their children with the necessary subsistence according to his means and conditions in life."

The defendant by answer admits the marriage and also that on 27 October, 1949, he left the home and has lived separate and apart from his wife since that time. However, by way of defense he alleges, in gist, that for a period of about thirteen months prior to 27 October, 1949, the plaintiff refused to live with him as man and wife and that because of her constant nagging, fussing, false accusations, and other unpleasant conduct, he, the defendant, to gain peace of mind and in the interest of his health and general welfare, "was forced to leave his home and separate himself from the plaintiff."

After the jury was impaneled and the pleadings were read, the defendant demurred *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, for that "the complaint fails to state or allege that the acts of which the plaintiff complains were without fault," and that "there is no allegation of wrongful or wilful conduct on the part of the defendant." The record discloses no ruling on the demurrer, but rather a motion by the plaintiff to amend the complaint. The amendment, allowed by the court, amends paragraph 4 of the complaint to read as follows: "That on or about October 27, 1949, the defendant, without fault or misconduct on the part of the plaintiff,

wrongfully separated himself from the plaintiff and the children of the marriage, and ever since said time has lived separate and apart from the plaintiff and said children."

In the trial below, much evidence was offered by each side in support of the charges and countercharges alleged in the pleadings, and the case was submitted to the jury on these issues, which were answered as indicated:

"1. Were the plaintiff and defendant married to each other as alleged in the Complaint? Answer: Yes.

"2. Did the defendant wrongfully separate himself from the plaintiff and fail to provide her and the children with necessary subsistence? Answer: Yes.

"3. Was the separation of the plaintiff and defendant caused in whole or in part by the plaintiff's own fault as alleged in the Answer? Answer: Yes."

The plaintiff in apt time excepted to the submission of the third issue.

In charging on the second issue the court instructed the jury that if they found "from this evidence and by its greater weight that the defendant, D. B. Caddell, on or about October 27, 1949, wrongfully separated himself from his wife and children, and that after the separation he failed to provide necessary subsistence for them, if you find those to be the facts from this evidence and by its greater weight, the Court instructs you that you would answer this second issue YES. If you fail to so find from the evidence, then it would be your duty to answer the second issue No."

The court then made this single reference to the meaning of the word "wrongful": "The Court will give you a definition as to what is meant by 'wrongful.' That word is used in this issue, ladies and gentlemen, and the word 'wrongfully' is defined in Black's Law Dictionary, . . . as follows: 'In a wrong manner, unjustly, in a manner contrary to the moral law or to justice.'"

Passing then to the third issue, the court told the jury "that if a husband and wife separate under this particular section of the statute that I have read to you, and the husband is partly at fault and wife is partly at fault, in whole or in part at fault, that in that event the wife would not be entitled to recover alimony; that she has to be free of fault; . . ."

And in concluding the charge on the third issue, the court instructed the jury "that if you find from this evidence and by its greater weight, the burden being upon the plaintiff so to satisfy you, that she was blameless in the matter, that the separation came about without any fault or provocation on her part, if she has satisfied you by the greater weight of this evidence that these are the facts, the Court instructs you that in that event you would answer the third issue No. If you fail to so find from

the evidence and by its greater weight, then the Court instructs you that you would answer that third issue YES."

Upon the coming in of the verdict, the plaintiff moved to set aside the verdict as to the third issue. The motion was overruled and the plaintiff excepted. Thereupon the plaintiff moved to set aside the entire verdict. Motion overruled and plaintiff excepted.

Judgment was entered on the verdict denying the plaintiff relief and taxing her with the costs, and she appeals, assigning errors.

Henry E. Fisher for plaintiff, appellant.
Elbert E. Foster for defendant, appellee.

JOHNSON, J. The plaintiff is suing for alimony without divorce under G.S. 50-16.

By the terms of this statute a wife may institute an action to have a reasonable subsistence and counsel fees allotted to her from the estate or earnings of the husband in either of these two general classes of factual situations: (1) "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift"; or (2) if he "be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, . . ."

Accordingly, where a wife elects to proceed under the first classification of causes mentioned in the statute, it suffices for her to allege and prove (1) the existence of a valid marriage between the parties, and (2) that the husband has separated himself from the wife and failed to provide her (and the children of the marriage) with necessary subsistence according to his means—or instead of the latter, that the husband is a drunkard or spendthrift. *Crews v. Crews,* 175 N.C. 168, 95 S.E. 149.

Nevertheless, where the pleadings place in issue the crucial question whether the husband has separated himself from the wife, there is nothing in the language or meaning of the statute which precludes the husband from proving as a defense that in point of fact and in legal contemplation it was the wife who separated herself from the husband. *Crews v. Crews, supra; Byerly v. Byerly,* 194 N.C. 532, 140 S.E. 158; *Masten v. Masten,* 216 N.C. 24, 3 S.E. 2d 274. And this is so notwithstanding what was said in *Skittletharpe v. Skittletharpe,* 130 N.C. 72, 40 S.E. 851; *Hooper v. Hooper,* 164 N.C. 1, 80 S.E. 64; *Allen v. Allen,* 180 N.C. 465, 105 S.E. 11; and *Shore v. Shore,* 220 N.C. 802, 18 S.E. 2d 353. See also 17 Am. Jur., Divorce and Separation, Sec. 101; Annotation, 19 A.L.R. 2d 1428.

Here it should be kept in mind that Chapter 24, Public Laws of 1919, rewrote the statute (G.S. 50-16) and extended its scope to include as

additional grounds for relief the causes mentioned in the second classification, *i.e.*, misconduct or acts of the husband constituting cause for divorce, either absolute or from bed and board.

In the case at hand it is noted that the plaintiff originally sought relief within the first classification of causes mentioned in G.S. 50-16 by alleging succinctly, and following the language of the statute, that the defendant husband "separated himself from the plaintiff . . . (and) failed to provide her and their children with the necessary subsistence according to his means and condition in life."

The question whether the plaintiff's allegations were sufficient to have withstood the defendant's demurrer *ore tenus* is not presented by this appeal. (But see *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909; *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214.) The plaintiff, rather than hazard a decision on the demurrer *ore tenus,* sought and obtained leave to amend. The amendment charges that "The defendant, without fault or misconduct on the part of the plaintiff, wrongfully separated himself from the plaintiff and the children . . ." It thus appears that the plaintiff sought to adjust her allegations to the point of eliminating all grounds of challenge raised by the demurrer. Whether she was required to go that far is not presented for review. At any rate, the amendment was allowed without objection. It seems to have been accepted by the court and by both litigants as being sufficient in form to transform the plaintiff's cause of action into one charging the defendant with abandonment under G.S. 50-7 (1).

Thereupon the case was tried upon the theory that the burden was upon the plaintiff to satisfy the jury that the separation was wrongful, amounting to an abandonment of the plaintiff by the defendant within the meaning of G.S. 50-7 (1).

As to this, the rule is that the theory upon which a case is tried in the lower court must prevail in considering the appeal and in interpreting the record and determining the validity of the exceptions. *Thrift Corp. v. Guthrie,* 227 N.C. 431, 42 S.E. 2d 601; *Hinson v. Shugart,* 224 N.C. 207, 29 S.E. 2d 694.

Thus, under the theory of the trial, the controlling issue for determination in the court below was whether the defendant's conduct in separating from the plaintiff amounted to an abandonment of the plaintiff.

This Court, in applying the provisions of G.S. 50-7 (1), has never undertaken to formulate any all-embracing definition or rule of general application respecting what conduct on the part of one spouse will justify the other in withdrawing from the marital relation, and each case must be determined in large measure upon its own particular circumstances. Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render

it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect, and constitute ground in itself for divorce at least from bed and board. See 27 C.J.S., Divorce, Sec. 56, p. 603; 17 Am. Jur., Divorce and Separation, Sections 88, 89, and 90; *Brooks v. Brooks,* 226 N.C. 280, bot. p. 284, 37 S.E. 2d 909; *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919; *Setzer v. Setzer,* 128 N.C. 170, 38 S.E. 731; *Cf. Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540.

Manifestly, the second issue as framed and submitted, and to which no exception was taken by either party, was sufficient in form to have presented to the jury, under proper instructions, the determinative question at issue.

The record indicates, however, that the trial court attempted to split this controlling issue and submit it to the jury in two subordinate phases. And conceding, without deciding, that under proper issues and appropriate instructions this dual mode of submitting the main issue might have been followed without prejudicial effect, nevertheless we are constrained to the view that the court's instructions as given presented the case in an erroneous light.

First, in respect to the crucial words "wrongful separation" appearing in the second issue and on which the case should have been made to turn, it is observed that the court gave the jury from Black's Law Dictionary an abstract definition of the word "wrongful," but nowhere in the charge did the court tell the jury what in law constitutes a "wrongful separation" or under which phase or phases of the evidence, if so found, the jury should or should not find the separation was wrongful.

And, secondly, in connection with the third issue, it is manifest that the court in telling the jury the wife had "to be free of fault" and that the burden was on her to satisfy the jury from the evidence that "she was blameless," placed on her burdens materially heavier than those imposed by the law.

In the light of the charge as given on both the controversial issues—second and third—indicating a misapplication of the pertinent principles of law, we think the verdict and judgment may not be amended, as suggested by plaintiff, by setting aside the third issue and letting the others stand, because this would unduly prejudice the defendant. Therefore the case will be remanded for another hearing (*Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477), and it is so ordered.

New trial.

PARKER, J., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. GLENN RAY T/A LEICESTER BUS LINE.

(Filed 6 January, 1953.)

1. Utilities Commission § 5—

Review of order of the Utilities Commission is limited to the record as certified and to the questions of law therein presented, and the Superior Court is without authority to make additional findings for the purpose of determining the validity of the order. G.S. 62-26.10.

2. Utilities Commission § 3: Carriers § 5—

An application of a carrier for modification of its franchise to provide "open door" operations between two points, also served by another carrier over a different route, is to be determined by the Utilities Commission upon the basis of the public convenience and necessity, and it is not necessary that the other carrier be given opportunity to remedy any inadequacy in its service. "Route" and "territory" are not synonymous.

3. Same—

The burden is upon the applicant for a modification of its franchise to support the application by competent, material, and substantial evidence. G.S. 62-18.

4. Administrative Law § 3—

The courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law.

5. Carriers § 5: Constitutional Law § 20a—

The denial of a carrier's application for modification of its franchise cannot amount to a confiscation of its property, since an applicant has no property rights in an ungranted franchise.

6. Utilities Commission § 5—

A determination by the Utilities Commission is not only *prima facie* valid, but is also *prima facie* just and reasonable.

7. Utilities Commission § 3: Carriers § 5—

Upon the hearing of an application for modification of a franchise to permit "open door" operations between two points also served by another carrier along a different route, the finding of the Commission that the public convenience and necessity did not require the removal of the "closed door" restrictions amounts in effect to a finding that the applicant had failed to carry the required burden of proof upon the question of public convenience and necessity.

8. Same—

Evidence that modification of a franchise would serve the convenience of at least six citizens who make frequent trips between the points in question *held* insufficient to show that the order of the Utilities Commission denying the application was arbitrary or capricious or rebut the presumption that the order is just and reasonable, since the bases of the Com-

mission's decision are the imponderables of substantial public need, whether such need is being reasonably met by existing service, and whether granting the application would endanger or impair the operations of existing carriers contrary to public interest.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by the State of North Carolina *ex rel.* Utilities Commission and the protestant Smoky Mountain Stages, Inc., from *Bennett, Special Judge,* December Term, 1951, of BUNCOMBE.

This is an appeal from a judgment of the Superior Court reversing an order of the North Carolina Utilities Commission entered 23 April, 1951.

This matter was heard by his Honor at the December Term, 1951, of the Superior Court of Buncombe County, and it was agreed by the parties that decision might be rendered after the expiration of the term and that judgment might be signed in or out of the District. The judgment was signed and filed 23 February, 1952.

The Smoky Mountain Stages, Inc., the protesting intervener before the Utilities Commission, had for many years held a franchise west of Asheville, N. C., authorizing it to serve Canton, Waynesville and points beyond on U. S. Highway 19 and 23. In 1946, which was long after the granting of the franchise to Smoky Mountain Stages, Inc., the appellee (hereinafter referred to as applicant) was, by consent (protest by the intervener herein having been withdrawn), granted a franchise to serve the "New Found" area of Buncombe and Haywood Counties, which franchise permitted applicant to operate between Asheville and Canton, partially over the main highway and partially over the New Found Road which leaves the main highway at a point some distance west of the city limits of Asheville and enters the City of Canton by a different but parallel street to the main highway. This franchise expressly limited the applicant to "closed doors" on the main highway and essentially limited his operations to passengers traveling from the New Found section to Asheville and Canton and from Asheville and Canton to the New Found section.

The applicant and the protestant operate over U. S. Highway 19 and 23 for a short distance west of Asheville. However, the applicant's route for the most part is over a secondary road some four or five miles greater in length than the distance between Canton and Asheville over U. S. Highway 19 and 23.

It appears from the evidence that the applicant operates a daily schedule, except Sundays, between Canton and Asheville, as follows: A bus leaves Canton for Asheville at 7:00 a.m. and on each odd hour thereafter up to and including 5:00 p.m., and a bus leaves Asheville for Canton at

8:00 a.m. and on each even hour until and including 6:00 p.m. The applicant's buses are carrying an average of 15 passengers per trip, which is about 50 per cent of capacity.

The protestant, including through and local buses, operates 25 schedules to and 25 schedules from Canton daily, a total of 50 schedules a day between Asheville and Canton. And according to the testimony of Charles W. Morgan, secretary and treasurer of the protesting company, his company has never received any written or oral request from any of the residents of Canton or Asheville for additional service of any kind between these two points; that the bus business has decreased from 20 to 30 per cent in Western North Carolina within the last two years.

In support of the contention of the applicant that public convenience and necessity required the removal of the restrictions now contained in his franchise, he offered six witnesses. Each of these witnesses testified that they lived in or near North Main Street in Canton, their homes being located a distance of from ½ to 1½ miles from either the bus station or the nearest point where they could board the bus of the Smoky Mountain Stages, Inc., proceeding toward Asheville. Most of these witnesses are employed in Asheville. They testified it was inconvenient to them to be required to go to the bus station and catch a bus when applicant's buses ran by or near their homes. On cross-examination of these witnesses it was revealed that city buses are operating in Canton which could be used for transportation to the bus station, and in the case of some of the witnesses by using a "short-cut" they could board the Smoky Mountain buses at a point considerably nearer their homes than the bus station. It was further revealed that these witnesses had been riding the buses of the applicant since 1946, and have been boarding them in Canton. They testified that since the Commission notified the applicant on or about 15 January, 1951, to cease transporting passengers from Canton to Asheville, they had been walking to the city limits to board the applicant's bus.

The applicant testified that in his operation it would be a decided convenience and a great benefit to people residing in the North Main Street section of Canton for the restrictions in his franchise to be removed, because it is a long walk for these folks to and from the bus station; that the only controversy is whether the people in this area will be required to go to the bus station or whether he will be permitted to pick them up at or near their front doors; that his tariffs approved by the Commission authorize him to sell a book of tickets for $3.00, which gives the passenger in Canton six round trips to Asheville, and that he sells a trip ticket between Canton and Asheville for $.35, whereas the Smoky Mountain Stages, Inc., is required to charge $.52 between Canton and Asheville.

It further appears from the evidence that the application for the removal of the restrictions in the applicant's franchise was not made until

after it was discovered he was violating the provisions of his franchise by picking up passengers in Canton whose destination was Asheville and was cited to show cause why his franchise should not be revoked. After the citation was issued he agreed with a representative of the Commission to cease carrying passengers in violation of his franchise but immediately thereafter filed an application for the removal of the restrictions which he had been violating.

The Commission found as a fact that public convenience and necessity do not require the removal of the restrictions placed upon the operating rights of the applicant, and entered an order accordingly.

The applicant duly filed exceptions. The exceptions were overruled. He then filed a petition to rehear which was denied, and from this ruling he appealed to the Superior Court. The cause was heard in the Superior Court on the record certified by the Utilities Commission, and the court found as a fact that the order of the Utilities Commission was not supported by competent, material and substantial evidence, and set aside the findings of fact by the Utilities Commission. The court then proceeded to find its own facts and from such findings held that the action of the Utilities Commission was unreasonable, unjust and arbitrary and in effect amounts to a confiscation of the applicant's property; and further found as a fact "that public convenience and necessity requires that petitioner be allowed to pick up passengers and discharge them along his route, within the corporate limits of the Town of Canton." The court concurred in the ruling of the Commission with respect to any modification of the applicant's franchise which prohibits picking up or discharging passengers along his route within the City of Asheville.

Judgment was entered to the effect that the applicant "be permitted to operate with open doors within the corporate limits of the City of Canton, and not operate with open doors within the corporate limits of the City of Asheville," and remanded the cause to the North Carolina Utilities Commission for appropriate orders in accordance with and conforming to the judgment. The State of North Carolina *ex rel.* Utilities Commission, and Smoky Mountain Stages, Inc., the protestant, appeal and assign error.

Attorney-General McMullan and Assistant Attorney-General Paylor for the Utilities Commission, appellant.

Williams & Williams for Smoky Mountain Stages, Inc., protestant.

James S. Howell and E. L. Loftin for appellee.

DENNY, J. When an appeal to the Superior Court is taken from an order entered by the North Carolina Utilities Commission, the review is limited to the record as certified and to the questions of law presented

therein. G.S. 62-26.10. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order entered by the Commission. *Utilities Comm. v. Fox, ante,* 553, 78 S.E. 2d 464.

In the case of *Utilities Comm. v. Queen City Coach Co.,* 233 N.C. 119, 63 S.E. 2d 113, *Barnhill, J.,* clearly pointed out that where a franchise carrier of passengers serves communities over a route other than the one proposed by the applicant, the Commission is not required upon the finding of public convenience and necessity, to afford the protestant, the authorized carrier, the opportunity to remedy the inadequacy. Service between the same points but over different routes does not constitute service over a route already served, within the meaning of our Bus Act. A franchise is not granted to a carrier "to operate in a certain 'territory' but over a designated 'route.' The route or road to be traveled serves the communities, districts, or territory adjacent to it. It follows that 'route' and 'territory' are not synonymous. . . . There is nothing in the statute to prohibit the service of the same points by different carriers over separate routes where it is found by the Commission such duplicate service is in the public interest." *Utilities Comm. v. Carolina Coach Co.,* 224 N.C. 390, 30 S.E. 2d 328.

In the hearing before the Utilities Commission, the burden was on the applicant to offer competent, material and substantial evidence in support of his application for a modification of his existing franchise. G.S. 62-18; *Utilities Comm. v. Trucking Co.,* 223 N.C. 687, 28 S.E. 2d 201. And the finding of the Commission that public convenience and necessity did not require the removal of the restrictions theretofore placed on the applicant's operating rights, was, in effect, a finding that the applicant had failed to carry the required burden of proof. In such cases, the courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law. *Pue v. Hood,* 222 N.C. 310, 22 S.E. 2d 896.

The court below was in error in its finding that the failure to grant the extension of the applicant's franchise, as requested, was in effect a confiscation of his property. An applicant has no property rights in an ungranted franchise. *Pue v. Hood, supra.* A franchise is a privilege that may be granted or withheld by the State depending on the facts and circumstances involved. Therefore, the applicant herein is not entitled to operate with open doors in Canton and Asheville, or on that portion of U. S. Highway 19 and 23, over which the protestant herein has a franchise, until he obtains a finding by the Utilities Commission that public convenience and necessity requires the removal of such restrictions which are now included in his present franchise. And whether the evidence

offered by the applicant before the Commission in support of his application, met the requirements of the statute was for the determination of the Commission in its legal discretion. Moreover, a determination by the Commission is made by statute, not simply *prima facie* evidence of its validity, but *prima facie* just and reasonable. G.S. 62-26.10; *Utilities Comm. v. Trucking Co., supra.*

In the last cited case, *Stacy, Chief Justice,* in speaking for the Court, said: "It is to be remembered that what constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration, *e.g.,* whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. Precisely for this reason its determination by the Utilities Commission is made not simply *prima facie* evidence of its validity, but *'prima facie* just and reasonable.' It is not the intent of the statute that the public policy of the State should be fixed by a jury. The court's jurisdiction in the premises is neither original nor wholly judicial in character, and so the weight to be given the decision or determination of the Utilities Commission in any given case is made an exception to its usual procedure." *Utilities Comm. v. Carolina Coach Co., supra.*

In reviewing the record before us, two things must be conceded. First, to grant the applicant's request would serve the convenience of at least six citizens of the North Main Street area of Canton who make frequent trips to Asheville. Second, the applicant, in view of the general decline in the bus business, is anxious to obtain the right to pick up passengers in the North Main Street section of Canton and to transport them to Asheville, and to pick up passengers in Asheville and to transport them to Canton. Even so, the Commission in determining what constitutes sufficient proof of "public convenience and necessity" must keep in mind the imponderables to be taken into consideration as pointed out in *Utilities Comm. v. Trucking Co., supra.* The function of the Commission is not to act merely for the convenience of a few individuals, or for the pecuniary benefit of the carriers involved, but primarily for the benefit of the public at large. *Pue v. Hood, supra.*

We find nothing in the record to warrant the conclusion that the Commission in denying the applicant the relief sought, acted arbitrarily or capriciously. In our opinion, the appealing protestant was entitled to an affirmance of the order of the Commission. There is no sufficient evidence on the record to overturn the determination by the Commission or to rebut the presumption that it was just and reasonable. *Utilities Comm. v. Trucking Co., supra; Utilities Comm. v. McLean,* 227 N.C. 679, 44 S.E. 2d 210. Therefore, so much of the judgment entered below as is in

conflict with the order of the Commission is set aside and the cause remanded for judgment in accord with this opinion.

Remanded.

PARKER, J., took no part in the consideration or decision of this case.

MRS. LOIS R. BUMGARDNER, ADMINISTRATRIX OF THE ESTATE OF DONNA RAE BUMGARDNER ELLIOTT, DECEASED, v. ALLISON FENCE COMPANY, ROBERT H. GEORGE AND H. M. BARGER, TRADING AND DOING BUSINESS AS RED BIRD TAXI.

(Filed 6 January, 1953.)

1. Pleadings § 19c—

A demurrer admits the truth of the allegations of fact contained in the complaint together with relevant inferences of fact necessarily deducible therefrom, but does not admit conclusions or inferences of law.

2. Same—

Upon demurrer, the complaint will be liberally construed, giving the pleader every reasonable intendment in his favor, and the demurrer overruled unless the pleading be fatally defective.

3. Automobiles §§ 8d, 18d, 21—Complaint held to allege joint negligence of one defendant in parking without lights and of other defendant in colliding with parked vehicle.

The complaint alleged in effect that one defendant, in violation of law, left his truck parked without lights on a city street on a rainy night, with pipe, constituting a part of the truck load, extending nine feet three inches beyond the truck body, and that intestate was fatally injured when the driver of the taxi in which she was riding failed to keep a proper lookout, or drove at excessive speed under the circumstances, and collided with the rear of the truck, causing the pipe of the truck load to pierce intestate's head. *Held:* Demurrer of the truck owner on the ground that the complaint disclosed that the negligence of the taxi driver was the sole proximate cause of the accident was properly overruled.

4. Negligence § 16: Pleadings § 31—

Plaintiff may properly describe the wounds inflicted upon his intestate as a result of the accident in suit as bearing upon the allegations of negligence, and motion to strike same on the ground that they tended to create passion or prejudice is properly denied.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant Allison Fence Company, and Robert H. George, and by H. M. Barger, trading and doing business as Red Bird Taxi, from

Rudisill, J., 16th Judicial District, in Chambers at Newton, N. C., 19 April, 1952, of CATAWBA.

Civil action to recover for alleged wrongful death, heard (1) upon demurrer of defendants Allison Fence Company and Robert H. George to complaint of plaintiff, and (2) upon motion of defendants H. M. Barger, trading and doing business as Red Bird Taxi, to strike certain portions of the complaint.

Plaintiff alleges in her complaint in pertinent part:

I. That on 3 December, 1951, defendant H. M. Barger was the owner of a certain automobile and operating same as a taxi under the trade name of Red Bird Taxi for the transportation of passengers in the city of Hickory, N. C.

II. That on said date defendant Allison Fence Company was the owner of a certain truck, which its servant, agent and employee Robert H. George, defendant, acting within the scope and course of his employment, parked on the right-hand side of 2nd Avenue, S.E., just east of 5th Street, S.E., and headed east in the city of Hickory, N. C., on the afternoon . . . and permitted it to remain so parked until approximately 6:05 p.m.; that the cab of said truck was locked and the bed of the same was loaded with sand, or gravel, a wheelbarrow and one-inch piping extending approximately 9 feet and 3 inches from the west end of said truck body; and that said truck was so parked "for the purpose of storing the same at said point for the night."

III. That "the contour of 2nd Avenue, S.E., east of 5th Street, S.E., is downward, creating a rather large dip on said 2nd Avenue, S.E.," and said "truck was parked on the right-hand side of said avenue at a point near the bottom of said dip"; that at the time "it was rainy, misty and in low points on said street foggy and hazy"; that ". . . there was insufficient light on 2nd Avenue, S.E., east of 5th Street, S.E., to reveal a person within a distance of 200 feet, and notwithstanding, the defendant Allison Fence Company acting through its agent" as aforesaid permitted said truck "to remain parked in the darkness."

IV. "13. That the defendants Allison Fence Company and Robert H. George negligently failed to have burning lights on the front and rear of said truck, and were particularly negligent in that they failed to have a burning red light on the rear of said truck and on the end of said load extending 9 feet and 3 inches beyond the body of said truck, notwithstanding they permitted the same to remain parked on said Avenue after a half hour of sunset, and notwithstanding the weather conditions were such that visibility was poor, and said defendants . . . were generally negligent."

V. And plaintiff further alleges in respect of and against defendant H. M. Barger:

"14. That on said occasion plaintiff's intestate . . . shortly before 6 o'clock P. M. . . . procured a public conveyance, to wit: a Red Bird Taxi, owned and operated at the time by the defendant H. M. Barger to take her to her home . . . located eastward from the point where the defendant Allison Fence Company's truck was parked on 2nd Avenue, S.E.

"15. That the plaintiff's intestate occupied the right rear seat of said taxicab and as said taxi proceeded on 2nd Avenue, S.E., and came out of the decline hereinbefore referred to, said taxi violently struck the unlighted rear portion of the defendant Allison Fence Company's truck with such force as to drive the front portion of said taxicab under the rear bed of said truck.

"16. That the defendant H. M. Barger on said occasion negligently failed to keep a proper lookout and negligently drove said Red Bird Taxi at an unreasonable rate of speed under the then existing circumstances, and negligently outran the range of his lights, negligently failed to reduce the speed of said Red Bird Taxi so as to permit him to travel in safety with his fare-paying passenger, the plaintiff's intestate, but on the contrary drove in such way and manner as to negligently fail to see objects on the highway and street, which he would or should have seen in the exercise of due care and caution under the circumstances then and there existing.

"17. Without any warning or notice to plaintiff's intestate as to the presence of the defendant Allison Fence Company's unlighted truck on said avenue and highway, the force of the collision drove pipes, which extended 9 feet and 3 inches over the bed of said truck, through the windshield of the taxicab in such way and manner as to drive one of the pipes through the right eye of plaintiff's intestate, thereby punching the same out, and said pipe was driven through and extended out the back of her head, thereby knocking a big hole in the back of her head, and emptied all of her brains on the floorboard of the back seat of said taxi; that another pipe hit the side of her nose and made a big gash through her left face, resulting in the instant death of plaintiff's intestate."

VI. And plaintiff further alleges: "18. That the death of the said Donna Rae Bumgardner Elliott, plaintiff's intestate, was due solely to and was the result of the joint and several negligent acts of the defendants concurring and proximately causing the said death of plaintiff's intestate —the defendant Allison Fence Company acting through its agent, servant and driver, as aforesaid—which negligent acts of omission and commission, in addition to what has heretofore been set out, were the direct and proximate cause of the death of plaintiff's intestate, in that: the defendants Allison Fence Company and Robert H. George, "(a) . . . negligently and carelessly parked said truck on said highway and avenue

under such circumstances and weather conditions that they knew, or ought to have known, in the exercise of ordinary care that same constituted a hazard and likely to produce death and damage; and (b) . . . without having a burning red light on the rear of said truck, or other visible device, as required by law, sufficient to warn of its presence, in violation of the General Statutes of North Carolina, in such cases made and provided; and (c) . . . permitted said loaded truck to remain on said highway and avenue loaded with pipes extending 9 feet and 3 inches beyond its bed, without providing a red light at the end of the load, and without providing at the end of the load a red flag, as required by Section 20-117 of the General Statutes of North Carolina; and (d) . . . and permitted to be parked said loaded truck at a place and at a time on said 2nd Avenue, S.E., where light was insufficient to reveal a person within a distance of 200 feet upon such avenue, in violation of Chapter 26, Article III, Section 56, of Charter and Code of the City of Hickory, which embraces the Ordinances of said City of Hickory, and which Chapter, Article, and Section is hereby specifically pleaded; and (e) . . . permitted to leave standing and unattended on said 2nd Avenue, S.E., said truck outside of a business or residential district, in violation of Section 20-161 of the General Statutes of North Carolina; and (f) . . . one-half hour after sunset . . . without lights, in violation of Section 20-134 of the General Statutes of North Carolina; and (g) . . . to be parked for storage purposes . . . on 2nd Avenue, S.E. in the City of Hickory, in violation of Chapter 26, Article III, Section 47, Subsection (3) of the Ordinances of said City of Hickory, which Chapter, Article, Section and Subsection of said Ordinances is hereby specifically pleaded; and (h) . . . in such way and manner as to interrupt and interfere with the passage of other vehicles, in violation of Chapter 26, Article III, Section 49 of the Ordinances of the City of Hickory, which Chapter, Article and Section of said Ordinances is specifically pleaded; and (i) The defendant, H. M. Barger, negligently drove said Red Bird Taxi at a speed greater then was reasonable and prudent under the conditions then and there existing; and (j) . . . failed to keep a proper lookout; and (k) . . . negligently outran the range of his lights; and (l) . . . negligently failed to reduce his speed so as to permit him to travel in safety, and safety to his passenger, the plaintiff's intestate; and (m) . . . negligently failed to see objects on the highway, particularly said parked truck, when he would or should have seen, had he exercised due care and caution under the then existing circumstances."

"19. That all of said joint and several negligent acts of omission and commission concurred and were the direct and proximate causes of the death of plaintiff's intestate."

Defendants Allison Fence Company and Robert H. George demurred to the complaint of plaintiff for that it "fails to state facts sufficient to constitute a cause of action against these defendants; that the allegations of the complaint establish that the plaintiff was injured solely and proximately by the intervening negligence of the defendant H. M. Barger, trading and doing business as Red Bird Taxi."

The court, upon hearing on this demurrer, being of opinion that it should be overruled, entered an order so holding. The demurring defendants excepted thereto, and appeal therefrom to the Supreme Court, and assign error.

And the defendant, H. M. Barger, trading and doing business as Red Bird Taxi, moved the court to strike the following portions of the complaint of plaintiff:

"1. All of paragraphs 16 . . . for that the same is redundant in that it is repetitive of the matters set forth in sub-paragraph (i) through (m) of paragraph 18 . . . and is highly prejudicial to this defendant.

"2. So much of paragraph 17 . . . as begins in the 6th line thereof and reads as follows: 'thereby punching the same out, and said pipe was driven through and extended out of the back of her head, thereby knocking a big hole in the back of her head, and emptied all of her brains on the floorboard of the back seat of the taxi,' for that (a) the foregoing matter is irrelevant, tends to passion and prejudice, and is highly prejudicial to this defendant. (b) If relevant, the foregoing matter is purely evidential and not properly pleaded in this complaint.

"3. So much of paragraph 17 of the complaint as begins on the 9th line thereof and reads as follows: 'and made a big gash through her left face,' for that (a) the foregoing matter is irrelevant, tends to passion and prejudice, and is highly prejudicial to this defendant. (b) If relevant, the foregoing matter is purely evidential and not properly pleaded in this complaint.

"4. So much of paragraph 20 of the complaint as begins in the 5th line thereof, and reads as follows: 'and slaughtered,' for that the same is irrelevant and immaterial and tends to passion and prejudice and is highly prejudicial to this defendant."

The court, upon hearing on the motion to strike, being of the opinion that paragraphs 1, 2 and 3 of said motion should be denied, and paragraph 4 of said motion should be allowed, entered an order in accordance therewith.

Defendant, the movant, excepted to so much of the order as denied his motion to strike the portions of the complaint as are set out in paragraphs 1, 2 and 3 of his motion, and appealed to the Supreme Court, and assigns error.

Theodore F. Cummings for plaintiff, appellee.

Smathers & Shuford for defendants Allison Fence Company and Robert H. George, appellants.

Smathers & Carpenter, Lewis B. Carpenter, and William B. Webb for defendant H. M. Barger, appellant.

WINBORNE, J. We treat the appeals of appellants in the order of their names:

Appeal of Allison Fence Company and Robert H. George.

The demurrer of these defendants brings into focus the allegations of plaintiff's complaint and raises the question as to whether or not the facts alleged are sufficient to constitute a cause of action against them. For this purpose the truth of the allegations contained therein is admitted, and "ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted. But the principle does not extend to admissions of conclusions or inferences of law," *Stacy, C. J.*, in *Ballinger v. Thomas*, 195 N.C. 517, 142 S.E. 761; also *Ins. Co. v. McCraw*, 215 N.C. 105, 1 S.E. 2d 369, and *Ferrell v. Worthington*, 226 N.C. 609, 39 S.E. 2d 812, and numerous other cases.

Indeed, it is provided by statute, G.S. 1-151, that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with the view to substantial justice between the parties." And decisions of this Court interpreting and applying the provisions of this statute require that every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before it will be rejected as insufficient. See *Ins. Co. v. McCraw, supra,* and cases there cited.

In the light of the provisions and principles of the statute, as so interpreted and applied, consideration of the facts alleged leads this Court to conclude that the allegations in respect to these defendants are not so fatally defective, as a matter of law, as to require the sustaining of the demurrer on the ground upon which it is predicated. The factual situation may be fully developed upon the trial in Superior Court. Then the court may consider the case in the light of the evidence offered. And such consideration will not be foreclosed by decision now made on the demurrer. See *Montgomery v. Blades*, 222 N.C. 463, at page 469, 23 S.E. 2d 844; *Lewis v. Shaver, ante*, 510, and cases there cited.

As to the appeal of H. M. Barger:

Careful consideration of the matters to which this defendant excepts and assigns as error fails to disclose error. We need refer only to allegations pertaining to the gruesomeness of the wounds inflicted upon plaintiff's intestate. It would appear that they have bearing upon the allegations of negligence of this defendant in operation of his taxi. See *Her-*

man v. R. R., 197 N.C. 718, 150 S.E. 361; *Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555. Compare the cases of *S. v. Miller*, 219 N.C. 514, 14 S.E. 2d 522, and *S. v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824, and *Coach Co. v. Motor Lines*, 229 N.C. 650, 50 S.E. 2d 909, where photographs were involved. Here, as there, the trial court may keep the evidence within due bounds.

Hence, the judgment on both appeals is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. BUSTER HILL.

(Filed 6 January, 1953.)

1. Intoxicating Liquor §§ 4a, 9b—

While a person may lawfully possess for family use any quantity of legally acquired tax-paid liquor in his private dwelling while occupied by him as such, nevertheless the possession of more than one gallon of tax-paid liquor, even within a private dwelling, invokes the presumption that such liquor is kept for the purpose of sale. G.S. 18-11.

2. Intoxicating Liquor § 2—

The Turlington Act, except as modified and repealed by the Alcoholic Beverage Control Act, is still the law in this State, and the two Acts must be construed *in pari materia*.

3. Intoxicating Liquor §§ 4a, 9b—

G.S. 18-48 and G.S. 18-50 are statewide in application, and the possession of any quantity of nontax-paid liquor is without exception unlawful, and under G.S. 18-11 raises the presumption, even though less than one gallon in quantity, that possession is for the purpose of sale.

4. Same—

Proof of the possession by defendant in his home of less than one gallon of legally acquired tax-paid liquor raises no presumption against him, and nothing else appearing, a verdict of not guilty should be directed in a prosecution for possession for the purpose of sale. To this extent, G.S. 18-11, raising the presumption from the possession of any quantity of liquor that such possession is for the purpose of sale, with burden upon defendant to prove that he possessed same in his private dwelling while occupied as such, for family use purposes permitted by the statute, has been modified by the Alcoholic Beverage Control Act.

PARKER, J., took no part in the consideration or decision of this case.

STATE *v.* HILL.

APPEAL by defendant from *Crisp, Special Judge,* July Term, 1952, GASTON. No error.

Criminal prosecution under a warrant which charges that defendant did unlawfully have and possess a quantity of tax-paid and nontax-paid liquor for the purpose of sale.

On 12 April 1952, officers procured a warrant authorizing the search of the dwelling of defendant and buildings within its curtilage. When they approached defendant's dwelling to make the search, they saw defendant pick up a large jar and pour some liquid therefrom into a bucket. It was later ascertained that this bucket contained white nontax-paid whiskey mixed with water. Defendant said the liquid in the bucket was lime water. They also found five pints of bonded liquor and one pint of gin. There were a number of empty pint bottles and empty half-gallon jars around the premises, and there were fruit jars "all over the woods out there." Both white and Negro men were in the house at the time the officers arrived.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Love, and Robert L. Emanuel, Member of Staff, for the State.

Max L. Childers for defendant appellant.

BARNHILL, J. There is no statutory limit upon the quantity of legally acquired liquor, upon which the taxes imposed by law have been paid, a person may lawfully have or keep in his private dwelling, while the same is occupied and used by him as his dwelling only, for the "family use" purposes prescribed in G.S. 18-11. *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Brady, ante,* 295.

Yet in a prosecution for the unlawful possession of intoxicating liquor for the purpose of sale, proof of the possession by the accused of more than one gallon of bonded or tax-paid liquor, even within his private dwelling, invokes the *prima facie* rule of evidence created by G.S. 18-11. *S. v. Barnhardt, supra; S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623; *S. v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449; *S. v. Brady, supra.*

So then, when we sweep aside the chaff and come to the substance of the material exceptions brought forward and discussed by the defendant, we find that two questions are presented for decision: (1) Does the statute, G.S. 18-11, permit a person to possess in his private dwelling, when occupied as such, for the "family use" purposes prescribed in G.S. 18-11, illicit "white" "moonshine" intoxicating liquor, that is, any alcoholic beverage "upon which the taxes imposed by the laws of congress of the United States or by the laws of this state, have not been paid," G.S.

18-48, and secondarily, if so, (2) is the *prima facie* rule of evidence created by G.S. 18-11 applicable only upon proof of the possession of more than one gallon of such illicit liquor?

It would seem that we have already answered these questions. Even so, clarification and reconciliation—to the point of modification—of some of our former decisions on this particular phase of our law regulating the possession, use, and sale of intoxicating beverages is essential.

The Turlington Act, now G.S. ch. 18, art. 1, except as modified and repealed by the Alcoholic Beverage Control Act, known as the ABC Act, now G.S. ch. 18, art. 3, is still the law in this State. *S. v. Davis,* 214 N.C. 787, 1 S.E. 2d 104; *S. v. Welch,* 232 N.C. 77, 59 S.E. 2d 199; *S. v. Brady, supra; S. v. Avery, ante,* 276. This was true even before the adoption of our General Statutes. *S. v. Davis, supra.* Now that both the Turlington Act and the ABC Act have been brought forward and re-enacted as separate articles of the same chapter of the General Statutes and relate to the same subject matter, they must, of necessity, be considered as separate but related parts of the composite body of our statutory law on the subject.

"The two Acts constitute the body of our law relating to the purchase, possession, and sale of intoxicating liquor and must be construed *in pari materia.*" *S. v. Avery, supra.*

G.S. 18-48, which originally was sec. 13 of the ABC Act, ch. 49, P.L. 1937, makes it unlawful for any person "to have in his . . . possession any alcoholic beverages . . . upon which the taxes imposed by the laws of congress of the United States or by the laws of this state, have not been paid . . ." and G.S. 18-50 (sec. 15 of the ABC Act) makes it unlawful to possess such illicit liquor for the purpose of sale.

In applying these sections we said in *S. v. Lockey,* 214 N.C. 525, 199 S.E. 715, that in a prosecution for the sale of illicit liquor under G.S. 18-50, the *prima facie* rule of evidence created by G.S. 18-11, a part of the Turlington Act, may not be invoked in aid of the prosecution. This ruling was reiterated in *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629, and in *S. v. Peterson,* 226 N.C. 255, 37 S.E. 2d 591.

We have since said, however, that when the two Acts are construed *in pari materia,* "it becomes apparent that an allegation in a warrant or bill of indictment to the effect that the Federal and State taxes had not been paid upon the liquor seized or that it was illicit liquor is merely descriptive, *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804, and does not . . . limit the prosecution to any particular section of the liquor law or deprive the State of the benefit of the general provisions of the law as it now exists." *S. v. Avery, supra.*

The time has come to clarify and reconcile these decisions to the end there may remain no doubt as to whether we have overruled *S. v. Lockey, supra,* and the cases to like effect above cited.

The provisions of G.S. 18-50 and G.S. 18-11 are not irreconcilable. Indeed, when the two statutes are considered as related parts of the composite whole, they become dovetailed in such manner as to make a clear and understandable regulation. The term "not legally permitted," as used in G.S. 18-11, and the term "illicit" as used in G.S. 18-50, may not be equally comprehensive, yet both designate or describe a type of intoxicating beverage a person may not lawfully possess for the purpose of sale. To that extent at least they are synonymous. We conclude, therefore, that, except as hereinafter noted, the rule of evidence created by G.S. 18-11 applies in any prosecution for the possession of liquor for the purpose of sale.

This conclusion, of necessity, overrules the statement to the contrary contained in *S. v. Peterson, supra,* and the decisions upon which that opinion was made to rest. More mature consideration compels such action. And the writer, the author of the opinion in the *Peterson case,* has long since learned that a person should never assume a position that he cannot back up—from.

The provisions of G.S. 18-48 and G.S. 18-50 are statewide in application. *S. v. Davis, supra.* The possession of any quantity of liquor upon which the Federal and State taxes have not been paid is, without exception, unlawful. *S. v. Barnhardt, supra; S. v. McNeill, supra; S. v. Avery, supra; S. v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907. Such contraband liquor does not come within the exceptive provisions of G.S. 18-11. It cannot be either legally acquired or possessed, and possession in the private dwelling of the accused, for whatever purpose it is there kept, affords no protection against the positive and unqualified provisions of the ABC Act. *S. v. Suddreth, supra; S. v. McNeill, supra; S. v. Barnhardt, supra; S. v. Avery, supra; S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819.

The sentence contained in *S. v. Barnhardt, supra,* at p. 226, to wit: "Under this section no distinction is made between tax-paid and nontax-paid liquor, and the quantity of liquor which may be possessed in one's private dwelling for personal consumption and family uses is unlimited." merely refers to the contents of G.S. 18-11. It has no relation to the provisions of G.S. 18-48 and was not intended to mean and must not be construed to mean that the law condones or permits the possession of illicit liquor in the home or elsewhere. That is one type of intoxicating beverage which is outlawed by the statute under any and all conditions, without exception. And proof of possession of any quantity thereof invokes the application of the rule of evidence contained in G.S. 18-11.

Of course there was technical error in the charge "that a person has a right in a non-conforming county such as this to possess in his home not to exceed one gallon of tax-paid liquor . . . Now, you have a legal right

to possess not to exceed one gallon of whiskey in your home." But on this record we do not perceive that the error was prejudicial to defendant. Indeed, the court thus, in effect, charged the jury that the possession by the defendant in his home of the four pints of bonded whiskey and one pint of gin which disclosed by the stamps thereon that it had been acquired from an ABC store was lawful and evidence in respect thereto should not be considered adversely to defendant unless, as later stated, the State established beyond a reasonable doubt, unaided by any presumption, that he in fact had it in his possession for the purpose of sale.

Perhaps there is some confusion or misunderstanding as to the "one gallon" rule respecting tax-paid liquor. Under the Turlington Act proof of the possession of any quantity of liquor, even in one's private dwelling, invoked the application of the presumption or rule of evidence created by G.S. 18-11 and the burden rested upon defendant to show that it was possessed in his private dwelling while occupied as such for the "family use" purposes permitted by statute. This rule was modified as to legally acquired liquor by the ABC Act. We so held in *S. v. Suddreth, supra.* There, *Winborne, J.*, speaking for the Court, said: "To accept this construction (of the ABC Act) is to attribute to the Legislature the intention to make it lawful for a person to purchase, transport and possess in his home for the purposes mentioned, not more than one gallon of intoxicating liquors or alcoholic beverages, and, at the same time, to make the possession of it evidence of his guilt of a criminal offense for which, upon charges being preferred, he may be convicted by a jury and subjected to punishment therefor. We cannot assume that the Legislature had any such inconsistent and conflicting intentions."

In short, we there held that, in a prosecution for the unlawful possession of intoxicating liquor for the purpose of sale, proof of possession by defendant in his private dwelling of not more than one gallon of legally acquired liquor raises no presumption against him and that in such case, nothing else appearing, a verdict of not guilty should be directed. On the question of the burden of proof as to whether the liquor was legally acquired, see *S. v. Holbrook,* 228 N.C. 582, 46 S.E. 2d 842.

In the trial below we find

No error.

PARKER, J., took no part in the consideration or decision of this case.

SALLIE E. VONCANNON AND JASON VONCANNON, HER HUSBAND, FLADA S. CRANFORD AND FRED CRANFORD, HER HUSBAND, JESSIE S. DAWSON AND E. H. DAWSON, HER HUSBAND, MARY S. HANCOCK AND GEORGE D. HANCOCK, HER HUSBAND, GENEVIEVE S. SEAWELL AND ARTHUR SEAWELL, HER HUSBAND, A. HOWARD SMITH AND ANNIE LEE K. SMITH, HIS WIFE, AND W. C. YORK, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF A. H. SMITH, DECEASED, V. HUDSON BELK COMPANY OF ASHEBORO, N. C., INC.

(Filed 6 January, 1953.)

1. Wills § 31—

The intent of testator as gathered from the four corners of the instrument is the polar star in the interpretation of a will, and such intent will be given effect unless contrary to some rule of law or at variance with public policy.

2. Same—

In construing a will to effectuate the intent of testator, apparent repugnancies should be reconciled and effect given to every clause or phrase or word, whenever possible, and to this end the court may transpose words, phrases or clauses, supply or disregard punctuation, or even supply words, phrases or clauses when necessary to effectuate the manifest intent.

3. Wills § 33f—

Testator devised to his wife the tract of land in question and by following sentence stated "For the remainder of her natural life and then at her death to be disposed of according to her wishes." *Held:* The will devised only a life estate to the widow, and the general power of disposition did not enlarge it into a fee.

4. Same—

A devisee of a life estate with general power of disposition not coupled with any trust or beneficial interest to others, has the option to exercise the power or not, and upon her failure to exercise the power, the lands will descend at her death to the heirs at law of testator.

5. Same—

A devisee of a life estate with power of disposition not coupled with any trust or beneficial interest to others may release or extinguish the right to exercise the power of appointment, and the execution and delivery of a warranty deed by her constitutes an estoppel and precludes her from thereafter exercising such power.

6. Same—

Where the widow having a life estate with power of disposition not coupled with any trust or beneficial interest to others, together with the heirs at law of testator, executes a warranty deed to the property, the deed is sufficient to convey the fee simple title thereto.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Hatch, Special Judge,* October Term, 1952, of RANDOLPH.

This is a controversy without action upon an agreed statement of facts, the pertinent parts of which are as follows:

1. A. H. Smith, a citizen and resident of Randolph County, North Carolina, died on 24 February, 1933, leaving a last will and testament which has been duly filed and probated in the office of the Clerk of the Superior Court in the aforesaid county.

2. W. C. York, the executor named in the last will and testament of A. H. Smith, qualified as such on 28 February, 1933, and duly administered the estate and filed his final account on 25 May, 1934.

3. Upon his death, A. H. Smith left him surviving Sallie E. Smith, his widow (who has since married one Jason Voncannon), and five children, his only heirs at law, to wit: Flada S. Cranford, Jessie S. Dawson, Mary S. Hancock, Genevieve S. Seawell, and A. Howard Smith, who, with their respective spouses, are plaintiffs herein.

4. The property which is the subject matter of this controversy is the land devised in Item Two of the last will and testament of A. H. Smith, deceased, which reads as follows:

"I give and devise to my beloved wife Sallie Smith the tract of land on which I now reside, containing house and two lots on Church Street in the town of Asheboro. For the remainder of her natural life and then at her death to be disposed of according to her wishes."

5. No disposition of said land was made in connection with the administration and settlement of the said testator's estate; nor has anything been done by the parties interested whereby their respective rights have been alienated or altered.

6. On 17 October, 1952, all the plaintiffs, except W. C. York, executor, entered into a written agreement in which they agreed to sell to the defendant the above devised property for a consideration of $16,500. A warranty deed was duly executed by the plaintiffs, including W. C. York, executor of the last will and testament of A. H. Smith, deceased, and tendered to the defendant. The defendant refused to accept the deed on the ground that such instrument would not vest in it a fee simple title to the land described therein.

At the hearing below his Honor held that the deed tendered by the plaintiffs to the defendant would vest in the defendant a fee simple title to the land described therein and entered judgment for specific performance in accord with the terms of the aforesaid contract. The defendant appeals and assigns error.

H. M. Robins for defendant, appellant.
Miller & Moser for plaintiffs, appellees.

DENNY, J. The intent of the testator is the polar star that must guide the courts in the interpretation of a will. *Coppedge v. Coppedge,* 234 N.C. 173, 66 S.E. 2d 777; *Buffaloe v. Blalock,* 232 N.C. 105, 59 S.E. 2d 625; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Holland v. Smith,* 224 N.C. 255, 29 S.E. 2d 888. This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect unless contrary to some rule of law or at variance with public policy. *House v. House,* 231 N.C. 218, 56 S.E. 2d 695; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

In construing a will, the entire instrument should be considered; clauses apparently repugnant should be reconciled; and effect given where possible to every clause or phrase and to every word. *Williams v. Rand, supra; Lee v. Lee,* 216 N.C. 349, 4 S.E. 2d 880; *Bell v. Thurston,* 214 N.C. 231, 199 S.E. 93; *West v. Murphy,* 197 N.C. 488, 149 S.E. 731; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451; *Snow v. Boylston,* 185 N.C. 321, 117 S.E. 14; *Hinson v. Hinson,* 176 N.C. 613, 97 S.E. 465; *Bowden v. Lynch,* 173 N.C. 203, 91 S.E. 957.

It is permissible in order to effectuate a testator's intent or to ascertain his intention, for the court to transpose words, phrases or clauses. *Heyer v. Bulluck, supra; Washburn v. Biggerstaff,* 195 N.C. 624, 143 S.E. 210; *Gordon v. Ehringhaus,* 190 N.C. 147, 129 S.E. 187; *Crouse v. Barham,* 174 N.C. 460, 93 S.E. 979; *Baker v. Pender,* 50 N.C. 351.

Likewise, to effectuate the intent of the testator, the court may disregard or supply punctuation. *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Bunn v. Wells,* 94 N.C. 67; *Stoddart v. Golden,* 179 Cal. 663, 178 P. 707, 3 A.L.R. 1060. Even words, phrases and clauses will be supplied in the construction of a will when the sense of the phrase or clause in question, as collected from the context, manifestly requires it. *Washburn v. Biggerstaff, supra; Gordon v. Ehringhaus, supra.*

In applying the above rules of construction, we hold that it was the intention of the testator, A. H. Smith, to give his widow, Sallie Smith (now Mrs. Voncannon), a life estate only in the property devised to her with power to dispose of it at her death according to her wishes.

The grant of the power to dispose of the property at her death according to her wishes, being annexed to a life estate, did not enlarge her estate so as to give her a fee in the premises. *Hardee v. Rivers,* 228 N.C. 66, 44 S.E. 2d 476; *Holland v. Smith, supra; Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Brinn v. Brinn,* 213 N.C. 282, 195 S.E. 793; *Hampton v. West,* 212 N.C. 315, 193 S.E. 290; *Helms v. Collins,* 200 N.C. 89, 156 S.E. 152; *Cagle v. Hampton,* 196 N.C. 470, 146 S.E. 88; *White v. White,* 189 N.C. 236, 126 S.E. 612; *Tillett v. Nixon,* 180 N.C. 195, 104 S.E. 352; *Darden v. Matthews,* 173 N.C. 186, 91 S.E. 835; *Fellowes v. Durfey,*

163 N.C. 305, 79 S.E. 621; *Griffin v. Commander,* 163 N.C. 230, 79 S.E. 499; *Herring v. Williams,* 153 N.C. 231, 69 S.E. 140; *Parks v. Robinson,* 138 N.C. 269, 50 S.E. 649; *Long v. Waldraven,* 113 N.C. 337, 18 S.E. 251.

In the case of *Chewning v. Mason,* 158 N.C. 578, 74 S.E. 357, the devise was in the following language: "I give and bequeath (after all my just debts shall have been paid) all of my real and personal property, together with all debts owing my estate, to my wife, Martha Chewning, during her natural life, and then to dispose of as she sees proper." The donee never exercised the power of disposal. Even so, her heirs contended that she took a fee under the will. The trial court held otherwise and gave judgment in favor of the heirs of the testator. This Court affirmed the judgment. *Walker, J.,* in speaking for the Court, said: "There is a marked distinction between property and power. The estate devised to Mrs. Chewning is property, the power of disposal a mere authority which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator or the donor of the power. . . . Where an *interest,* and not a mere *power,* is conferred, the absolute property is vested, without any act on the part of the legatee; but where a power only is given, the power must be executed, or it will fail. We may, therefore, take the rule to be settled that where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee."

The real question, therefore, for determination on this appeal is whether or not the donee of the power given in the testator's will may with the joinder of all the heirs at law of the testator and their spouses, give a deed in fee simple to the devised premises. Certainly the widow has the power to execute a good and indefeasible title to her life estate. But, it is optional with her as to whether or not she will exercise the power to dispose of the fee. If she elects not to exercise the power of disposition, the remainder, in the absence of any conveyance thereto, would, upon the death of the life tenant, become vested in fee simple in the heirs at law of the testator. *Chewning v. Mason, supra.*

It is said in 72 C.J.S., Powers, section 19, page 411, "A general beneficial power may always be surrendered by the grantee or donee and thus extinguished, provided the donor's intention is not thereby frustrated; thus, when a power is one which the donee may exercise for his own benefit, it may be extinguished by his act. Even a special power, when

not coupled with a trust, may be surrendered, renounced, or released and thereby extinguished.

"Any dealing by the donee of an extinguishable power with the property forming its subject matter which is inconsistent with the exercise of the power, puts an end to it but such donee may absolutely alienate his estate in the property without extinguishing the power, if it can thereafter be exercised without derogation of the alienee's estate."

Likewise, we find in 41 Am. Jur., Powers, section 96, p. 875, *et seq.*, the following statement with respect to the extinguishment of powers: "A general power to appoint by will may be released and extinguished by the donee's deed. It has been said that if the donee of a general power may appoint to his own estate or to anyone in the world, no individual is wronged by what he may do, and, therefore, no individual has a right to complain." This same authority states in the succeeding section, p. 876, "A release or extinguishment of a releasable power of appointment may take any form. It may be by a contract or by deed, or it may be implied from a covenant of general warranty. A release of a power of appointment may be effected either by express covenant or instrument of release, or by some act of the donee which is inconsistent with the subsequent exercise of the power. A releasable power of appointment may be released or extinguished by an agreement not to appoint. . . . Moreover, any conduct of a donee of a general power, which in good faith precludes him from making a voluntary appointment under the power, operates as an estoppel, and any dealing with the estate by the donee inconsistent with the exercise of the power by which the rights of others are affected, terminates the power . . ."

In the case of *Langley v. Conlan,* 212 Mass. 135, Ann. Cases 1913C, page 421, where lands had been devised to the daughter, coupled with power of appointment by will, and the daughter executed a mortgage on the premises and subsequently exercised the power of appointment, the court held that she was estopped by her conduct from exercising the power and that her appointees took nothing thereunder. And our Court in *Tillett v. Nixon, supra,* cited with approval the following statement from the *Langley* opinion: "It is only consonant with principles of fair dealing and common sense that any conduct of the donee of a power which in good faith precludes him from making an appointment should have the effect of an estoppel. Any dealing with the estate by the donee of the power inconsistent with its exercise by which the rights of others are affected puts an end to the power."

In the instant case, A. H. Smith, the testator, created a life estate in the devised premises for the benefit of his widow. He made no disposition of the property in the event of her failure to exercise the power of appointment; he died intestate to that extent. Hence, the property

vested in his heirs at law, subject to the widow's life estate, and subject to be divested by the exercise of the power of appointment by the widow. *Tillett v. Nixon, supra.*

The holder of the life estate, under these circumstances, could dispose of such estate without impairing her right to exercise the power of appointment. And, likewise, since there is no trust or beneficial interest coupled with the power to be exercised for the benefit of the remaindermen or anyone else, she may release or extinguish her right to exercise the power of appointment. *Langley v. Conlan, supra.* Therefore, we hold that the execution and delivery of a warranty deed by the life tenant (Mrs. Voncannon, the donee of the power of appointment), will constitute an estoppel and preclude her from passing any interest in the devised premises under such power. Consequently, the deed tendered to the defendant is sufficient to convey an absolute fee simple title to the premises described therein.

The judgment of the court below is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

JAMES H. McLANEY v. ANCHOR MOTOR FREIGHT, INC., OF DELAWARE, SOUTHERN PINE MILLS, INC., AND GEORGE McLANEY, JR.

(Filed 6 January, 1953.)

1. Pleadings § 19c—

A demurrer admits the truth of the allegations of fact contained in the complaint together with relevant inferences of fact necessarily deducible therefrom, but does not admit conclusions or inferences of law.

2. Same—

Upon demurrer, the complaint will be liberally construed, giving the pleader every reasonable intendment in his favor, and the demurrer overruled unless the pleading be fatally defective.

3. Automobiles §§ 8d, 18d, 21—Complaint held to allege intervening negligence of one defendant insulating negligence of other in stopping on highway without giving signal.

The complaint alleged in effect that plaintiff was riding in the car of one defendant which was following closely a truck belonging to the same defendant, and that both vehicles were following a truck owned by the appealing defendant, that the truck of the appealing defendant was stopped on the highway by its driver without giving any signal and without regard to traffic on the highway, that the following truck, without slackening speed, turned sharply to its left and passed the parked truck, but that the

driver of the car failed to keep a proper lookout, was driving at excessive speed under the circumstances, and was following too closely the preceding vehicle, and as a result collided with the rear of the parked truck. *Held:* The demurrer of the appealing defendant should have been sustained on the ground that the facts of the complaint disclose that any negligence on the part of its driver in stopping or parking its truck was insulated by the intervening, independent negligence of the driver of the car.

4. Neligence §§ 7, 16—

Where it appears from the facts alleged in the complaint that the injury was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person, defendant's demurrer to the complaint should be sustained.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant Anchor Motor Freight, Inc., of Delaware, from *Bone, J.*, 8 March, 1952, of BLADEN.

Civil action to recover damages for personal injury allegedly resulting from actionable negligence of defendant heard upon demurrer to complaint.

Plaintiff alleges in his complaint in pertinent part:

"2. That the defendant Anchor Motor Freight, Inc., of Delaware is a corporation . . . under the laws of the State of Delaware . . . engaged in the motor freight business, and . . . frequently operates motor vehicles over and upon the highways of North Carolina.

"3. That the defendant Southern Pine Mills, Inc., is a domestic corporation . . . State of North Carolina . . . engaged in the business of logging and manufacturing lumber.

"4. That the defendant George McLaney, Jr., is President of Southern Pine Mills, Inc.

"5. That . . . defendant Southern Pine Mills, Inc. purchased . . . a tudor sedan for the exclusive use of its president . . . and . . . at the time of the collision, as hereinafter alleged," he "was operating said vehicle, accompanied by the plaintiff . . . with the permission of, and as officer and agent of defendant, Southern Pine Mills, Inc., within the scope of his authority and in the performance of his rights and duties . . .

"6. That on or about the 21st day of March, 1950, the defendant George McLaney, Jr., was operating said . . . tudor sedan on U. S. Highway #701, about eight miles north of the Town of Elizabethtown, North Carolina, and was driving in a northerly direction, behind a logging truck owned by the defendant Southern Pine Mills, Inc., and operated by its employee Henry Guion; that the defendant George McLaney, Jr., directed his attention to a motor vehicle which had become stuck in the sand on the left or west shoulder of said highway; that, upon return-

ing his attention to said highway, the defendant George McLaney, Jr., saw the company vehicle operated by Henry Guion cut sharply to its left, and then saw a Chevrolet truck and freight trailer parked upon the paved and traveled portion of the said highway #701; that said defendant applied his brakes and otherwise made an effort to avoid a collision, but was unable to do so, and ran said car into the left rear side of said freight trailer.

"7. That said Chevrolet truck and trailer, which had stopped or was parked upon said highway as above stated, was owned by the defendant Anchor Motor Freight, Inc. of Delaware, and operated by its agent or employee Russell Fisher Yeagers, who at all times referred to was driving said truck and trailer in the performance of his duty and within the course of his employment as such agent or employee . . .

"8. That at the times above referred to Henry Guion was the driver of said logging truck owned by the defendant Southern Pine Mills, Inc., and that he was an employee of said corporation and was driving said logging truck and trailer in the performance of his duty, all within the course of his employment as such employee . . .

"9. That at the time of . . . said collision, the defendant George McLaney, Jr., officer and agent of defendant Southern Pine Mills, Inc., was negligent in that: (a) He operated the car of the defendant Southern Pine Mills, Inc., without keeping a proper lookout for other vehicles traveling and stopping upon the highway, and without regard to the safety of persons with him. (b) That he diverted his attention from the highway to a motor vehicle that was stuck in the sand off of and on the west side of the highway. (c) He operated said car negligently in following too closely behind the vehicle immediately in front of him, (d) . . . at a speed greater than was reasonable and prudent under the circumstances and conditions then existing, and without regard to the traffic conditions and circumstances then and there existing.

"10. That at the time of . . . said collision, Russell Fisher Yeagers, driver and agent of the defendant Anchor Motor Freight, Inc. of Delaware, was negligent in that: (a) He stopped and parked said truck and trailer upon the main traveled portion of said highway in violation of G.S. 20-161; (b) he failed to give, at the time of stopping said vehicle, and just prior thereto, a correct and visible signal to the driver or drivers of vehicles behind him, indicating his intention to slow down or stop; (c) he failed to keep a proper and careful lookout for other vehicles upon the said highway, and (d) he operated said truck without regard to traffic, conditions and circumstances then and there existing upon the said highway.

"11. That at the time of . . . said collision Henry Guion, the driver and employee of the defendant Southern Pine Mills, Inc. was negligent in

that: (a) He negligently followed too closely the truck and trailer of Anchor Motor Freight, Inc., of Delaware; (b) he cut out sharply to the left around the parked truck and trailer of the defendant Anchor Motor Freight, Inc. of Delaware, without giving a horn or hand signal, or otherwise giving notice or warning to the following vehicle operated by the defendant George McLaney, Jr., (c) he failed to keep a proper and careful lookout; (d) he failed to decrease his speed when the vehicle preceding him slowed down and came to a stop; (e) he operated said vehicle without regard to the traffic conditions and circumstances then and there existing.

"12. That as a result of said collision the . . . tudor sedan of the Southern Pine Mills, Inc. was completely demolished, and the plaintiff sustained multiple fractures of the head, his face cut, punctured and torn, etc. . . .

"16. That the said negligent acts of defendants as hereinabove alleged was a proximate cause of the injuries sustained by plaintiff as aforesaid . . ."

Wherefore, the plaintiff prays recovery in large amount.

The defendant Anchor Motor Freight, Inc., demurred to the complaint for that same does not state sufficient facts to constitute a cause of action against it, in that it appears upon the face of the complaint:

"1. That the sole proximate cause of the motor vehicle collision in question was the negligence of the defendants Southern Pine Mills, Inc., and George McLaney, Jr.

"2. That if this defendant was guilty of any act of negligence, the same was insulated and rendered inoperative by the negligence of the defendants Southern Pine Mills, Inc., and George McLaney, Jr."

The parties having agreed that the demurrer might be heard out of term and out of the county in which the action is pending, and that order in respect thereto might be signed out of term, out of the county, and out of the district, and the Judge holding courts of the Ninth Judicial District, being of opinion that the demurrer should be overruled, entered order in accordance therewith at Nashville, N. C., on 8 March, 1952.

Defendant Anchor Motor Freight, Inc., excepts thereto, and appeals therefrom to Supreme Court and assigns error.

H. H. Clark and Edward B. Clark for plaintiff, appellee.

A. J. Fletcher and F. T. Dupree, Jr., for defendant Anchor Motor Freight, Inc., appellant.

WINBORNE, J. The demurrer of the appellant, Anchor Motor Freight, Inc., presents the question as to whether or not the facts alleged in the complaint of plaintiff are sufficient to constitute a cause of action against them. For this purpose the truth of the allegations contained therein

are admitted, and "ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted. But the principle does not extend to admissions of conclusions or inferences of law," *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *Bumgardner v. Fence Company, ante,* 698, and cases there cited.

Also, it is provided by statute, G.S. 1-151, that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with the view to substantial justice between the parties." And decisions of this Court interpreting and applying the provisions of this statute require that every reasonable intendment must be in favor of the pleader. The pleading must be fatally defective before it will be rejected as insufficient. See *Ins. Co. v. McCraw,* 215 N.C. 105, 1 S.E. 2d 369, and cases there cited.

In the light of the provisions of the statute, as so interpreted and applied, admitting the truth of the facts alleged in the complaint, this Court is constrained to conclude as a matter of law that the allegations in respect of this defendant, the appellant Anchor Motor Freight, Inc., are fatally defective upon the ground on which the demurrer is predicated, that is, it affirmatively appears upon the face of the complaint that the injury of which plaintiff complains was, as stated by *Stacy, C. J.,* in *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108, "independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person," to wit, the defendant George McLaney, Jr. See *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; also *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E. 299; *Ballinger v. Thomas, supra; Boyd v. R. R.,* 200 N.C. 324, 156 S.E. 507; *Hinnant v. R. R.,* 202 N.C. 489, 163 S.E. 555; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Chinnis v. R. R.,* 219 N.C. 528, 14 S.E. 2d 500; *Warner v. Lazarus,* 229 N.C. 27, 47 S.E. 2d 496; *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849; *Clark v. Lambreth,* 235 N.C. 578, 70 S.E. 2d 828; *Godwin v. Nixon, ante,* 632.

The factual situation here is so strikingly similar to that in *Murray v. R. R., supra,* as it related to conduct of defendant Elliott, in operation of her automobile, that the question of law here presented might fairly be decided on the authority of that case. There the driver of the car which was being overtaken by defendant Elliott, saw the obstruction in the highway, created by defendant railroad in repairing a grade crossing, slowed down, turned to the left and passed in safety and without injuring anyone. But as she put on speed to pass, the car turned left to by-pass the obstruction and, as she said, she "had nowhere to go but to hit the obstruction or the other car." She did the former, and plaintiff, a workman engaged in the repair work, was injured. The Court, speaking thereto, held that the "evidence points unerringly to the conclusion that this

situation was created by her failure to exercise ordinary care and to observe the law of the road in the operation of her automobile, and that the injury to plaintiff was proximately caused thereby, independent of any act or omission of duty upon the part of the defendant Railroad Company," citing *Boyd v. R. R., supra; Powers v. Sternberg, supra; Butner v. Spease, supra,* where the subject of intervening negligence had been recently treated and applied.

Hence, we hold that the demurrer here is well founded, and should be sustained. Therefore the judgment below is

Reversed.

PARKER, J., took no part in the consideration or decision of this case.

POSEY E. WRENN v. HOWARD OLIVER GRAHAM, KIKER & YOUNT, INC., AND F. A. TRIPLETT, INC.

(Filed 6 January, 1953.)

1. Pleadings §§ 3a, 10—

A party may not bring forward allegations contained in prior paragraphs of the pleading by referring to such paragraphs by number and stating that pleader repleads them. Rule of Practice in the Supreme Court 20 (2).

2. Pleadings §§ 2, 10—

Ordinarily, only matters which are germane to the original or primary cause of action and in which all the parties have a community of interest may be litigated in the same action.

3. Same—

The personal injuries and property damage suffered by a party, and not the accident causing them, is the subject of his action in tort, and his right to compensation therefor is the claim he asserts, and only such torts as arise immediately and directly out of the subject of the original or primary action and which have such relation thereto that their adjustment is necessary to a full and final determination of that cause may be joined in the complaint or pleaded as a cross action. G.S. 1-123.

4. Pleadings § 10—Defendant may not set up cross action against his co-defendants to recover for his own injuries or damage.

Plaintiff's car was involved in a collision at the beginning of a highway detour around a project for the widening of the highway and the rebuilding or construction of certain bridges. Plaintiff instituted suit against the driver of the other car involved in the collision and the highway and bridge contractors. Defendant driver asserted a counterclaim against plaintiff and the contractors as joint tort-feasors. *Held:* Demurrer of the contractors to the cross action for misjoinder of parties and causes

was properly allowed, since the individual defendant's right of action against the contractors does not arise out of the subject of plaintiff's cause of action and is not necessary to a full and final determination of plaintiff's claim, and plaintiff may not be required to allow defendants to fight out their rights and liabilities as between themselves in his action to recover his damages. G.S. 1-123.

APPEAL by defendant Graham from *Sink, J.*, September Term, 1952, GUILFORD. Affirmed.

Civil action to recover compensation for personal injuries and property damage, heard on demurrer of the corporate defendants to the cross action pleaded against them by the defendant Graham and motion to strike the same.

Defendant Kiker & Yount, Inc., contracted with the State Highway and Public Works Commission to widen and resurface a part of U.S. 220 near the Guilford Battleground. Defendant Triplett, Inc., contracted to rebuild or construct certain bridges as a part of the same road improvement project. There was a temporary detour constructed for the use of the public while work on one of the bridges was in progress.

An auto operated by plaintiff on the detour and one operated by defendant Graham on the main highway collided just as plaintiff was emerging from the south end of the detour onto the main highway. Plaintiff makes allegations of negligence against all three defendants which are not material here.

Defendant Graham, in his answer, after denying any negligence on his part and alleging certain defenses, pleads a "cross action" against his codefendants and a "counterclaim" against plaintiff. His asserted claim is stated in one cause of action against his codefendants and plaintiff as joint tort-feasors.

The corporate defendants appeared and demurred to said cross action and moved to strike the same for the reasons assigned in the written demurrers filed. The demurrers were sustained and defendant Graham excepted and appealed.

Adam Younce for defendant appellant, Howard Oliver Graham.

Huger S. King for defendant appellee Kiker & Yount, Inc., and Smith, Sapp, Moore & Smith for defendant appellee F. A. Triplett, Inc.

BARNHILL, J. Paragraph 2 of appellant's cross action is as follows:

"2. This defendant herewith repleads paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the further answer and defense hereinabove appearing."

This does not suffice to bring forward and make any allegation in the further defense a part of the cross action. Rule 20 (2), Rules of Practice

in the Supreme Court, 221 N.C. 557; *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47; *Alexander v. Brown, ante,* 212. This being true, the allegations contained in the cross action are insufficient to state a cause of action either against plaintiff or the corporate defendants. But we do not base our decision on that ground, for to do so would merely invite repleading and necessitate another appeal to decide the real question the parties seek to present. That question is this: In an action founded on allegations of negligence, may one of the three defendants file and prosecute a cross action against his codefendants to recover compensation for personal injuries and property damage which he alleges arose out of and were proximately caused by the same automobile collision out of which plaintiff's cause of action arose? The statute, G.S. 1-123, and our decisions thereunder answer in the negative.

Ordinarily only those matters germane to the cause of action asserted in the complaint and in which all the parties have a community of interest may be litigated in the same action. *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734, and cases cited.

"In order that a cross action between defendants may be properly considered as a part of the main action, it must be founded upon and connected with the subject matter in litigation between the plaintiff and the defendants." *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397; *Horton v. Perry, supra.* It must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. *Coulter v. Wilson,* 171 N.C. 537, 88 S.E. 857; *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555. "Each cause of action must relate to one general right. . . . Each must be so germane to it as to be regarded really as a part thereof" and ". . . directed to the same *subject matter* which constitutes *one general right.*" *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382; *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614; *Schnepp v. Richardson, supra.*

Whether joined in the complaint with another cause of action or pleaded as a cross action, a tort claim relied upon must arise out of the subject of the original or primary action and "the connection . . . must be immediate and direct." *Hancammon v. Carr, supra.* Questions in dispute among the defendants in an action may not be litigated in that action unless they arise out of the subject of the action as set out in the complaint and have such relation to the plaintiff's claim as that their adjustment is necessary to a full and final determination of that cause. *Hulbert v. Douglas,* 94 N.C. 128; *Schnepp v. Richardson, supra; Montgomery v. Blades, supra.* In other words, a plaintiff may not be required to cool his heels in the anteroom while defendants fight out, by cross action, a claim, one against the other, which is independent of and irrelevant to the cause he asserts. *Schnepp v. Richardson, supra; Beam v. Wright,* 222 N.C. 174, 22 S.E. 2d 270.

The roots of the controversy on this appeal are lodged in conflicting interpretations of the term "the same subject of action" as used in G.S. 1-123, and like terms appearing in our decisions.

"The 'subject of the action' means . . . the thing in respect to which the plaintiff's right of action is asserted whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had." Phillips, Code Pleading, 2d Ed., sec. 377, p. 423; *Hancammon v. Carr, supra.*

While his cause of action, as alleged by him, arose out of the collision of the two automobiles, and proof in respect thereto is essential, the collision is not the subject of plaintiff's action. The personal injuries and property damage suffered by him as a result thereof is the subject of his action and his right to compensation therefor is the claim he asserts. *Montgomery v. Blades, supra; Horton v. Perry, supra.*

Here, in effect, Graham, in respect to his cross action, makes himself a plaintiff against his codefendants. He is suing on one cause of action while plaintiff alleges an entirely different cause. Plaintiff has no interest in his claim against the corporate defendants and he, as complainant, has no interest in the claim asserted by plaintiff. Had he and plaintiff joined forces and instituted a joint action against the other defendants, it would have clearly constituted a misjoinder of causes and parties. From a practical standpoint, there is no difference in the course he here seeks to pursue. *Montgomery v. Blades, supra; Horton v. Perry, supra.* He asserts against his codefendants a cause of action which is independent of and irrelevant to the "subject of action" which forms the basis of plaintiff's claim. Hence the order sustaining the demurrers and striking the cross action contained in Graham's answer must be affirmed. *Teague v. Oil Co.,* 232 N.C. 65, 59 S.E. 2d 2.

The appellant, through his counsel, contends that since his cross action is against plaintiff and his codefendants as joint tort-feasors, the rule stated in the *Blades* and like cases has no application here. This interesting argument is ingenious but not persuasive. While defendant has the right to litigate in this action all questions pertaining to the cause of action alleged by plaintiff, including the liability of plaintiff for the injuries he—Graham—allegedly suffered as a proximate result of plaintiff's negligence, he may not pursue his claim against the corporate defendants in this action.

Had appellant elected to institute a separate and independent action against plaintiff and the corporate defendants, the trial judge, in his discretion, could have consolidated the two actions for trial. This is a roundabout way to the same end appellant seeks to accomplish here. Nonetheless, the statute does not permit the joinder of the two causes as a matter of right. Whether all persons suffering injury or damage aris-

ing out of one and the same motor vehicle collision should be permitted to join as coplaintiffs against the allegedly negligent motorist is for the General Assembly to decide. This Court studiously refrains from making law by judicial fiat. It only applies it as it is written.

The order entered in the court below is

Affirmed.

JAMES SWINTON AND WIFE, JANIE SWINTON, v. SAVOY REALTY COMPANY, A CORPORATION, AND A. TOLA.

(Filed 6 January, 1953.)

1. Fraud § 12—

Plaintiffs' evidence to the effect that they are aged Negroes without education, that they were induced to enter a contract for the purchase of a lot 80 x 150 feet by fraudulent representation of the vendor's agent that the lot included additional lands, the corners of which were pointed out to them on the ground, *is held* sufficient to be submitted to the jury in their action for fraud.

2. Limitation of Actions § 5b—

Plaintiffs, aged Negroes without education, instituted this action to recover damages for fraudulent representations as to the amount of land included in a lot purchased by them. *Held:* Their testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered, or should have been discovered by them in the exercise of reasonable diligence. G.S. 1-52 (9).

3. Damages § 7—

In this State, punitive damages may be awarded in the sound discretion of the jury in tort actions provided there be some features of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppression, or in a manner which evinces a reckless and wanton disregard of plaintiffs' rights.

4. Same—

Punitive damages may not be awarded in an action for fraud merely upon a showing of the misrepresentation constituting the basis of the cause of action, without more.

5. Appeal and Error § 39f—

Exceptions to the charge will not be sustained when it is without prejudicial error construed contextually.

6. Appeal and Error § 29—

Exceptions not supported by any reason or argument are deemed abandoned. Rule of Practice in the Supreme Court 28.

PARKER, J., took no part in the consideration or decision of this case.

SWINTON *v.* REALTY CO.

APPEAL by defendants from *Bone, J.*, May Term, 1952, of CUMBERLAND. Modified and affirmed.

Suit to recover damages for fraud in the sale of land.

The plaintiffs alleged and offered evidence tending to show that defendant Realty Company, through its agent and employee A. Tola, who was acting within the scope of his employment and about the business of the defendant Corporation, induced plaintiffs to contract to purchase a lot of land 80 by 150 feet at the price of $2,000 by falsely and fraudulently representing that the boundaries of the lot as designated and pointed out by the defendants embraced an area "268 feet wide and 160 yards deep," showing them the corners of a lot of that area which the defendants represented the plaintiffs were purchasing. This included the house in which plaintiffs lived. After having paid the purchase price over a period of years, upon receipt of the deed the plaintiffs learned that the lot therein conveyed was only 80 by 150 feet and worth no more than $500. Plaintiffs asked for $1,500 damages, and also for an additional amount as punitive damages.

The defendants denied the imputation of fraud and offered evidence that the lot was sold by a plat showing it was No. 310, and only 80 by 150 feet in size, and further that the plaintiffs who had lived on the premises for many years knew at the time or learned more than three years before suit the size of the lot sold them, and defendants plead the three years' statute of limitations.

Issues were submitted to the jury and answered as follows:

"1. Did the defendant A. Tola falsely and fraudulently represent to the plaintiffs that the boundaries of the land contracted to be sold by agreement dated April 3, 1944, were as set out in paragraph 10 of the plaintiffs' substituted and amended complaint?

"Answer: YES.

"2. If so, was the defendant Tola acting as the agent of the corporate defendant at said time?

"Answer: YES.

"3. Are the plaintiffs barred by the statute of limitations?

"Answer: No.

"4. What actual damage, if any, are the plaintiffs entitled to recover of the defendants?

"Answer: $1500.00.

"5. What punitive damages, if any, are the plaintiffs entitled to recover of the defendants?

"Answer: $1500.00."

Upon the coming in of the verdict the court having some doubt as to the third issue, set the verdict on that issue aside, and at a subsequent term again submitted it to the jury with the result that the issue was again answered "No."

Upon the verdict judgment was rendered that plaintiffs recover $1,500 compensatory damages and $1,500 punitive damages.

Jones & Jones for plaintiffs, appellees.
Robert H. Dye for defendants, appellants.

DEVIN, C. J. The defendants noted numerous exceptions during the trial, but base their appeal chiefly on three grounds: (1) the denial of their motion for judgment of nonsuit, (2) submission of issue of punitive damages, and (3) errors in the court's instructions to the jury.

1. It is apparent from an examination of the record that the plaintiffs' evidence considered in the light most favorable for them was sufficient to make out a case for the jury. The plaintiffs are aged Negroes without education, and their testimony, if believed, was adequate to establish actionable fraud. *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486; *Gray v. Edmonds,* 232 N.C. 681, 62 S.E. 2d 77; *Kennedy v. Trust Co.,* 213 N.C. 620, 197 S.E. 130.

The plaintiffs' evidence was sufficient to show that the action was begun within three years of the time when the facts constituting the alleged fraud were discovered, or should have been discovered in the exercise of reasonable diligence. G.S. 1-52 (9); *Lee v. Rhodes,* 231 N.C. 602, 58 S.E. 2d 363; *Wimberly v. Furniture Stores,* 216 N.C. 732, 6 S.E. 2d 512; *Hargett v. Lee,* 206 N.C. 536, 174 S.E. 498. The facts stated in *Harding v. Ins. Co.,* 218 N.C. 129, 10 S.E. 2d 599, and *Hargett v. Lee,* 206 N.C. 536, 174 S.E. 498, cited by defendants, are materially different from those in the case at bar.

2. Defendants assign error in the action of the court in submitting an issue as to punitive damages.

The power of the court to assess punitive or exemplary damages, and thereby authorize the taking of money from the defendant and awarding it to the plaintiff in addition to that sufficient to compensate him for the injury done him, is questioned in some jurisdictions (25 C.J.S. 708), but it has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury and within reasonable limits, though the right to such an award does not follow as a conclusion of law because the jury has found an issue of fraud against the defendant. There must be an element of aggravation accompanying the tortious conduct which causes the injury. Smart money may not be included in the assessment of damages as a matter of course simply because of an actionable wrong, but only when there are some features of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights. *Baker v. Winslow,* 184 N.C. 1, 113 S.E. 570. "But these damages

are awarded on the ground of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit." *Cotton v. Fisheries Products Co.,* 181 N.C. 151, 106 S.E. 487.

In the American Law Institute Restatement Law of Torts, sec. 908, it is said: " 'Punitive damages' are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct." In actions to recover damages for a tort which involves the ingredient of fraud, malice, insult or is characterized by reckless and wanton disregard of the rights of the plaintiff exemplary or punitive damages may be awarded for the purpose of punishing or making an example of the defendant. 15 A.J. 713. As a general rule exemplary damages are not recoverable in actions for breach of contract. 25 C.J.S. 716; *Saberton v. Greenwald,* 146 Ohio St. 414; 165 A.L.R. 599.

In *Saberton v. Greenwald, supra,* the action was to recover damages for fraudulent representation in the sale of a watch. It was held by a divided court that punitive damages might be recovered under the facts of that case. Three Justices dissented, *arguendo,* on the ground that the tort sued on was not of such a character as to warrant the assessment of punitive damages, questioning also the power of the court to make the defendant pay twice for the same wrong.

In some cases, in actions to recover damages for fraud, where punitive damages are asked, it is suggested that a line of demarcation be drawn between aggravated fraud and simple fraud, with punitive damages allowable in the one case and refused in the other. In a note in 165 A.L.R. 616, it is said: "All that can be said is that to constitute aggravated fraud there must be some additional element of asocial behavior which goes beyond the facts necessary to create a case of simple fraud."

Without undertaking to pursue this further, we think the rule is that the facts in each case must determine whether the fraudulent representations alleged were accompanied by such acts and conduct as to subject the wrongdoer to an assessment of additional damages, for the purpose of punishing him for what has been called his "outrageous conduct."

In the case at bar the plaintiffs' original complaint alleged that defendants entered into a written contract to convey lot No. 310, and pointed out certain lines as the boundaries of this lot, and plaintiffs in their complaint demanded specific performance of the contract according to the boundaries thus indicated. Subsequently in an amended and substituted complaint, plaintiffs having accepted the deed to lot 310, sued to recover damages for the loss occasioned by defendants' fraud in the sum of $1,500. This the jury awarded them. Thus the plaintiffs seem to have been made whole for the $2,000 paid out, as they have received a lot worth $500 and

$1,500 as damages on the ground of fraud. This is all the plaintiffs asked for, except an additional amount as punitive damages.

We are inclined to the view that the facts in evidence here are not sufficient to warrant the allowance of punitive damages. There was no evidence of insult, indignity, malice, oppression or bad motive other than the same false representations for which they have received the amount demanded. Here fraud is not an accompanying element of an independent tort but the particular tort alleged.

Though the conduct of the defendants was reprehensible, they have now been required to compensate the plaintiffs fully for the loss and injury caused by their false representations. We do not think the law requires that an additional amount for punishment should be meted out in this action.

3. The defendants have noted exception to several portions of the court's charge to the jury, and to the failure of the court to explain the law relating to certain phases of the testimony.

We have examined these in connection with the charge as a whole in the light of the evidence offered, and do not perceive any substantial ground upon which to predicate harmful error.

Other exceptions to which no reason or argument is submitted are deemed abandoned. Rule 28; *Bank v. Snow,* 221 N.C. 14, 18 S.E. 2d 711.

For the reasons herein set forth the allowance of punitive damages should be eliminated from the judgment, and except as modified in this respect the judgment is affirmed.

Modified and affirmed.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. ELMER HEDRICK AND J. PAUL SNOW.

(Filed 6 January, 1953.)

1. Conspiracy § 1—

A conspiracy is a combination or agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, the unlawful agreement and not the execution of the crime being the offense.

2. Conspiracy § 6—

A conspiracy may be established by circumstantial evidence.

3. Same: Insurance § 67: Criminal Law § 52a (3)—Circumstantial evidence of defendants' guilt of conspiracy to procure insurance benefits by means of false claim held sufficient for jury.

Evidence tending to show that appealing defendant transferred to his codefendant the certificate of title to a burned, nonexistent automobile, that the codefendant procured insurance based on the certificate, following which he reported the car stolen and filed claim thereon, with other related incriminating circumstances shown in evidence, *is held* sufficient to be submitted to the jury in a prosecution for conspiracy to procure insurance benefits by means of false claim, G.S. 14-214, notwithstanding that defendants' evidence, if believed by the jury, may have diluted the probative force of the State's evidence so that it did not exclude every reasonable hypothesis of innocence and point unerringly to guilt.

4. Criminal Law § 81c (4)—

Where concurrent sentences are imposed upon conviction of defendant on each of the counts in the bill of indictment, and there is no error in respect to the trial of any one count, any error relating to the other counts is harmless.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant Snow from *Rousseau, J.*, and a jury, 21 July, 1952, Criminal Term of GUILFORD (Greensboro Division).

Criminal prosecution on indictment charging Elmer Hedrick and Paul Snow, in three counts, (1) with conspiracy to procure insurance benefits by means of false claim in violation of G.S. 14-214; (2) with presenting false claim to procure insurance benefits in violation of G.S. 14-214; and (3) with preparing and subscribing to a false affidavit and proof of loss with intent to use same in procuring insurance benefits in violation of G.S. 14-214.

The evidence on which the State relies may be summarized as follows: The defendant Snow owned a 1946 model Plymouth automobile which was burned in Chatham, Virginia, on 10 December, 1951. The charred remains of the automobile were disposed of as junk and the automobile became nonexistent, and Snow was paid therefor by his insurance carrier. Thereafter, on 8 January, 1952, Snow, having retained the certificate of title to the burned automobile (though under the prevailing custom the certificate should have been turned in to the purchaser of the salvage), appeared with his codefendant Hedrick before a Notary Public with the certificate of title to the nonexistent 1946 Plymouth automobile, being Motor No. P15-168524, Serial No. 15186953. The motor number was stricken out by pen and above it was inserted "P4-196660," with notation thereon "motor changed." The appellant Snow made an assignment of the certificate of title to Hedrick. Also on 8 January, 1952, Hedrick went to the office of the Greensboro agent of the Miller Insurance Association of Illinois, and there filled out an application for a fire, theft, and

windstorm insurance policy covering a 1946 Plymouth automobile, 4-door sedan, being Motor No. P4-196660 and Serial No. 15186953. The agent's secretary typed up the policy and it was issued to Hedrick. No one in the agent's office saw or made effort to see the alleged automobile. According to the records of the North Carolina Department of Motor Vehicles, Snow on 8 January, 1952, transferred to Hedrick a certificate of title for a 1946 Plymouth automobile, 4-door sedan, being Motor No. P15-168524, Serial No. 15186953. Also, on the same day a certificate was filed with the Department of Motor Vehicles for a change of motor number on the certificate of title. The replacement number was P4-196660. The "P4" prefix indicates the motor had been used in a 1937 model Plymouth.

On the week end of 9 February, 1952, Hedrick, a married man with children, made a trip to Roanoke, Virginia. He said he did not know anybody in that city, and his only reason for going, as he put it, was "I go lots of places on weekends." He registered in a hotel in Roanoke on 9 February, 1952. Next morning, he reported to the police that his automobile had been stolen off the street the night before. He returned to Greensboro that afternoon, and subsequently filed a claim and proof of loss for the alleged stolen automobile with Miller Insurance Association of Illinois. The automobile alleged to have been stolen was a 1946 Plymouth, 4-door sedan, Motor No. P4-196660, Serial No. 15186953. Hedrick said he took the keys out of the allegedly stolen automobile before leaving it parked on the street in Roanoke, but on request to bring the keys to the insurance adjuster he said they had been misplaced and he could not find them.

Following these events, R. L. Turnage, a special investigator of the North Carolina State Insurance Department, contacted Hedrick at the store where he was working in Greensboro, and following this interview both Hedrick and Snow were arrested. The evidence of the State also discloses that the defendants had been friends or acquaintances for some considerable time. For a time prior to the events in evidence both had worked at the same store in Greensboro.

The defendants offered evidence tending to show that Snow owned, in addition to the car which was burned in Virginia, another Plymouth 4-door sedan—a 1947 model car that had been used as a taxicab—and that it was this car that he sold to Hedrick. Snow testified he did not intend to transfer the certificate of title to the burned car; that by oversight he picked up the wrong certificate and by mistake used it in making the transfer before the Notary. As to this, the State in rebuttal offered evidence tending to show that some two months after its alleged theft the second car was seen by a witness who said he knew the car and identified it as being the same one which Snow claimed he sold to Hedrick.

Other evidence *pro* and *con* bearing on this phase of the case, including the testimony of the State's witness Turnage to the effect that Hedrick made a full confession of guilt and implicated Snow during Turnage's interview with Hedrick prior to the arrests, is omitted as not being pertinent to decision.

The jury returned a verdict of guilty as charged against each defendant.

Judgment was entered as to each defendant as follows: On the first count charging conspiracy, imprisonment in the State's prison for not less than three nor more than five years; on the second and third counts, which were consolidated for judgment, a like sentence was imposed to run concurrently with the first.

The defendant Snow appeals, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Sharp & Robinson and Adam Younce for J. Paul Snow, appellant.

JOHNSON, J. The single question presented by this appeal is whether the evidence offered below was sufficient to take the case to the jury over the defendant Snow's motion for judgment as of nonsuit.

A conspiracy may be defined as a combination or agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *S. v. Whiteside,* 204 N.C. 710, 712, 169 S.E. 711; *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737. The unlawful combination is the essence of criminal conspiracy; thus the conspiracy is the crime, and not its execution. *S. v. Whiteside, supra; S. v. Wrenn,* 198 N.C. 260, 151 S.E. 261. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *S. v. Knotts,* 168 N.C. 173, 83 S.E. 972. "No overt act is necessary to complete the crime of conspiracy." *S. v. Davenport, supra.*

Direct proof of conspiracy is not essential, for such is rarely obtainable. "It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *S. v. Whiteside, supra.*

It necessarily follows that the crime of conspiracy may be shown by circumstantial evidence. *S. v. Whiteside, supra; S. v. Lea, supra; S. v. Martin,* 191 N.C. 404, 132 S.E. 16. See also *S. v. Needham,* 235 N.C. 555, 71 S.E. 2d 29; *S. v. Shook,* 224 N.C. 728, 32 S.E. 2d 329.

Here, the evidence tending to show that Snow transferred to Hedrick the certificate of title to a burned, nonexistent automobile, that Hedrick

procured insurance based on this certificate, following which he reported the car stolen and filed claim for insurance benefits, with other related incriminating circumstances shown in evidence (not including the evidence of Hedrick's confession, admitted only against him), was sufficient to carry the case to the jury against Snow. The evidence offered by the defendants, if believed by the jury, may have recast the State's line of circumstantial evidence in such light as to have diluted its probative force before the jury to the point of not fulfilling the requirement that it exclude every reasonable hypothesis of innocence and point unerringly to the guilt of the defendants. *S. v. Needham, supra; S. v. Shook, supra.* Obviously, however, the jury in its composite wisdom, after hearing the testimony and observing the demeanor of the witnesses, disbelieved the defendants' evidence and resolved the issues against them. The record amply sustains the conviction and sentence on the conspiracy charge.

Whether the appealing defendant was properly convicted on the second and third counts in the bill, we need not now decide. His sentence on these consolidated counts was made to run concurrently with the sentence on the conspiracy count. Therefore, any errors in the failure of the court to nonsuit the case as to the second and third counts are harmless. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Lea, supra; S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804; *S. v. Hicks, supra; S. v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323.

The verdict and judgment will be upheld.

No error.

PARKER, J., took no part in the consideration or decision of this case.

SIDNEY FELDMAN v. CHARLOTTE A. FELDMAN.

(Filed 6 January, 1953.)

1. Divorce and Alimony § 11—

Since the wife's right to support after divorce *a vinculo* was unknown to the common law, no right thereto exists unless provided by statute.

2. Same—

The only statutory provision permitting alimony after decree of divorce *a vinculo* is provision that decree of divorce on the ground of separation shall not have the effect of impairing or destroying the right of the wife to alimony under any judgment or decree rendered before the commencement of the suit for absolute divorce. G.S. 50-11.

3. Same—Decree of divorce on ground of separation renders wife's judgment for support ineffective unless entered prior to suit for divorce.

In the husband's action for divorce on the ground of separation, the wife filed a cross action for divorce *a mensa* and permanent alimony. Pending trial, the parties agreed that the husband should pay a stipulated sum monthly to the wife for her support, which agreement was entered as a consent order in the cause. *Held:* Upon the subsequent decree of absolute divorce in the husband's action, the wife's right to support was relegated solely to the contract, and order striking out the consent judgment without prejudice to the contractual rights and obligations of the parties was properly allowed on the husband's motion, the consent order not having been entered prior to the institution of the action for divorce.

APPEAL by defendant from *Pless, J.*, June Term, 1952, GUILFORD (Greensboro Division). Affirmed.

Civil action for divorce.

Plaintiff instituted this action alleging as his cause of action that he and his wife had lived separate and apart for a period of more than two years. Defendant filed a cross action for divorce *a mensa* and prayed judgment for (1) divorce *a mensa,* (2) alimony *pendente lite,* and (3) permanent alimony.

A consent order allowing alimony *pendente lite* for defendant and a child of the marriage and counsel fees was entered. Thereafter, the parties agreed upon a settlement of property rights and for the payment of monthly sums by plaintiff for the support of the defendant and the child of the marriage. This agreement was entered as a consent order at the April Term 1947. Thereupon the cause was tried on the cause of action alleged in plaintiff's complaint. The issues were answered in favor of plaintiff and a decree of absolute divorce was entered on the verdict. The judgment recites: ". . . the defendant has withdrawn her cross-action."

At the April Term 1952, defendant, after notice, moved that plaintiff be adjudged in contempt for failure to pay the installments required by the consent order. In this connection it is admitted that the child has been legally adopted and plaintiff is no longer liable for its support. Defendant avers, however, that she is still entitled to the full payments required by the order. Plaintiff filed a motion to strike the consent order. At the May Term 1952, Patton, Special Judge, declined to hear plaintiff's motion to strike until and unless he paid all installments in arrears. Plaintiff thereupon paid all arrearages and was purged of contempt. Plaintiff then filed a motion to strike the consent order.

Plaintiff's motion came on for hearing at the June Term 1952. Upon hearing the same, Pless, J., relying on *Livingston v. Livingston,* 235 N.C. 515, entered an order "that said consent order of April 23, 1947, shall be and the same is hereby set aside and rendered inoperative as an

order of Court; provided, however, the entry of this order shall not in anywise impair or affect the rights of the defendant, Charlotte A. Feldman, to sue upon said consent order in contract, if she be so advised, this order being without prejudice to the contractual rights and obligations of the parties under and pursuant to said consent order of April 23, 1947."

Defendant excepted and appealed.

Hayes, Hatfield & McClain for plaintiff appellee.
Jordan & Wright and Perry C. Henson for defendant appellant.

BARNHILL, J. Allowance of alimony payable after a decree of divorce *a vinculo* was unknown to the common law. *Duffy v. Duffy,* 120 N.C. 346; *Lockman v. Lockman,* 220 N.C. 95, 16 S.E. 2d 670; Gavit Black. Com., pp. 188, 189.

"At common law, where a divorce *a vinculo matrimonii* was granted, no allowance for the future support of the wife was given, and we have no statute in this State allowing it." *Duffy v. Duffy, supra; Crews v. Crews,* 175 N.C. 168, 95 S.E. 149; *Hobbs v. Hobbs,* 218 N.C. 468, 11 S.E. 2d 311; *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118; Anno. 166 A.L.R. 1004.

As the right did not exist at common law, the right of the wife to support after divorce *a vinculo* is subject to legislative regulation. Only such rights to alimony exist as are provided by statute, *Cooke v. Cooke,* 164 N.C. 272, 80 S.E. 178, and the General Assembly of North Carolina, except as hereinafter noted, has never enacted any statute permitting the granting of alimony after the dissolution of the bonds of matrimony. Since the decree dissolves the status, it terminates all the incidents of marriage, including the right of the wife to support and maintenance.

This principle was first put into statutory form by the General Assembly of this State in 1871. Ch. 193, sec. 43, of the Public Laws of 1871-72 provides that "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again: Provided . . ." (Proviso relates to children). This statute has been enacted and re-enacted in every succeeding codification of our law and is now G.S. 50-11.

The only modification thereof in respect to alimony is contained in ch. 204, P.L. 1919. Section 1 thereof is as follows:

"Section 1. That in all cases where an absolute divorce is granted upon the grounds of separation of husband and wife for ten (now two) successive years as provided by law, such decree granting such divorce shall not have the effect of impairing or destroying the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of such proceeding for absolute divorce."

This section of that Act, as amended, is brought forward as a proviso in G.S. 50-11.

It is not contended that the consent order was entered prior to the institution of this action. Instead, the record discloses and it is conceded that it was entered on defendant's cross action filed in this cause. Hence it is without statutory authorization in so far as it requires plaintiff to pay alimony after the entry of the final decree of divorce.

It is true that when the order was signed the court had jurisdiction of the parties and of the subject matter of the action. Even so, he had no jurisdiction to enter an order requiring plaintiff to support the defendant after the marital status was dissolved. And it is axiomatic that jurisdiction cannot be conferred by consent, waiver, or estoppel. *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27. Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.

That part of the order which requires the payment of alimony after the date of the decree of absolute divorce must rest entirely upon the consent of the parties. To this extent, it is nothing more than a contract.

The wife is afforded ample legal means for the protection of her right to support and maintenance during coverture. If the husband is guilty of misconduct which gives rise to a cause for divorce, she may institute an action for divorce *a mensa* under G.S. 50-7, 14, or for reasonable subsistence without divorce under G.S. 50-16. If the husband institutes the action, she may elect either to plead that the separation arose out of the wrongful conduct of the husband and thus preserve her right to maintenance or refrain from contesting the action and risk the loss of her marital rights. *Stanley v. Stanley, supra.* Whether further remedies are to be provided so that a man may be required to support his wife after the marriage has been dissolved is for the General Assembly to decide.

The judgment entered is

Affirmed.

CLEO STRIGAS, GEORGE STRIGAS AND NICK STRIGAS v. DURHAM LIFE INSURANCE COMPANY.

(Filed 6 January, 1953.)

1. Contracts § 8—

Where an instrument is wholly in writing and its terms are explicit, the court determines their effect simply by declaring their legal meaning.

2. Insurance § 36a (2)—

After lapse of the policy for nonpayment of premiums, insured's request to insurer to "hold" the insurance until insured returned from Europe and promise that insured would then settle with insurer, is not a request that

insurer convert the policy into extended term insurance in accordance with an option set out in the policy, and upon the death of insured within that period, insurer is liable only for the amount of paid up insurance in accordance with the automatic option contained in the policy.

3. Insurance § 37—

Ordinarily, admissions by insurer of the execution of the policy and the death of the insured places the burden on insurer of proving that the policy was not in force at the time of the death of the insured, but where plaintiffs allege that premium on the policy was not paid on due date or within the grace period thereafter, and claim under the extended term insurance option, plaintiffs have the burden of showing compliance with the essential provisions of the policy necessary to convert it into extended term insurance, and upon failure of such proof by them the court may direct a verdict for insurer.

4. Trial § 30—

The court may direct a verdict against the party who has the burden of proof if the evidence offered and taken as true fails to make out a case.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Pless, J.*, March Term, 1952, of GUILFORD (Greensboro Division).

This is an action instituted by the plaintiffs to recover on a life insurance contract.

The defendant, in July, 1946, issued its whole life nonparticipating policy of life insurance No. 368106 in the face amount of $2,500, on the life of John Strigas as insured. All the quarterly premiums due on the policy in accordance with the terms thereof, were paid in full down to and including the payment due 13 April, 1949, such payments being for a full period of three years. The premium due on 13 July, 1949, was not paid when due or within the stipulated grace period. Accordingly, the policy of insurance lapsed on 13 August, 1949, subject to its nonforfeiture provisions.

The nonforfeiture provisions contained in the policy are to the effect that if the policy shall lapse for nonpayment of premium, after premiums have been paid for three full years, and if there is no indebtedness to the company on account of the policy, the company will grant one of the following options:

1. CASH SURRENDER VALUE. Pay the cash value of the policy on written request of the insured and surrender of the policy within three months from date of lapse; or

2. AUTOMATIC PAID-UP INSURANCE. Without any action on the part of the insured, the company will continue the policy as a Nonparticipating Paid-up Life Policy for the amount as provided therein; or

3. EXTENDED INSURANCE. The company, upon written request of the insured within three months from the date of lapse, will continue the face amount of the policy as Nonparticipating Term Insurance from the date to which premiums have been paid for the term set out in the policy.

The evidence of the plaintiff was sufficient to establish the following facts: (1) That the insured went to Greece in June, 1949, and planned to return in November of that year but did not do so until the latter part of February or early in March, 1950, and that he died on 28 March, 1950; (2) that the insured, while absent from this country, wrote his son, George J. Strigas, and requested him to write to the Durham Life Insurance Company and tell them "to hold his policy and he would settle for it when he returned"; and (3) that thereafter in response to a letter from the defendant addressed to the insured dated 20 October, 1949, suggesting the desirability of making application for reinstatement of the policy, the son of the insured returned the letter to the defendant with the following notation written thereon:

"Dear Mr. Cozart:

"My father has gone to Europe since June, & I am expecting him to return in November, please hold his Insurance until he returns. He will settle with you then.

(s) GEORGE J. STRIGAS."

Issues were submitted to the jury as follows:

"1. Was the policy of insurance which is described in the pleadings in force and effect as extended insurance at the time of the death of the insured?

"2. What amount are the plaintiffs entitled to recover of the defendant?"

The court instructed the jury that in its opinion the notation written on the bottom of the letter of 20 October did not comply with the requirements of option 3, and instructed the jury, as a matter of law, if they believed all the evidence to answer the first issue "No." The issue was so answered. It was agreed that in view of the court's instructions on the first issue, that the second issue should be answered, "$163.00 with interest from April 28, 1950," this being the amount due the plaintiffs under option 2 in the policy.

From the judgment on the verdict, the plaintiffs appeal and assign error.

Hines & Boren and Jordan & Wright for plaintiffs, appellants.

I. O. Brady and Hudgins & Adams for defendant, appellee.

DENNY, J. Where an instrument is wholly in writing and the intention of the writer must be ascertained from the document itself, the intention of the writer as well as the effect of that intention is a question of law. *Young v. Jeffreys,* 20 N.C. 357; *Spragins v. White,* 108 N.C. 449, 13 S.E. 171; *Mining Co. v. Smelting Co.,* 122 N.C. 542, 29 S.E. 940; *Wilson v. Cotton Mills,* 140 N.C. 52, 52 S.E. 250; *Patton v. Lumber Co.,* 179 N.C. 103, 101 S.E. 613. And if the terms of a writing or contract are explicit, the court determines their effect simply by declaring their legal meaning. *Wilson v. Cotton Mills, supra.*

Conceding that the son of the insured, George J. Strigas, was acting as the agent of his father when he wrote the notation on the letter of 20 October and forwarded it to the defendant, which notation the defendant admits in its answer it received and took no action pursuant thereto, it was insufficient, in our opinion, to constitute a request for extended term insurance under the provisions of the policy. The writing contained nothing more than a request for additional time in which to pay the premium or premiums that would fall due while the insured was on his trip to Greece. There is no provision in the policy for any such extension of time and the company was under no obligation to grant such a request. A request to hold is not the equivalent of a request to convert or to change. The word "hold" means in its usually accepted sense, "to maintain or sustain; . . . to possess; . . . to keep; to retain." Black's Law Dictionary, Third Edition. We do not think the language used by the insured to his son, or by his son to the defendant, is susceptible of being construed to be a request for a conversion of the policy from one type of insurance to another. Furthermore, if the insured had intended to convert his policy into extended term insurance under the provisions of option 3 in the policy, there would have been no necessity for the statement that he would settle when he returned. There would have been no debt or obligation to settle. A conversion of the policy, pursuant to the provisions of option 3, would have constituted a complete settlement of all obligations of the insured with respect to the premium then due as well as to future premiums; the policy would have been paid up for its face amount as extended insurance for a definite term as set forth in the policy.

In an action to recover on a life insurance policy where the insurer admits the execution of the policy and the death of the insured, the burden of proving that the policy was not in force at the time of the death of the insured is ordinarily on the insurer. *Page v. Insurance Co.,* 131 N.C. 115, 42 S.E. 543. However, in the instant case the plaintiffs allege that the quarterly premium due on the policy held by the insured was not paid on 13 July, 1949, the date it was due, or within the stipulated grace period. Consequently, the plaintiffs having alleged that the policy lapsed prior to the death of the insured, the burden was on them in the

trial below to show compliance with the essential provisions of the policy in order to convert the face amount thereof into extended term insurance.

We think the ruling of the court below relative to the insufficiency of the plaintiffs' evidence to establish compliance with the provisions of option 3 of the policy for extended term insurance, was correct and must be upheld. "The court may always direct a verdict against the party who has the burden of proof, . . . if the evidence offered and taken to be true fails to make out a case." McIntosh, North Carolina Practice and Procedure, section 574, page 632, *et seq.; Spruill v. Insurance Co.*, 120 N.C. 141, 27 S.E. 39; *S. v. Prince*, 182 N.C. 788, 108 S.E. 330.

In the trial below, we find

No error.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. LOUISE RAINEY.

(Filed 6 January, 1953.)

1. Searches and Seizures § 2—

Where the peace officer duly swears to and signs the complaint-affidavit made out on his information, the fact that the oral information upon which it is based was given prior to the taking of the oath is not an irregularity, but is in accorance with statutory procedure. G.S. 18-13, G.S. 15-27.

2. Intoxicating Liquor § 9d—

Evidence tending to show that officers with search warrant entered defendant's home, caught defendant as she was attempting to empty nontax-paid liquor from a jar, that two nonresidents of the house were there at the time with small glasses having the odor of liquor before them on the table, and that on several occasions people were seen going into the house sober and coming out drunk, *is held* sufficient to be submitted to the jury in a prosecution for possession of nontax-paid liquor for the purpose of sale.

3. Criminal Law § 53h—

An instruction that defendant had the prerogative not to testify and to rely on the weakness of the State's evidence, and by her plea of not guilty challenged the truthfulness and sufficiency of the testimony, *is held* incomplete and erroneous in failing to charge that her failure to take the stand did not create any presumption against her. G.S. 8-54.

4. Criminal Law § 53d—

While the court is not required to charge on a subordinate feature of the case in the absence of request for special instructions, when the court

undertakes to do so it becomes the duty of the court to charge fully and completely on such subordinate feature.

5. Criminal Law § 81c (1)—

In order to be entitled to a new trial, defendant has the burden of establishing not only that error was committed but that such error was material and prejudicial, since verdicts and judgments are not to be set aside for mere error and no more.

6. Criminal Law § 81c (2)—

On the present record, the failure of the court to charge that defendant's election not to testify created no presumption against her, after undertaking to charge on defendant's right not to testify, *is held* not prejudicial in view of repeated categorical instructions that defendant's plea of not guilty raised a presumption of innocence with the burden on the State to overcome this presumption by proof of guilt beyond a reasonable doubt, and it being apparent that upon the evidence of guilt a different result would not likely ensue.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Pless, J.*, 26 May Criminal Term, 1952, of GUILFORD (Greensboro Division).

Criminal prosecution tried on appeal from Municipal-County Court upon a warrant charging the defendant with illegal possession of nontax-paid liquor for the purpose of sale. The jury returned a verdict of guilty as charged, and from judgment pronounced the defendant appealed, assigning errors.

Attorney-General McMullan and Samuel Behrends, Jr., Member of Staff, for the State.

Joe D. Franks, Jr., and Stanley & Caveness for defendant, appellant.

JOHNSON, J. The defendant places chief stress on a group of exceptions which challenge the competency of vital evidence offered by the State on the ground that it was obtained under an illegal search warrant. The search warrant was issued under substantially these circumstances: A peace officer appeared before the Deputy Clerk of the Greensboro-Municipal County Court and informed her, without being sworn, that he had reason to believe the defendant, who lived at 404 East Street in the City of Greensboro, had intoxicating liquor in her possession for the purpose of sale. The Deputy Clerk then prepared the complaint-affidavit and search warrant, after which the applying officer swore to and signed the complaint-affidavit, and then the issuing Deputy Clerk signed the affidavit and warrant. The evidence is not clear whether the officer who applied for the search warrant signed before or after the oath was admin-

istered, but all the evidence shows that the oath was administered prior to signing by the Deputy Clerk who issued the warrant.

Here the defendant's exceptions rest solely on the fact that the oral information of the officer procuring the warrant was furnished to the Deputy Clerk prior to taking the oath. The exceptions are untenable. The procedure followed fulfills the requirements of the controlling statutes. G.S. 18-13 and G.S. 15-27 as amended. See also *S. v. Gross,* 230 N.C. 734, 55 S.E. 2d 517; 67 C.J.S., Oaths and Affirmations, Sec. 6 (b).

Next, the defendant challenges the sufficiency of the evidence to carry the case to the jury over her motion for judgment as of nonsuit. The evidence may be summarized as follows: After the officers, with search warrant, gained entrance to the defendant's home, one of them "glimpsed" her "running out a door through the kitchen." He followed and caught her while she was in the act of pouring the contents of a quart jar into the commode. The officer wrested the jar from her before it was entirely emptied. She did not then deny ownership, but only claimed the fluid was not liquor. The officer testified the jar contained nontax-paid liquor. No tax stamp of any kind was on it. The jar, with contents, was introduced in evidence. Two men who were not residents of the house were there at the time, and small glasses with the odor of liquor were on the table in front of them. The men appeared to have been drinking "considerably." Half a case of 7-Up and half a case of Coca-Cola were found in the kitchen. One of the officers said he had been observing the defendant's residence on prior occasions, most recently the night before, and "had seen lots of people going in sober and coming out drunk. . . . some walking, some . . . in cars, and some in taxis. . . . (he) had seen this at least three times before . . . search."

This evidence was sufficient to take the case to the jury, and the court below properly overruled defendant's motion for judgment as of nonsuit. *S. v. Hill, ante,* 704; *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804; *S. v. Avery,* 236 N.C. 276, bot. p. 279, 72 S.E. 2d 670.

The defendant also assigns error in respect to the portion of the charge dealing with the failure of the defendant to take the stand and testify in her own behalf. As to this, the court charged the jury as follows:

"The defendant, lady and gentlemen, did not go upon the stand and did not offer evidence. This was her prerogative. She has a right to rely upon what she conceives to be the weakness of the State's evidence, and by her plea of not guilty challenges both the truthfulness and sufficiency of the testimony."

It may be conceded that this instruction was incomplete and erroneous for failure of the court to go further and tell the jury that the failure of the defendant to testify "shall not create any presumption against" her. G.S. 8-54. *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733. And this is so,

even though the instruction relates to a subordinate feature of the case on which failure to instruct ordinarily will not be held for error unless a request for instructions be made (*S. v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156), for the reason that the court having elected to charge on this phase of the case, *i.e.,* failure of the defendant to testify, it then became its duty to charge fully and completely on this circumstance. See *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867.

However, verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on the appellant to show this. *S. v. Bryant, post,* 745 (filed this day); *S. v. Perry,* 226 N.C. 530, 39 S.E. 2d 460; *S. v. King,* 225 N.C. 767, 33 S.E. 2d 590; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Stancill,* 178 N.C. 683, 100 S.E. 241; *S. v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323. See also *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797.

An over-all study of the charge discloses that the trial court in charging on the law as to the presumption of innocence gave special stress to its application to the defendant's situation. Three times during the course of the charge the court adverted to this phase of the case, each time telling the jury in effect that the defendant's plea of not guilty raised in her behalf a presumption of innocence, and that the burden of proof was on the State to overcome this presumption and prove her guilt beyond a reasonable doubt. And the court concluded its charge by telling the jury that if they had a reasonable doubt as to her guilt, it would be their duty "to give her the benefit of it and acquit her."

With the defendant's exceptions relating to the validity of the search warrant and to the competency of the evidence discovered thereunder resolved against her, it is not perceived how she, in view of this record, could hope for acquittal in another trial.

While the instruction as given is disapproved, as being incomplete, nevertheless we conclude that on the record as here presented prejudicial error has not been made to appear. *S. v. Bryant, supra.*

We have examined the rest of the defendant's exceptive assignments and find them to be without substantial merit. The verdict and judgment below will be upheld.

No error.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. FRED WALKER.

(Filed 6 January, 1953.)

1. Homicide § 25—

The evidence taken in the light most favorable to the State *is held* sufficient to take the case to the jury on the charge of defendant's guilt of murder in the first degree.

2. Homicide § 27f—

Where defendant's evidence affords sufficient predicate, the court should charge on his right while on his own premises to fight in his own defense in the face of an unprovoked assault without retreating, regardless of the character of the assault upon him, and in such case an instruction that he had a right to stand his ground only in case the assault upon him was felonious must be held for error.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Crisp, Special Judge,* at August Term, 1952, of WILKES.

Criminal prosecution upon a bill of indictment charging defendant with crime of murder in the first degree of one Conrad Hayes.

The defendant for his plea says that he is not guilty.

The evidence offered by the State tends to show the following:

The homicide here involved occurred around midnight of Saturday, 28 June, 1952. The scene of it was a very small old country road, sort of worn down in the middle, not over a half mile off the main highway #421 in the Miller Creek section of Wilkes County. This road was about nine feet wide with banks on each side a foot to eighteen inches high. There were three houses in a row on the east side of this road. First, the Claus Hayes house, referred to as the Hayes house, where the father and mother of the deceased Conrad Hayes lived, and where he stayed. The next, where the defendant Fred Walker and his wife and children lived, referred to as the Walker house. It was located, as variously estimated, 225 feet to 100 or 200 yards further down the road from the Hayes house. And the third, where Lonnie Ashley and his wife and children lived, referred to as the Ashley house. It was located about 75 feet or 25 yards further down the road.

Path: There was a path leading from, and directly in front of the porch of the Walker house, straight out through the yard to the road—a distance variously estimated at 15 to 25 yards.

The Walker yard: There was a yard in front of the Walker house—both north and south.

Chip block: Coming out of the Walker house, to the left of the path, there was a chip block or stump out near the corner of the yard, right next to the road.

Weeds: On the left side of the yard facing the road, there was a field of some kind, a potato patch, where there were weeds variously estimated to have been from knee,—to waist high. These weeds were on the side of the yard right close to the chip block.

The body: The body of deceased was found in the road, about 5 or 6 feet above the chip block toward the Hayes house, as expressed by one witness; about 20 feet from where the path turned in to the Walker house, by another; about 200 yards from the Hayes house, in opinion of another; about 75 feet from, and south of the Walker house,—south part of the yard in opinion of another. The body was lying with feet to the east, and in the center of the road, and the head on the west bank. The body was kind of turned over just a little on the right side. A single barrel loaded shotgun was about or under his feet.

The State also offered evidence bearing upon the circumstances under which Conrad Hayes came to his death.

And the State further offered declarations of defendant tending to show that he admitted that he shot Conrad Hayes, but that he did so while on his own premises and in self-defense when Hayes had returned to, and was entering defendant's premises, with loaded shotgun in hand, after he, Hayes, had threatened to go home and get his gun and to come back and shoot defendant, and after defendant had later heard him say he "would go down there and kill every one of them."

At the close of evidence offered by the State, defendant demurred thereto as to the charge of murder in the first degree, and as to murder in the second degree, and as to manslaughter. The motion as to murder in the first degree was granted. "The motion as to murder in the second degree, or manslaughter is overruled," and the defendant excepts.

Verdict: Guilty of manslaughter.

Judgment: Confinement in State's Prison for a term of not less than 7 nor more than 10 years.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Member of Staff, for the State.

Trivette, Holshouser & Mitchell and W. H. McElwee, Jr., for defendant, appellant.

WINBORNE, J. While defendant presents many assignments of error on this appeal, only those based (1) upon exceptions to denial of his motion for judgment as of nonsuit as to the charges on which the court submitted the case to the jury, and (2) upon a group of exceptions to various portions of the charge pertaining to defendant's plea of self-defense, need express consideration.

As to the first, it is sufficient to say that the evidence, without reciting it, taken in the light most favorable to the State is sufficient to take the case to the jury.

But, as to the second, it appears that the court made the right of self-defense available to defendant upon the jury finding that assault was made upon him with felonious intent. These exceptions are well taken.

While it may be conceded that the charge as given in this respect might be applicable to a different factual situation, it is rightly contended that it is inapplicable to a case where the party assaulted is at the time on his own premises. The decisions of this Court uniformly so hold.

Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home, or place of business, or on his own premises, the law imposes upon him no duty to retreat before he can justify his fighting in self-defense,—regardless of the character of the assault. *S. v. Harman,* 78 N.C. 515; *S. v. Bost,* 192 N.C. 1, 133 S.E. 176; *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Bryson,* 200 N.C. 50, 156 S.E. 143; *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526; *S. v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *S. v. Pennell,* 224 N.C. 622, 31 S.E. 2d 857; *S. v. Minton,* 228 N.C. 15, 44 S.E. 2d 346; *S. v. Grant,* 228 N.C. 522, 46 S.E. 2d 318; *S. v. Pennell,* 231 N.C. 651, 58 S.E. 2d 341, and numerous other cases. See also *S. v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142, where the cases on the subject are assembled.

The principle is expressed in *S. v. Harman, supra,* in opinion by *Reade, J.,* in this manner: "If prisoner stood entirely on defensive and would not have fought but for the attack, and the attack threatened death or great bodily harm, and he killed to save himself, then it was excusable homicide, although the prisoner did not run or flee out of his house. For, being in his own house, he was not obliged to flee, and had the right to repel force with force and to increase his force so as not only to resist but to overcome the assault."

Again in *S. v. Bryson, supra, Stacy, C. J.,* speaking to the subject, said: "The defendant being in his own home and acting in defense of himself, his family and his habitation . . . was not required to retreat, regardless of the character of the assault," citing *S. v. Glenn, supra,* and *S. v. Bost, supra.*

And in *S. v. Pennell, supra,* the principle is restated by *Barnhill, J.,* "Defendant was in his own place of business. If an unprovoked attack was made upon him and he only fought in self-defense, he was not required to retreat, regardless of the nature of the assault."

Applying the principle enunciated in these decisions, the doctrine of retreat has no place in the present case, and it is immaterial whether the assault be felonious or nonfelonious.

But as the decisions of this Court uniformly hold, this principle does not relieve the defendant of the burden of satisfying the jury as to the essential elements of the principle of law as to the right of self-defense available to one assaulted on his own premises.

We do not intimate any opinion on the facts. What they are is a matter for the jury.

Other assignments of error relate to matters which may not recur upon another trial.

The error pointed out is prejudicial to the defendant, and on account of it, he is entitled to a

New trial.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. W. H. BRYANT.

(Filed 6 January, 1953.)

1. Criminal Law § 53h—

Where defendant does not testify in his own behalf, an instruction that the jury should consider all the evidence or lack of evidence of both the State and the defendant, is erroneous.

2. Criminal Law § 81c (2)—

In this case in which defendant did not testify, error of the court in charging that the jury should take into consideration the lack of evidence of both the State and of defendant *held* not prejudicial in view of the court's repeated charge that the burden was on the State to satisfy the jury of defendant's guilt beyond a reasonable doubt and that if the jury had any doubt about defendant's guilt it should return a verdict of not guilty, and the fact that upon the State's evidence a different result would not likely ensue if a new trial should be awarded.

3. Criminal Law § 52a (1)—

While defendant's failure to testify is not subject to comment or consideration, in weighing the credibility of the evidence offered by the State the jury may consider that the State's evidence is uncontradicted.

4. Criminal Law § 50h—

The fact that the solicitor, just as the jury was leaving the box, announced in open court that a witness, whose testimony had clearly disclosed his participation in the crime for which defendant was then on trial, entered a plea of guilty in the prosecution against him, *is held* not to entitle defendant to a new trial, the court having charged the jury that if they heard the solicitor's announcement they should not consider it, and the procedure being in accordance with the accepted practice in criminal courts.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *McLean, Special Judge,* March Extra Term, 1952, MECKLENBURG. No error.

Criminal prosecution under bill of indictment which charges that defendant (1) broke and entered the warehouse of McClain Distributing Company with felonious intent to steal, and (2) did take, steal, and carry away one TV set, property of said company.

Defendant and one Ransom were police officers of Charlotte, and operated a patrol car from 11:00 p.m. until 7:00 a.m. On the night of 5 March 1951, sometime after midnight, defendant told Ransom he wanted to get a TV set. Ransom drove the patrol car to the window of the McClain warehouse. Defendant got on the fender, broke a pane, unlatched the window, and went in. He came out through an overhead door. He had a TV set which he put in the car. Ransom then drove to Creech's motorcycle place and they removed the cardboard covering from the TV set. They then carried it to defendant's automobile. Its whereabouts was not discovered until some time later.

At the conclusion of the State's evidence, the defendant demurred to the evidence under G.S. 15-173. The demurrer was overruled. Defendant excepted and rested without offering testimony. The jury rendered a general verdict of guilty. The court pronounced sentence and defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

W. C. Davis and S. M. Millette for defendant appellant.

BARNHILL, J. The defendant assigns as error the instruction of the court as follows:

"Now, Gentlemen of the Jury, the Court has given you certain of the contentions of both the State and the defendant—not all of them. It is your duty to consider all of the contentions, both for the State and the defendant, and consider all of the evindence or the LACK of evidence of both the State and of the defendant."

The last sentence of the quoted instruction, as it appears in the record before us, was ineptly phrased and ill-advised. It is expressly disapproved. Even so, on this record we are not convinced that it was materially prejudicial to the defendant.

The court specifically instructed the jury that it should consider the fact defendant did not testify in his own behalf in no wise adversely to him, and repeatedly charged the jury that the burden was on the State to satisfy it of defendant's guilt beyond a reasonable doubt before it could

return a verdict of guilty and that if it had "some doubt" or "any doubt" about defendant's guilt it should return a verdict of not guilty.

Furthermore, while defendant's failure to testify is not the subject of comment or consideration, the jury, in weighing the credibility of the evidence offered by the State may consider the fact that it is uncontradicted. *S. v. Weddington,* 103 N.C. 364; *S. v. Winner,* 153 N.C. 602, 69 S.E. 9, or unrebutted by evidence available to defendant. *S. v. Costner,* 127 N.C. 566; *S. v. Kiger,* 115 N.C. 746; *S. v. Jones,* 77 N.C. 520; Stansbury, N. C. Evidence, sec. 56, p. 93. Perhaps this is the thought the court had in mind when it gave the instruction. In any event, when it is considered contextually, it cannot be held for error. The defendant has failed to make it appear that a new trial would probably produce a different result. *S. v. Davis,* 229 N.C. 386, 50 S.E. 2d 37; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *Braddy v. Pfaff,* 210 N.C. 248, 186 S.E. 340.

When the court completed its charge and as the jury started to leave the jury box, the solicitor addressed the court as follows:

"If your Honor please, in the case of STATE against W. H. RANSOM the defendant waives the finding of a Bill of Indictment and enters a plea of Guilty of Storebreaking and Larceny. Let the Record show that Mr. Kidd represents him."

The defendant immediately moved the court to withdraw a juror and order a mistrial. "At this time, the jury is brought back" and the court cautioned them that if they heard what was said by the solicitor in reference to Ransom as they were leaving the jury box, the jurors should not consider it. Defendant excepted to the refusal of the court to order a new trial.

The exception is without merit. "In practice, it is not uncommon to receive submissions from defendants, or to allow them to plead guilty, at any time while the Court is in session, with a view to convenience, and to expedite business of the Court. And not infrequently, a party on trial with another, for the gravest offense, is allowed to change his plea to guilty, or to consent to a verdict of guilty for some grade of the offense of which he is charged. The Court, however, should be careful, to see that such practice works no undue prejudice to another party on trial. *S. v. Martin,* 70 N.C. 628; *S. v. Pratt,* 88 N.C. 639." *S. v. Hunter,* 94 N.C. 829.

Ransom had just been on the witness stand and testified to facts which clearly disclosed his participation in the crime for the commission of which the defendant was then on trial. The jury was already fully apprized of his guilt. For us to hold that his submission to the charge in the presence of the jury was prejudicial to the defendant would disrupt accepted procedure in criminal courts and materially hamper the orderly

administration of the law. We can perceive no reason why we should place our stamp of disapproval upon it.

The evidence in the case was clear and direct. No doubt the defendant failed to testify in his own behalf because he did not desire to add perjury to the crime he had already committed. On this record he could have no reasonable hope of acquittal in a future trial, for such a verdict would manifest a clear miscarriage of justice. Hence the verdict and judgment must be sustained.

No error.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. MARVIN FRANK SMITH AND BUSTER PEYTON.

(Filed 6 January, 1953.)

1. Criminal Law § 52a (3)—

Circumstantial evidence is sufficient to support a conviction only when the circumstances shown are sufficient to exclude every reasonable hypothesis except that of guilt.

2. Same: Gaming § 9—Circumstantial evidence of defendant's guilt of conspiracy or participation in lottery held insufficient.

The only evidence tending to connect appealing defendant with the sale of lottery tickets was the circumstance that defendant, at an early hour of the morning, stopped his car at a point on a public road, alighted, walked directly to the place where officers had put "decoy tickets" beside a certain telephone pole in accordance with the custom of the "pick-up" man, and was apprehended as he was bending over. *Held:* While the evidence creates a strong suspicion of defendant's guilt it does not exclude the hypothesis that defendant's stopping and alighting at the place in question was to perform some innocent mission, and defendant's motion to nonsuit is allowed in the Supreme Court. G.S. 15-173.

APPEAL by defendant, Marvin Frank Smith, from *Patton, Special Judge,* and a jury, at May Term, 1952, of GUILFORD.

Criminal prosecution for conspiracy to violate lottery statutes and violation of lottery statutes.

For ease of narration, the appellant Marvin Frank Smith and his co-defendant Buster Peyton are called by their respective surnames.

Smith and Peyton were arraigned on a three-count indictment, and entered pleas of not guilty. The first count charged that they conspired with "divers other persons" to violate G.S. 14-290 and G.S. 14-291.1 by operating a lottery and selling lottery tickets; the second count charged

that they actually operated a lottery in violation of G.S. 14-290; and the third count charged that they actually sold lottery tickets in violation of G.S. 14-291.1.

The State called Luther Jarrell, Eugene Wattlington, and two police officers of the City of Greensboro to the stand as witnesses for the prosecution. Their testimony revealed these facts:

1. Jarrell and Wattlington participated in the operation of a "butter and egg lottery" in the City of Greensboro in the capacity of "pick-up" men.

2. Jarrell was hired by Peyton to assist in carrying on the lottery. Neither Jarrell nor Wattlington ever saw Smith, or ever had any personal contacts of any kind with him.

3. "In the operation of a butter and egg lottery, the 'pick-up' man goes to a certain place and picks up the tickets, and takes them to another place for somebody else to pick up."

4. Under the plan of operation, Jarrell picked up paper bags of lottery tickets at a church on the McConnell Road and carried them in his automobile to the intersection of Cedar Street and the Freeman Mill Road, where he deposited them beside certain telephone poles; and Wattlington picked up the paper bags of lottery tickets left by Jarrell at the intersection of Cedar Street and the Freeman Mill Road and transported them in his automobile to a point on the road leading from the High Point Road to Sedgefield, where he laid them down behind a road sign and a sapling.

5. Police officers of the City of Greensboro arrested both Jarrell and Wattlington on the night of 14 December, 1950, while they were attempting to perform their respective tasks.

6. Subsequent to these arrests, to wit, at 1:00 o'clock a.m. on 15 December, 1950, police officers of the City of Greensboro caused Wattlington to place a paper bag containing "decoy tickets," behind the road sign and the sapling beside the road leading from the High Point Road to Sedgefield, and stationed themselves in the darkness nearby.

7. Some thirty minutes later, Smith "drove up" alone in a Buick automobile, and "stopped . . . about even with the sign and sapling." He alighted, "walked . . . directly in front of the sign and sapling," and "started bending over . . . (or) leaning over . . . (or) reaching . . . over . . . towards the ground there." The police officers thereupon "caught hold of" Smith and placed him under arrest. Smith did not touch the bag of "decoy" tickets.

Smith offered nine witnesses who deposed to his good character. Neither he nor Peyton introduced any other evidence.

Both Smith and Peyton were convicted by the jury and sentenced by the judge on each of the three counts contained in the indictment.

Peyton abided by the judgment, but Smith excepted and appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

H. L. Koontz for defendant, Marvin Frank Smith, appellant.

ERVIN, J. The chief question presented by the assignments of error is whether the trial judge erred in overruling the motion of the appellant for a compulsory nonsuit.

There was no direct evidence at the trial tending to connect Smith with the crimes alleged. The State undertook to establish complicity on his part by these circumstances:

Wattlington, a participant in the crimes alleged, was accustomed to put paper bags containing lottery tickets behind a road sign and a sapling standing beside a public road in a rural district. At an early hour of the morning, Smith stopped his automobile at a point on the public road "about even with the sign and sapling," alighted, "walked directly in front of the sign and sapling," and started bending over, or leaning over, or reaching over towards the ground there." Smith was thereupon placed under arrest.

Circumstantial evidence will support a conviction when, and only when, the circumstances are sufficient to exclude every reasonable hypothesis except that of guilt. To meet this requirement, the circumstantial facts must be consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent. *S. v. Needham,* 235 N.C. 555, 71 S.E. 2d 29; *S. v. Jarrell,* 233 N.C. 741, 65 S.E. 2d 304; *S. v. Webb,* 233 N.C. 382, 64 S.E. 2d 268; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Graham,* 224 N.C. 347, 30 S. E. 2d 151; *S. v. Penry,* 220 N.C. 248, 17 S.E. 2d 4; *S. v. Jones,* 215 N.C. 660, 2 S.E. 2d 867; *S. v. English,* 214 N.C. 564, 199 S.E. 920; *S. v. Madden,* 212 N.C. 56, 192 S.E. 859; *S. v. Prince,* 182 N.C. 788, 108 S.E. 330; *S. v. Plyler,* 153 N.C. 630, 69 S.E. 269; *S. v. West,* 152 N.C. 832, 68 S.E. 14; *S. v. Wilcox,* 132 N.C. 1120, 44 S.E. 625; *S. v. Austin,* 129 N.C. 534, 40 S.E. 4; 23 C.J.S., Criminal Law, section 907.

The circumstantial facts put in evidence by the State are calculated to create a strong suspicion that the appellant visited the spot marked by the road sign and the sapling for the illegal purpose of securing lottery tickets. Yet they can certainly be reconciled with the theory that the appellant stopped his automobile on a public road and alighted from it to perform some innocent mission, and that his ensuing proximity to the

road sign and the sapling was wholly fortuitous in character. This being true, the circumstances are legally insufficient to exclude every reasonable hypothesis except that of the appellant's guilt, and the prosecution ought to have been dismissed as to him upon an involuntary nonsuit.

The circumstantial facts in the instant action bear a striking similarity to those in *S. v. Wilkerson,* 72 N.C. 376, where the defendant was indicted for stealing a hog. It was shown there that a hog belonging to the prosecutor had been killed and hidden under leaves in the corner of a fence, and that the defendant went to the place of concealment at night, looked around carefully as if looking for someone, stooped over the hog as if to take it up, and fled the scene on being hailed by the prosecutor, who had learned of the slaying and concealment of his hog and had stationed himself on watch nearby.

The Court held these circumstances insufficient to establish the guilt of the defendant.

For the reasons given, we vacate the conviction and sentence of the appellant, and sustain his motion for a compulsory nonsuit. Under the statute, this ruling is tantamount to a verdict of not guilty. G.S. 15-173.

This ruling may permit a violator of the law to go unwhipped of justice. If so, it does no violence to the basic concept of criminal justice epitomized in Sir William Blackstone's terse assertion that "it is better that ten guilty persons escape than that one innocent suffer." *S. v. Hendrick, supra.*

Reversed.

O. W. OAKLEY v. THE TEXAS COMPANY.

(Filed 6 January, 1953.)

1. Pleadings § 19c—

Upon demurrer, a pleading will be liberally construed in favor of the pleader.

2. Limitation of Actions § 6b—Action held for recurrent trespass and therefore not barred by statute of limitations.

Plaintiff instituted this action to recover damages to his land caused by the seeping of gasoline from defendant's underground storage tank. Defendant pleaded the statute of limitations because the action was not instituted within three years from the first injury alleged. By reply, plaintiff alleged that on three separate occasions defendant dug up and reinstalled the tank to stop the leakage, the last of which was within three years of the institution of the action. *Held:* Construing the reply liberally, it is sufficient to allege recurring acts of negligence or wrongful conduct, each causing a renewed injury to plaintiff's property, and therefore demurrer to the reply should have been overruled. G.S. 1-52 (3).

APPEAL by plaintiff from *Bone, J.*, July Term, 1952, of PERSON. Reversed.

Suit to recover damages for injury to plaintiff's real property caused by seepage of gasoline from defendant's pumps and tanks.

Plaintiff alleged that under a lease agreement entered into with defendant in 1946 defendant installed two gasoline pumps from which plaintiff dispensed gasoline to the public; that following an injury to one of the pumps it was reinstalled 15 November, 1948; that thereafter gasoline was observed in the water in plaintiff's well, plaintiff using the water from the well in his Sandwich Shop on the premises, and the water became undrinkable; that plaintiff notified defendant and efforts were made to repair the pump and prevent the escape of gasoline; that after many efforts to correct the trouble had failed and plaintiff had lost $370 worth of gasoline, plaintiff had to have another well dug far enough away not to be contaminated by the escaping gasoline; that the new well cost $652, and plaintiff lost trade in his Sandwich Shop and had to close it out.

Plaintiff alleged defendant was negligent in repairing and reinstalling defective equipment, and that defendant's negligence caused the losses of which plaintiff complains.

The defendant in its answer admitted the lease agreement, and that defendant at plaintiff's request made certain repairs to its pumps in November, 1948, but denied the allegations of negligence or fault on its part; and for a further defense set up the three years' statute of limitations, alleging that for more than three years before he instituted his suit plaintiff had actual knowledge of the facts alleged, and that his action is barred.

Plaintiff in reply alleged that following the reinstallation of the damaged pump in November, 1948, gasoline continued to seep from the pump, and that on or about 15 March, 1949, the defendant again repaired and reinstalled the pumps, and that in November, 1949, in an effort to correct the damage resulting from defective equipment, the defendant dug up the pumps and made substantial repairs and reinstalled the same; that the defendant, not having corrected the damage and being cognizant of the same, in March, 1950, again removed the tanks and pumps for repairs; that as a result of the repeated repairing and reinstalling of defective equipment plaintiff's well was contaminated and he was forced to dig another well in August, 1950.

Defendant demurred to plaintiff's reply on the ground that the plaintiff has not "set forth facts which would bring the institution of his action for the alleged cause of action set forth in his complaint within the statute of limitations."

The demurrer was sustained, and the plaintiff excepted and appealed.

Donald L. Dorey and R. B. Dawes for plaintiff, appellant.
Clem B. Holding for defendant, appellee.

DEVIN, C. J. The defendant did not demur to the complaint, but demurred to the reply as having failed to set forth facts sufficient, as against the plea of the statute of limitations, to show the action was instituted within the time limited.

The theory of the demurrer is that the complaint, though alleging the injury was due to defendant's negligence, sets out a case of continuing trespass, and that under the statute, G.S. 1-52 (3), the action therefor must have been commenced "within three years from the original trespass, and not thereafter"; that the plaintiff has fixed November, 1948, as the first injurious act, and his suit was not commenced until 4 January, 1952.

The defendant's position is that the complaint has described a continuous injury to his real property amounting in law to a trespass beginning 15 November, 1948, and that in attempting to reply to the plea of the statute in the answer plaintiff has failed to state facts which would show his action was brought within the statute.

Giving that liberal construction to the plaintiff's pleading that the rule in this jurisdiction requires (*Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874), we think the plaintiff has set out in his reply definite dates of alleged recurring acts of negligence or wrongful conduct on the part of the defendant in 1949 and 1950, each causing renewed injury to his property and culminating in the loss of his well and his sandwich business.

In *Sample v. Lumber Co.,* 150 N.C. 161, 63 S.E. 731, the plaintiff sued to recover damages for wrongful timber cutting. There was evidence that the cutting had begun more than three years before suit, and had been continuous. On the question of the statute of limitations the Court had this to say: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass and not thereafter; but this term, 'continuing trespass,' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some *quasi*-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of the wrong."

This statement of the law was quoted with approval in *Teeter v. Tel. Co.,* 172 N.C. 783, 90 S.E. 941, and *Ivester v. Winston-Salem,* 215 N.C. 1 (9), 1 S.E. 2d 88.

In *Anderson v. Waynesville,* 203 N.C. 37, 164 S.E. 583, it was said: "The injury resulting from a nuisance or a trespass upon real property is continuous in its nature and gives successive causes of action as successive injuries are perpetrated. Continuous injuries caused by the maintenance of a nuisance are barred only by the running of the statute against the recurrent trespasses." See also *Perry v. R. R.,* 171 N.C. 38, 87 S.E. 948; *Lightner v. Raleigh,* 206 N.C. 496 (504), 174 S.E. 272; 34 A.J. 106; 54 C.J.S. 127.

There was error in sustaining the defendant's demurrer to the reply. Judgment reversed.

MILTON WARSHAW v. RUTH A. WARSHAW.

(Filed 6 January, 1953.)

1. Appeal and Error § 31g—

Where the record does not contain any paper relative to service and no stipulation in respect thereto, and no pleading save the answer, the appeal must be dismissed. Rule of Practice in the Supreme Court 19.

2. Appeal and Error § 20a—

The rules of the Supreme Court governing appeals are mandatory and not directory, and must be universally enforced.

3. Trial § 5—

Trial prior to the expiration of the time for filing answer is at least a material irregularity, since the cause is not then at issue.

4. Appeal and Error § 6c (3)—

An exception to the signing of the judgment and to the "findings of fact" is a broadside exception which merely challenges the sufficiency of the facts found to support the judgment.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Nimocks, J.,* March Term, 1952, CUMBERLAND. Affirmed.

Civil action for divorce heard on motion to vacate judgment.

Plaintiff instituted this action 25 August 1948 against defendant, a nonresident. He undertook to serve summons by publication. No answer was filed and the cause was tried and a decree of divorce entered at the term of court beginning 25 October 1948. On 12 July 1949 defendant moved before the clerk that the cause be reopened to permit her to make a general appearance and file answer. The clerk entered an order which was later vacated by the judge. Details in respect thereto are not material on this appeal. An answer was filed.

On 29 December 1951 defendant filed a motion to vacate the original decree of divorce. The motion was in part on the ground the decree had been entered prior to any valid service of summons. The facts in respect thereto as found by the court below and as disclosed by the record are these: Summons herein was issued 30 August 1948 and was returned unserved for the reason defendant was a nonresident and could not be found within this State. On 30 August 1948 plaintiff filed his affidavit to obtain service by publication. On the same day the clerk entered his order authorizing and directing substitute service of summons. Notice of the action was duly published. This notice required defendant to appear on 1 October 1948 and answer or demur within thirty days thereafter as required by statute. The notice failed to designate the place where defendant was required to appear or what she was required to answer. (The facts in respect to service by publication appear in an affidavit filed by defendant.) The cause was tried and the original decree was entered at a term of court which convened 25 October 1948. The plaintiff made a "special appearance" and moved to dismiss the motion for that the court was without jurisdiction of the parties or the cause of action. He likewise demurred on the grounds set out in his written demurrer which appears of record.

The court below, after finding the essential facts, adjudged "that the divorce decree rendered at said October 1948 Term be, and it is hereby set aside, vacated and declared void in all respects." Plaintiff excepted and appealed.

Malcolm McQueen for plaintiff appellant.

Robert H. Dye for defendant appellee.

BARNHILL, J. The record in this cause does not include the summons, the affidavit for publication, the order for service by publication, or the notice of the action as published. Nor does it contain any of the pleadings save and except an answer filed by defendant after the final decree of divorce was entered. There is no stipulation of record in respect to the service of summons. These defects in the record necessitate a dismissal of the appeal. Rule 19, Rules of Practice in the Supreme Court, 221 N.C. 553; *Plott v. Construction Co.*, 198 N.C. 782, 153 S.E. 396; *Waters v. Waters*, 199 N.C. 667, 155 S.E. 564; *Riggan v. Harrison*, 203 N.C. 191, 165 S.E. 358; *Insurance Co. v. Bullard*, 207 N.C. 652, 178 S.E. 113; *Goodman v. Goodman*, 208 N.C. 416, 181 S.E. 328; *Bank v. McCullers*, 211 N.C. 327, 190 S.E. 217; *Ericson v. Ericson*, 226 N.C. 474, 38 S.E. 2d 517.

The rules of this Court governing appeals are mandatory and not directory. *Calvert v. Carstarphen*, 133 N.C. 25; *Pruitt v. Wood*, 199

N.C. 788, 156 S.E. 126, and cases cited. To assure uniformity of treatment they must be universally enforced. *Stone v. Ledbetter,* 191 N.C. 777, 133 S.E. 162; *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335.

We may note that this disposition of the appeal deprives the plaintiff of no substantial right. The original cause was tried before the time for answer had expired. It was not then at issue. Whether the decree entered on the verdict is void we are not presently required to decide. Suffice it to say there was at least material irregularity in the proceeding.

Furthermore, the only exception is to the signing of the judgment and to "findings of fact." This is a broadside exception which merely challenges the sufficiency of the facts found to support the judgment entered. *Vestal v. Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427.

Incidentally, the record presents a somewhat novel situation. The plaintiff insists that the original decree is valid and should be sustained. At the same time he asserts that the court below erred in failing to rule on his demurrer for that the court is without jurisdiction of the parties or the cause of action.

The defendant has now made a general appearance and filed answer. Thus she has submitted herself to the jurisdiction of the court. The cause will remain on the civil issue docket and the plaintiff may proceed to trial if he is so advised.

Appeal dismissed.

PARKER, J., took no part in the consideration or decision of this case.

E. WORTH JEFFRIES AND WIFE, RUBY JEFFRIES, v. JOSEPH PARKER.

(Filed 6 January, 1953.)

Deeds § 13a—

Where the granting clause conveys an unqualified fee and the *habendum* contains no limitation thereon, and grantor warrants a fee simple title, *held* a provision following the description stating that if one of the grantees died before disposing of his interest, his share should go to the other grantee, is deemed mere surplusage without force and effect as being repugnant to the fee.

APPEAL by defendant from *Carr, J.,* in Chambers, 13 September 1952, ALAMANCE.

Civil action to enforce specific performance of a contract to purchase real property.

On 21 January 1919, Mary J. Jeffries conveyed the *locus* to E. Worth Jeffries and James H. Jeffries by deed of record in Alamance County. E. Worth Jeffries and James H. Jeffries are named as parties of the second part in the premises. The granting clause is "to said E. Worth Jeffries and James H. Jeffries, their heirs . . ." In the *habendum* the grantor defines the estate conveyed as "the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said E. Worth Jeffries and James H. Jeffries, their heirs and assigns, to their only use and behoof forever." And the grantor covenants "with said E. Worth Jeffries and James H. Jeffries, their heirs and assigns, that she will warrant and defend the said title to the same against the lawful claims of all persons whomsoever."

The paragraph describing the property contains the following at the end, and as a part, thereof: "It is understood that in case of the death of James H. Jeffries before he otherwise disposes of his part of this land, that his share is to be the property of E. Worth Jeffries in fee simple, subject to the dower right of James H. Jeffries wife, Mandy Jeffries." Mandy Jeffries predeceased James H. Jeffries.

On 21 March 1942, James H. Jeffries died intestate, leaving surviving certain collateral heirs. At the time of his death he had not disposed of or conveyed his interest in said land.

On 28 April 1951, E. Worth Jeffries and wife contracted to sell to defendant, and defendant contracted to buy, said property at the price of $10,000. The contract contemplated that the grantor should convey a good and sufficient marketable title in fee. Defendant declined to comply with the contract for the reason plaintiffs are not possessed of and cannot convey a fee simple title to the property.

When the cause came on for hearing in the court below, the court, being of opinion that said deed "vested in James H. Jeffries a defeasible fee subjected to be defeated upon his having not disposed of same prior to his death and in which event the said title vested in the survivor, E. Worth Jeffries, and the said E. Worth Jeffries now holds an absolute fee simple title to the said property," entered judgment decreeing specific performance. Defendant excepted and appealed.

Long & Ross and Thomas C. Carter for plaintiff appellees.
Louis C. Allen for defendant appellant.

BARNHILL, J. When the granting clause in a deed to real property conveys an unqualified fee and the *habendum* contains no limitation on the fee thus conveyed and a fee simple title is warranted in the covenants of title, any additional clause or provision repugnant thereto and not by reference made a part thereof, inserted in the instrument as a part of,

or following the description of the property conveyed, or elsewhere other than in the granting or *habendum* clause, which tends to delimit the estate thus conveyed, will be deemed mere surplusage without force or effect. *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228, and cases cited; *Kennedy v. Kennedy,* 236 N.C. 419; *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *McNeill v. Blevins,* 222 N.C. 170, 22 S.E. 2d 268. This is now settled law in this jurisdiction. *Krites v. Plott,* 222 N.C. 679, 24 S.E. 2d 531, and *Jefferson v. Jefferson,* 219 N.C. 333, 13 S.E. 2d 745, to the extent they conflict with this conclusion, have been overruled.

The question has been ably and comprehensively discussed in the recent decisions of this Court herein cited. Further discussion at this time would add nothing that might be of material assistance to those for whose benefit our decisions are reduced to writing. Suffice it to say therefore, that the line of decisions represented by *Artis v. Artis, supra,* to which we adhere, compels the reversal of the judgment entered in the court below.

Reversed.

COMMERCIAL FINANCE COMPANY v. LUELLA R. CULLER AND HOOTS MOTOR COMPANY.

(Filed 6 January, 1953.)

Reference § 3—

An action on a note given to finance an automobile, in which all payments alleged by defendant are admitted by plaintiff, does not involve a long account with charges and discharges as contemplated in G.S. 1-189 and is not subject to compulsory reference notwithstanding further counterclaims for usury and damage for the mortgagee's alleged breach of his agreement to procure insurance on the car.

APPEAL by defendant Luella R. Culler from *Rousseau, J.,* April Term, 1952, of FORSYTH.

The plaintiff instituted this action to recover the sum of $362.65 alleged to be due and owing to the plaintiff as the holder of a note executed by the defendant Luella R. Culler to the plaintiff on 28 December, 1950, in the sum of $638.50, and secured by a chattel mortgage of even date, on a 1947 Kaiser Fordor Sedan. Demand for payment of the note is alleged to have been made and refused. A writ of claim and delivery was issued at the time of the institution of the action for the possession of the automobile described in the chattel mortgage, but the car being in the possession of the defendant Hoots Motor Company as bailee of the defendant Luella R. Culler, the possession thereof has not been taken under the writ.

According to the allegations of the answer filed by the defendant Luella R. Culler, she purchased a Kaiser automobile on or about the 27th day

of July, 1949, and in order to complete the transaction she obtained a loan of $900.00 from the plaintiff. She alleges that she executed her note, secured by a chattel mortgage, on the automobile in the sum of $1,340.85 to the plaintiff; that it was understood and agreed that the sum of $440.85 included in the note was for carrying charges over a period of 21 months, including a $75.00 deductible insurance policy on the automobile to protect her against loss in the event the automobile became damaged as a consequence of any collision or traffic accident.

It is admitted that the appellant borrowed an additional $100.00 from the plaintiff on 28 December, 1950, but she denies the execution of any agreement at that time or any other time to pay the plaintiff the sum of $638.50, or that she signed any chattel mortgage on said date. She alleges, however, that on 28 December, 1950, she was again advised that the insurance on her car was in full force and that the policy thereon would expire 27 May, 1951; that the defendant's car was in a collision on or about 17 March, 1951 and damaged to the extent of $440.00; that the plaintiff was promptly informed of the collision and requested to notify the insurance company; that the plaintiff then advised her that no insurance had been obtained on her car and none was in force at the time of the collision, and that her loss was not covered in any way.

The appellant denies that she is indebted to the plaintiff in any amount, and by way of further answer, setoff, and counterclaim pleads certain payments, giving the date and amount of each, totaling $960.50, and the plaintiff in its reply admits the receipt of such payments. The appellant set up a claim for damages in the sum of $440.00, resulting from the failure of the plaintiff to have her car covered by insurance in accord with the alleged agreement, and a claim for usury charged and collected in the amount of $388.00, and prays the court for judgment against the plaintiff for $440.00 in compensatory damages; for $388.00 for usury, and punitive damages in the sum of $10,000.

During the progress of the trial, the court, on its own motion, entered an order of compulsory reference as to all issues raised by the pleadings, both of fact and law, on the ground that the controversy "requires the examination of long accounts and a series of transactions between the parties, and that the controversy is so involved that it cannot be readily presented to a jury."

The defendant Luella R. Culler appeals and assigns error.

William S. Mitchell for plaintiff, appellee.
Eugene H. Phillips for defendant, appellant.

DENNY, J. A compulsory reference is not authorized on the ground that the trial requires the examination of long accounts in an action

instituted to recover on a promissory note or an account where the receipt of each and every payment alleged to have been made thereon is admitted. *Acceptance Corp. v. Pillman,* 235 N.C. 295, 69 S.E. 2d 563; *Lee v. Thornton,* 176 N.C. 208, 97 S.E. 23; *Peyton v. Shoe Co.,* 167 N.C. 280, 83 S.E. 487; *Hall v. Craige,* 65 N.C. 51. Where numerous payments on an indebtedness have been made, the case involves only a matter of computation of figures and has none of the elements of a long account with charges and discharges, as contemplated in the statute which provides for a compulsory reference. *Hall v. Craige, supra.*

It is true that by reason of the counterclaims for usury and damages as set forth in the pleadings, this action is somewhat complicated, but these additional matters do not raise questions which may be referred under an order of compulsory reference within the purview of G.S. 1-189.

The order of compulsory reference entered below is set aside and the cause remanded for trial by jury unless otherwise disposed of by consent of the parties.

Reversed.

ELVIN AIKEN v. JAMES L. SANDERFORD AND JOHN F. SANDERFORD, TRADING AND DOING BUSINESS AS SANDERFORD FUEL SERVICE.

(Filed 6 January, 1953.)

1. Automobiles §§ 24½a, 24½c—

G.S. 20-71.1 is not applicable to an action not brought within one year after the cause of action accrues.

2. Same—

In order to hold the owner of a vehicle liable under the doctrine of *respondeat superior,* plaintiff must allege and prove that the driver was guilty of negligence constituting a proximate cause of the injury and that the relationship of master and servant existed between the owner and the driver at the time of and in respect to the transaction out of which the injury arose.

3. Automobiles § 24½a—

Complaint alleging in effect that defendants owned the vehicle in question and that it was negligently operated by one of their drivers fails to state a cause of action against the owners under the doctrine of *respondeat superior,* it being required that it be alleged that the driver was at the time acting within the scope of his employment.

4. Appeal and Error § 37—

Failure of plaintiff to state a cause of action may be raised by a party in his brief on appeal, or the Supreme Court may take cognizance thereof *ex mero motu.*

5. Pleadings § 24c—

Probata without *allegata* is unavailing.

APPEAL by plaintiff from *Bone, J.*, October Term, 1952, of GRANVILLE.

Civil action to recover damages for injury to plaintiff's automobile alleged to have been caused by the actionable negligence of the defendants. At the close of the plaintiff's evidence the defendants' motion for judgment of nonsuit was allowed. From the judgment based on such ruling the plaintiff appealed, assigning error. Affirmed.

J. Grover Lee for plaintiff, appellant.

Hugh M. Currin for defendant, appellee.

PARKER, J. On 8 December, 1950, about 1:30 p.m., the plaintiff's wife was operating his automobile on Fleming Street in the Town of Creedmoor, traveling east at around 20 or 25 miles an hour on the right side of the street. Fleming Street runs east and west. The defendants had a fuel station on the south side of this street. On the west side of this station was a driveway. The plaintiff's wife saw a pickup truck loaded with coal standing in the driveway. About the time she drove by the driveway, this truck backed out into the street, and there was a collision between it and the plaintiff's automobile causing damage to both. The driver of the truck was Charlie Moss. The truck belonged to the defendants. The plaintiff commenced his action on 15 December, 1951.

The only allegation in the complaint as to the relationship of the driver of the truck to the defendants appears in paragraph 5, as follows: "one Ford truck owned by the defendants loaded with coal and being operated by one of the drivers of the defendants, whose name, so this plaintiff is informed, was Charlie Moss." The plaintiff filed no amended complaint or reply.

G.S. 20-71.1 entitled in part "Ownership evidence of defendant's responsibility for conduct of operation" is not applicable as the plaintiff did not bring his action within one year after his cause of action accrued.

To avoid a compulsory nonsuit it is requisite for the plaintiff to allege and offer evidence tending to show three things: (1) that Moss was negligent; (2) that the negligence of Moss was the proximate cause of the injury to the plaintiff's automobile; and (3) that the relation of master and servant existed between the defendants and Moss at the time of the injury, and in respect to the transaction out of which the injury arose. *Hoover v. Indemnity Co.*, 206 N.C. 468, 174 S.E. 308; 35 Am. Jur., Master and Servant, Sec. 593, p. 1032; *Carter v. Motor Lines,* 227

N.C. 193, 41 S.E. 2d 586; *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757.

We have examined the complaint in *Hoover v. Indemnity Co.*, 206 N.C. 468, 174 S.E. 308, and this is the allegation in respect to the agent and the defendant: Paragraph 5 "That during said period of treatment the defendant, through and by means of its duly constituted servant and agent, one P. B. Clark, whom this plaintiff is informed, believes and so alleges was its claim adjuster and general agent to direct and control such cases as may develop against the defendant, Globe Indemnity Company, under the North Carolina Workmen's Compensation Act, assumed and took absolute and complete physical control of the plaintiff's intestate against his wishes, etc." In that case *Mr. Justice Connor* speaking for the court in reversing the overruling of a demurrer said: "Conceding, without deciding, that the facts alleged in the complaint are sufficient to constitute a cause of action in favor of the plaintiff and against the agent of the defendant, and that the Superior Court of Gaston County would have jurisdiction of an action instituted by the plaintiff against said agent to recover on such cause of action, we are of the opinion that the facts alleged in the complaint are not sufficient to constitute a cause of action against the defendant. It does not appear from the complaint, construed most liberally in favor of the plaintiff, that the wrongful act of its agent was within the scope of his employment by the defendant, or that such act was authorized or ratified by the defendant."

The defendant in his brief has raised the point that in his complaint the plaintiff has failed to allege that Charlie Moss, the driver of the defendants' truck, was acting within the scope of his employment. If the defendants had not raised the point, we would do so *ex mero motu.* McIntosh, North Carolina Practice and Procedure, Section 436, page 447, citing *McDougald v. Graham,* 75 N.C. 310; *Tucker v. Baker,* 86 N.C. 1; *Garrison v. Williams,* 150 N.C. 674, 64 S.E. 783. The last cited case has been cited and approved in *Snipes v. Monds,* 190 N.C. 190, 129 S.E. 413; *Seawell v. Cole,* 194 N.C. 546, 140 S.E. 85; *Key v. Chair Co.,* 199 N.C. 794, 156 S.E. 135; *Watson v. Lee County,* 224 N.C. 508, 31 S.E. 2d 535, and in *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336. See also *Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644.

The complaint most liberally construed fails to allege that Charlie Moss was an agent of the defendants at the time and in respect to the transaction out of which the injury to plaintiff's automobile arose. *Probata* without *allegata* is insufficient. Both must concur to establish a cause of action. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14.

The judgment of nonsuit of the court below is

Affirmed.

HAZEL WOOD CROUSE v. FLOYD M. CROUSE.

(Filed 6 January, 1953.)

1. Appeal and Error § 39e—

Where the record fails to show what testimony the witness would have given had she been permitted to answer the question, the exclusion of the testimony cannot be held prejudicial.

2. Divorce and Alimony § 14—

Nonsuit *held* proper in this action for alimony without divorce because of failure of evidence to support the allegations of the complaint setting forth the cause of action.

APPEAL by plaintiff from *Crisp, Special Judge,* at May Term, 1952, of ALAMANCE.

Action by wife against husband for alimony without divorce under G.S. 50-16.

The complaint alleges as grounds for the plaintiff's right to maintain her suit that her husband, the defendant, separated himself from her and failed to provide her with the necessary subsistence according to his means and condition in life; that the defendant maliciously turned her out of doors; and that the defendant offered such indignities to her person as to render her condition intolerable and her life burdensome. The action was tried before Judge Crisp and a jury at the May Term, 1952, of the Superior Court of Alamance County. When the plaintiff had introduced her evidence and rested her case, the defendant moved to dismiss the action upon a compulsory nonsuit, and the court allowed the motion and entered judgment accordingly. The plaintiff excepted and appealed.

H. Clay Hemric for plaintiff, appellant.

J. Elmer Long and Clarence Ross for defendant, appellee.

PER CURIAM. The plaintiff's counsel propounded this question to her on her re-direct examination: "Will you tell the jury about that?" The court sustained the defendant's objection to the question, and the plaintiff noted an exception to this ruling. This exception presents nothing for review because the case on appeal does not show what testimony the plaintiff would have given had she been permitted to answer the question. *Lipe v. Bank, ante,* 328, 72 S.E. 2d 759. The remaining exceptions are addressed to the entry of the compulsory nonsuit, and are untenable because the evidence adduced by the plaintiff at the trial was insufficient to prove the allegations of her complaint.

Judgment affirmed.

RAY R. AMOS v. SOUTHERN RAILWAY COMPANY, ATLANTIC & YADKIN RAILWAY COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY.

(Filed 6 January, 1953.)

Appeal and Error § 50½—

Where the identical question sought to be presented by the appeal is pending before the Supreme Court of the United States and its decision thereon will be binding upon our Court, the cause will be retained.

APPEAL by plaintiff from *Patton, Special Judge,* October Term, 1952, of FORSYTH.

This is an action to recover for personal injuries alleged to have been sustained by the plaintiff on 16 April, 1949, while in the employment of the defendants. The accident occurred in Stokes County, North Carolina.

On 14 December, 1951, the plaintiff instituted an action against the Southern Railway Company in the Circuit Court of the City of St. Louis, Missouri, to recover for his alleged injuries under the provisions of the Federal Employers' Liability Act. The Southern Railway Company answered, denying that the plaintiff was its employee and pleaded a release theretofore given to the Atlantic & Yadkin Railway Company and the Norfolk & Western Railway Company. The action is still pending in the Missouri court. Thereafter, on 15 April, 1952, the plaintiff instituted this suit on the same cause of action in the Superior Court of Forsyth County, North Carolina, seeking to recover under the provisions of the Federal Employers' Liability Act from the three defendants named herein.

The Southern Railway Company filed a petition in the cause in the Superior Court of Forsyth County, praying that the plaintiff be enjoined from further prosecuting the Missouri action. The court heard the matter, found the facts set out in the order, and permanently enjoined the plaintiff from any further prosecution of the Missouri suit. The plaintiff appealed from the order, assigning error.

Elledge & Johnson for plaintiff, appellant.

Womble, Carlyle, Martin & Sandridge for defendant, Southern Railway Company, appellee.

PER CURIAM. The Supreme Court of the United States has granted a petition for writ of *certiorari* in the case of *Atlantic Coast Line R. Co. v. Pope,* 209 Ga. 187, 71 S.E. 2d 243, and the case is now calendared for argument in that Court. The case involves the identical question presented for decision on this appeal. And since we will be bound by the

decision of the Supreme Court of the United States on the question, we are withholding disposition of this appeal until the Supreme Court of the United States renders its decision in the above case.

Cause retained.

APPENDIX.

CHAMBERS v. CHAMBERS.

(Filed 22 August, 1952.)

1. Evidence § 35—

The introduction in evidence of the official will book from the clerk's office containing the instrument in question raises the presumption that the will had been duly proven.

2. Adverse Possession § 9a—

Where title to land has been acquired by another prior to the execution of a will, a devise in the will of "the remainder of all my property consisting of real estate" without any particular description of the *locus* does not raise any presumption that testator intended to devise the *locus* and, nothing else appearing, the will is not color of title in favor of the named devisee.

3. Appeal and Error § 43—

Where the matter pointed out in a petition for rehearing is insufficient to alter the result, the petition will be denied.

PETITION by defendants to rehear this case reported in 235 N.C. 749.

The Justices to whom the petition was referred filed the following memorandum in passing upon the petition.

Fuller, Reade, Umstead & Fuller and B. I. Satterfield for petitioners.

DEVIN, C. J., and JOHNSON, J., considering the petition to rehear.

The only question raised by the petition to rehear was whether there was evidence offered in the trial which would have warranted submission of an issue, tendered by defendants, of adverse possession of the land under color by Garland Chambers and his children.

In affirming the decision below on this point the opinion of this Court proceeded on the view that the record did not show that the will of John E. Chambers had been probated or was offered in evidence (235 N.C. 751).

The printed record of the "purported" will does not show that it was ever proven as John E. Chambers' will, but on page 47 of the record it does appear the defendants, without objection, offered in evidence "what purports to be the last will and testament of John E. Chambers recorded in Book 21 of Wills at page 243." This purported will was inserted in the Record as Exhibit C.

As the will was offered from the record in the official Will Book from the clerk's office, the presumption would arise that the will had been duly proven.

However, an examination of the will discloses that in paragraph 1 the testator devised to the children of his daughter Lula "113 acres known as the Franklin land" (eastern half); and in paragraph 5 he devised to

Garland Chambers "the remainder of all my property consisting of real estate," and all personal property.

There was no particular description of the Joe Chambers land (the land in controversy), and as Joe Chambers had acquired title to the land by adverse possession before the will was written as found by the jury (and affirmed by this Court), it would not be presumed the testator intended to devise under the designation "all my property" land of which he had been divested, unless he had described the Joe Chambers land by particular description (*Elmore v. Byrd,* 180 N.C. 120). And nothing else appearing, the indefinite description of "all my property" would not constitute color of title to the Joe Chambers land and serve to vest title in Garland Chambers after 7 years adverse possession. It would take 20 years, which defendants could not show.

For the reasons stated, the petition to rehear is denied.

DAVIS v. JENKINS.

(Filed 6 January, 1953.)

PETITION to rehear case reported *ante,* 283.

F. T. Hall and P. H. Bell for plaintiff.
Thorp & Thorp for defendants.

DEVIN, C. J. Petition to rehear was "allowed only for the purpose of amplification of the order remanding the cause for further proceeding."

In the decision of this Court filed 8 October, 1952, and reported in *ante,* 283, it was held on the facts therein set out that sale and deed attacked were voidable, and it was ordered that the judgment of nonsuit be stricken out and the cause remanded for further proceedings as might be necessary to determine and administer the rights of all interested parties. By this order it was not intended to foreclose the defendants from submitting to the Superior Court on another trial the defenses set up in their answer, nor may the opinion heretofore filed and reported be understood as denying to the defendants right to trial by jury of the issues raised by the pleadings.

With this amplification the petition to rehear is denied.

Petition denied.

A.B.C. Act—See Intoxicating Liquor.

Abandonment—As ground for alimony without divorce, *Caddell v. Caddell*, 686.

Abatement—Of nuisances, see Injunctions.

Abatement and Revival—Pendency of prior action, *McDowell v. Blythe Brothers Co.*, 396; *Allen v. McDowell*, 373.

Acceleration of Remainder—Upon widow's dissent from will, *Trust Co. v. Johnson*, 594; *Bank v. Easterby*, 599.

Acquittal—withholding of count from jury amounts to acquittal thereon, *S. v. Love*, 344.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 5½. Abatement for Pendency of Prior Action in General.

The pendency of a prior action between the same parties for the same cause of action in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having jurisdiction. *McDowell v. Blythe Brothers Co.*, 396.

§ 6. Procedure to Raise Question of Pendency of Prior Action.

The pendency of a prior action between the same parties for the same cause of action may be taken advantage of by demurrer when the fact of such pendency appears on the face of the complaint, G.S. 1-127; but must be raised by answer when the fact of the pendency of the prior action does not appear on the face of the complaint. *McDowell v. Blythe Brothers Co.*, 396.

Where the complaint alleges that defendant had instituted another action against plaintiff in another county on the same cause of action, but specifically alleges that such other action was instituted "after this suit had been instituted," demurrer for pendency of the other action is properly denied, since it does not appear from the face of the complaint that such other action was first instituted, nor may the priority of such other action be established by facts alleged in the demurrer. *Ibid.*

§ 7. Priority of Institution of Actions and Time From Which Action Is Pending.

An action is pending for the purpose of abating a subsequent action between the same parties for the same cause of action from the time of the issuance of the summons. *McDowell v. Blythe Brothers Co.*, 396.

§ 8. Abatement for Pendency of Prior Action—Termination of Prior Action.

Where voluntary nonsuit is taken in a prior action subsequent to the filing of answer in the second action but prior to the hearing of motion to abate contained therein, the motion to abate on the ground of the pendency of the prior action is properly denied. *Allen v. McDowell*, 373.

Prior action is pending until it is determined by final judgment. *McDowell v. Blythe Brothers Co.*, 396.

ACTIONS.

§ 3a. Moot Questions and Adversary Proceedings.

Suit to determine validity of proposed municipal bonds will be treated as adversary proceeding regardless of stipulations of parties. *Britt v. Wilmington*, 446.

§ 9. Time From Which Action Is Pending.

An action is pending from the time it is commenced, and an action is commenced by issuance of summons. *Spencer v. Motor Co.*, 239.

ADMINISTRATIVE LAW.

§ 6. Review of Orders of Administrative Agencies.

The courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable or arbitrary action, or disregard of law. *Utilities Com. v. Ray*, 692.

ADVERSE POSSESSION.

§ 3. Hostile and Exclusive Possession in General.

Where a grantee goes into possession of the tract of land conveyed and also a contiguous tract under the mistaken belief that the contiguous tract was included within the description in his deed, *held* no act of such grantee, however exclusive, open and notorious will constitute adverse possession of the contiguous tract so long as he thinks his deed covers the contiguous tract, since there is no intent on his part to claim adverse to the true owner. *Price v. Whisnant*, 381.

In order for possession to be adverse, claimant must hold openly, notoriously, and continuously under known and visible lines and boundaries by making such use of the land of which it is naturally susceptible continuously in the character of owner so as to make him subject to an action in ejectment, and occasional acts of ownership which are unaccompanied by a continuous possession of public notoriety and which amount to no more than separate and unconnected trespasses, is insufficient. *Ibid.*

§ 5. Necessity of Claim Under Known and Visible Lines and Boundaries.

Claimant by adverse possession must show possession of a definite area of land which can be located within certain and identifiable boundaries. *Carswell v. Morganton*, 375.

§ 9a. What Constitutes Color of Title.

Where title to land has been acquired by another prior to the execution of a will, a devise in the will of "the remainder of all my property consisting of real estate" without any particular description of the *locus* does not raise any presumption that testator intended to devise the *locus* and, nothing else appearing, the will is not color of title in favor of the named devisee. *Chambers v. Chambers*, 766.

§ 9b. Presumptive Possession to Outermost Boundaries.

Presumptive possession to the outermost boundaries of a tract of land can arise only when claimant goes into possession under color of title, and in the absence of color the possessor cannot acquire title to any greater amount of land than that which he actually occupies for the statutory period. *Carswell v. Morganton*, 375.

§ 19. Sufficiency of Evidence and Nonsuit.

Plaintiff claimed that his predecessor in title went into possession of two tracts of land through a tenant who possessed both tracts of land for at least twenty years without color of title. Plaintiff's evidence tended to show that the tenant actually occupied only a few acres of one of the tracts, without evidence tending to describe, identify, or locate the particular land actually occupied. *Held:* Nonsuit was properly entered. *Carswell v. Morganton*, 375.

Evidence tending only to show intermittent trespasses is insufficient to be submitted to jury. *Price v. Whisnant*, 381.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

The Supreme Court will overlook nonfatal deficiencies in the record in order to exercise its existing jurisdiction at the first opportunity when the appeal presents a grave problem of general public concern. *S. v. Scoggin*, 1.

APPEAL AND ERROR—*Continued.*

As a general rule, an appellate court will not grant relief to a party who has not appealed or complained of the judgment. *Surety Corp. v. Sharpe*, 35.

Even where an appeal is dismissed as premature, the Supreme Court may exercise its discretionary power to express an opinion upon the question sought to be presented. *Burgess v. Trevathan*, 157.

Where an appeal is dismissed, the Supreme Court in its discretion may nevertheless discuss the question sought to be presented. *Peace v. High Point*, 619.

The Supreme Court is limited to a review of alleged error of law upon appeal. *Langley v. Langley*, 184.

The function of the Supreme Court is to review proceedings upon appeal for alleged errors, and where the trial court makes no ruling upon a particular question, the Supreme Court may not make any ruling thereon. *Greene v. Spivey*, 435.

Failure of plaintiff to state a cause of action may be raised by a party in his brief on appeal, or the Supreme Court may take cognizance thereof *ex mero motu*. *Aiken v. Sanderford*, 760.

§ 2. Judgments Appealable.

Ordinarily, an appeal from an order allowing a motion for the joinder of an additional party will be dismissed as fragmentary and premature. *Burgess v. Trevathan*, 157.

But in employee's action against third person tort-feasor, order joining employer affects substantial right and is appealable. *Lovette v. Lloyd*, 663.

Denial of motion for judgment on pleadings is not appealable before verdict. *Garrett v. Rose*, 299.

An immediate appeal lies from the granting of a motion to strike out certain parts of a pleading. *Ibid.*

No appeal lies from denial of motion to be permitted to introduce evidence after judgment. *New Hanover County v. Holmes* 565.

An order overruling a demurrer *ore tenus* is not appealable. *Morgan v. Oil Co.*, 615.

An appeal from the refusal of the court to dismiss the action is premature. *Peace v. High Point*, 619.

§ 6c (2). Exception to Judgment or Signing of Judgment.

A general exception to the judgment or the signing of the judgment presents for review the sole question of whether the facts found support the judgment. *In re Sams*, 228.

An exception to the judgment is sufficient to raise the question of whether the facts embodied in the case agreed support the judgment. *Atkins v. Fortner*, 265.

An exception and assignment of error to the judgment presents the sole question whether the facts found by the judge support the judgment. *Medical College v. Maynard*, 506.

Failure of proper case on appeal limits review to whether judgment is supported by facts found. *Whitley v. Caddell*, 516.

§ 6c (3). Exceptions to Findings of Fact.

An exception to the "findings of fact as set forth in the judgment" is a broadside exception and is insufficient to challenge the sufficiency of the evidence to support the findings or any one of them. *In re Sams*, 228.

APPEAL AND ERROR—*Continued.*

An exception to the signing of the judgment and to the "findings of fact" is a broadside exception which merely challenges the sufficiency of the facts found to support the judgment. *Warshaw v. Warshaw*, 754.

§ 6c (5). Form and Sufficiency of Exceptions to Charge.

An exception to the charge on the ground that it "did not give the contentions of the plaintiffs with equal dignity with those of defendant" as required by G.S. 1-180 *held* ineffectual as a broadside exception in that it fails to point out any particular contention or series of contentions given or omitted by the court as the basis for the exception. *Poniros v. Teer Co.*, 144.

An exception to a portion of the charge containing statements of a number of propositions without specifying any particular statement in the charge as erroneous cannot be sustained if any one of the statements is correct. *Powell v. Daniel*, 489.

§ 6c (6). Requirement That Error in Charge Be Brought to Court's Attention in Apt Time.

While error in the statement of the law or the contentions of the parties in respect to the law need not be called to the trial court's attention at the time, misstatement of the contentions of the parties in respect to the evidence must be called to the court's attention in apt time in order to be considered on appeal. *Powell v. Daniel*, 489.

Asserted inaccuracies in the court's statement of the contentions of the parties must be brought to the trial court's attention in apt time to afford opportunity for correction in order to be considered on appeal. *In re Will of Kemp*, 680.

§ 8. Theory of Trial in Lower Court.

An appeal will be determined in accordance with theory of trial in lower court. *Caddell v. Caddell*, 686.

§ 10a. Necessity for Case on Appeal.

A "case on appeal" is not necessary where the record proper contains case agreed which is equivalent to a special verdict. *Atkins v. Fortner*, 264.

§ 10e. Settlement of Case on Appeal.

Where oral evidence is offered, the trial court may not settle case on appeal by anticipatory order. *Whitley v. Caddell*, 516.

§ 11. Appeal Bonds and Costs.

The cost of preparing the transcription of the record is a part of the costs in the Supreme Court, and the judge of the Superior Court upon the subsequent trial is without jurisdiction to entertain motion for the recovery of such costs. *Ward v. Cruse*, 400.

"The cost of making up the transcription on appeal" refers only to the cost of transcribing the judgment roll and case on appeal which the clerk of the Superior Court is required to certify to the clerk of the Supreme Court, G.S. 1-284, and an amount expended for a transcription of the testimony preliminary to preparing and serving appellant's case on appeal constitutes no part of this cost. *Ibid.*

APPEAL AND ERROR—*Continued.*

§ 14. Jurisdiction and Proceedings in Superior Court After Appeal.

An appeal deprives the Superior Court of jurisdiction of all matters involved in the appeal from the time the appeal is taken to the time the decision of the Supreme Court is certified to the Superior Court. *Keith v. Silvia*, 293.

§ 16. Term of Supreme Court to Which Appeal Must Be Taken.

Where judgment is rendered during the December Term of a Superior Court, an appeal to the following Fall Term of the Supreme Court is too late. *New Hanover County v. Holmes*, 565.

§ 20a. Form and Requisites of Transcript in General.

The rules of the Supreme Court governing appeals are mandatory and not directory, and must be universally enforced. *Warshaw v. Warshaw*, 754.

§ 29. Abandonment of Exceptions Not Brought Forward in the Brief.

Exceptions not supported by any reason or argument are deemed abandoned. Rule of Practice in the Supreme Court 28. *Swinton v. Realty Co.*, 723.

§ 31b. Dismissal for Failure of Case on Appeal.

Failure of proper case on appeal does not work dismissal but limits review to whether judgment is supported by facts found. *Whitley v. Caddell*, 516.

§ 31c. Dismissal for Failure to Docket Appeal in Time.

Appeal dismissed for failure to bring case up for next ensuing term of Supreme Court. *New Hanover County v. Holmes*, 565.

§ 31g. Dismissal for Insufficiency of Record.

Where the record does not contain any paper relative to service and no stipulation in respect thereto, and no pleading save the answer, the appeal must be dismissed. *Warshaw v. Warshaw*, 754.

§ 37. Review of Discretionary Orders and Judgments.

Ruling on motion for bill of particulars is not reviewable. *Tillis v. Cotton Mills*, 533.

§ 38. Presumptions and Burden of Showing Error.

A stipulation that orders whereby additional parties were made and other formal parts of the record need not be printed does not justify the assumption that any person not named in the caption was made a party. *Costner v. Children's Home*, 361.

§ 39b. Error Rendered Harmless by Verdict.

Ordinarily error relating to an issue not reached by the jury is harmless. *Poniros v. Teer Co.*, 144.

Error in the charge on the issue of contributory negligence in omitting reference to proximate cause is rendered harmless when the jury answers the issue of negligence in the negative and thereby renders the question of contributory negligence immaterial. *Williams v. Cody*, 425.

Appellant may not complain of the charge in respect to an issue answered in his favor. *Anderson v. Office Supplies*, 519.

APPEAL AND ERROR—*Continued.*

§ 39c. Error Harmless Because Appellant Not Entitled to Relief on Any Aspect.

Where plaintiff is entitled to judgment as a matter of law, any error in the trial of the cause must be held harmless on defendant's appeal. *Wells v. Clayton*, 102.

Where it appears from the entire record that plaintiffs failed to offer competent evidence sufficient to make out their cause of action, the court's instruction to the jury to answer the issue in favor of defendants may not be held for error and the rulings of the court in the progress of the trial cannot be held prejudicial on plaintiff's appeal. *Muse v. Muse*, 182.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of testimony over objection cannot be held prejudicial when substantially the same testimony is thereafter admitted without objection. *Lipe v. Bank*, 328; *Powell v. Daniel*, 490.

The exclusion of evidence cannot be held prejudicial on appeal when appellant fails to show what the rejected testimony would have been. *Lipe v. Bank*, 328; *Goeckel v. Stokely*, 604.

Exclusion of immaterial evidence cannot be held prejudicial. *In re Will of Kemp*, 680.

The exclusion of competent evidence is not prejudicial when the evidence thereafter is properly admitted. *Powell v. Daniel*, 489.

Where plaintiffs' witnesses in an action against a railroad company to recover for the destruction of timber on plaintiffs' land by fire, have testified in detail as to the condition of defendant's right of way at the time, the exclusion of a photograph of the right of way taken some two years after the fire and competent only for the purpose of illustrating the witnesses' testimony on the theory that it showed conditions similar to those existing at the time of the fire, cannot be held prejudicial. *Fleming v. R. R.*, 568.

Where the record fails to show what testimony the witness would have given had she been permitted to answer the question, the exclusion of the testimony cannot be held prejudicial. *Crouse v. Crouse*, 763.

§ 39f. Harmless and Prejudicial Error in Instructions.

A charge must be considered in its entirety with a view to harmonizing all its component parts, and when it is without prejudicial error when so construed an exception thereto will not be sustained. *In re Humphrey*, 141; *Macon v. Murray*, 484; *In re Will of Kemp*, 680.

Instruction in this case *held* not prejudicial in view of evidence and theory of trial. *Fleming v. R. R.*, 568.

Where the jury sets the amount of the recovery at less than that contended for by plaintiff in accordance with the court's instruction to fix the amount, the instruction cannot be held prejudicial on defendant's appeal upon his contention that plaintiff was entitled to recover the full amount or nothing at all. *Goeckel v. Stokely*, 604.

Exceptions to the charge will not be sustained when it is without prejudicial error construed contextually. *Swinton v. Realty Co.*, 723.

§ 40c. Review of Injunctive Proceedings.

On appeal from an order granting or denying injunctive relief, the findings of fact made by the court are not conclusive, but nevertheless they will not be

APPEAL AND ERROR—*Continued.*

disturbed when they are clearly supported by the evidence offered. *Fremont v. Baker*, 253.

While the court's findings of fact upon the hearing for an interlocutory or preliminary injunction are reviewable on appeal, they will not be disturbed when the evidence justifies and requires such findings. *Brown v. Candler*, 576.

§ 40d. Review of Findings of Fact.

The presumption that the court found facts sufficient to support its decree does not obtain where the judgment contains a recital of the specific facts upon which the challenged decree is based. *Edmunds v. Hall*, 153.

In the absence of an effective assignment of error to the findings of fact it will be presumed that there was sufficient evidence to support the findings. *In re Sams*, 228.

§ 40l. Review of Constitutional Questions.

The rule that the Supreme Court will not decide a constitutional question when the appeal may be decided upon a question of lesser moment applies only to acts of the General Assembly and not to the validity of a municipal ordinance. *S. v. Scoggin*, 1.

§ 43. Petitions to Rehear.

Where the matter pointed out in a petition for rehearing is insufficient to alter the result, the petition will be denied. *Chambers v. Chambers*, 766.

§ 47. Disposition of Appeal—New Trial.

Where a case has been tried under a misapplication of the pertinent principles of law, the verdict and judgment ordinarily will not be amended, but a new trial will be ordered. *Caddell v. Caddell*, 686.

§ 50. Remand.

Where it is apparent from record that all parties necessary to determination of cause have not been joined, the cause will be remanded. *Costner v. Children's Home*, 361.

§ 50½. Retention of Cause.

Where the identical question sought to be presented by the appeal is pending before the Supreme Court of the United States and its decision thereon will be binding upon our Court, the cause will be retained. *Amos v. R. R.*, 764.

§ 51a. Force and Effect of Decision—Law of the Case.

Where the Supreme Court holds on appeal that the evidence was sufficient to overrule defendant's motions to nonsuit, in the subsequent trial upon substantially the same evidence the question of the sufficiency of the evidence is foreclosed. *Mintz v. R. R.*, 109.

§ 51c. Interpretation of Decisions of Supreme Court.

A decision of the Supreme Court must be considered in the light of the facts of the case in which it is rendered. *Woodard v. Clark*, 190.

ARREST.

§ 1b. Arrest by Officer Without Warrant.

When officer sees nontax-paid liquor in car driven by defendant and admitted by him to be his car, it is duty of officer to arrest defendant without a warrant. *S. v. Harper*, 371.

ASSAULT AND BATTERY.

§ 4. Civil Actions—Pleadings.

In this action for assault and battery, defendant filed answer denying the material allegations of the complaint and specifically pleading certain facts and circumstances by way of an affirmative defense. Plaintiff filed reply denying the allegations of the further answer, and by "further replication" alleged that defendant had pleaded guilty in criminal prosecutions to charges of assault upon plaintiff, and that defendant well knew that each allegation of the further answer and defense "is absolutely untrue." *Held:* The allegations of the "further replication" constitute no proper part of the reply, and defendant's motion to strike same should have been allowed. *Spain v. Brown*, 355.

ASSIGNMENTS.

§ 3. Operation and Effect of Assignment.

A contract for money due or to become due may be assigned by agreement which manifests an intention to make the assignee the present owner of the debt, and such agreement operates as a binding transfer of the title to the debt as between the assignor and the assignee regardless of notice to the debtor. *Lipe v. Bank*, 328.

§ 6. Rights and Remedies of Acceptor.

Where a debt has been assigned by valid agreement, the debtor, upon receiving notice of the assignment, is under duty to pay the debt to the assignee, irrespective of who gives notice. *Lipe v. Bank*, 328.

ATTORNEY AND CLIENT.

§ 7. Duties and Obligations of Relationship.

Where the attorney who drew the script withdraws from the caveat proceedings, he is competent to testify for propounder in regard to the mental capacity of deceased, and his act in so doing does not violate either the letter or spirit of the rules and regulations of the State Bar. *In re Will of Kemp*, 680.

AUTOMOBILES.

§ 8a. Due Care in General; Attention to Road.

Duty to keep proper lookout does not require anticipation of negligence on part of others. *Morgan v. Saunders*, 162; *Hawes v. Refining Co.*, 643.

The duty to keep a proper lookout requires increased vigilance when the motorist's danger is increased by conditions obscuring his view. *Chesson v. Teer Co.*, 203.

The operators of motor vehicles must exercise the care that an ordinarily prudent man would exercise under like circumstances, which includes the duty to keep his vehicle under control, to keep a reasonably careful lookout, and to anticipate the presence of others on the highway, which duties are mutual and each may assume that others on the highway will comply therewith. *Hawes v. Refining Co.*, 643.

§ 8d. Parking and Parking Lights.

Evidence *held* to disclose contributory negligence as matter of law on part of motorist hitting tractor across his lane of travel. *Morgan v. Cook*, 477.

The parking of an automobile near the highway, even though its location be such as to obscure the vision of motorists along the highway of automobiles

entering the highway from an adjacent parking lot, cannot be held for negligence. *Rogers v. Garage*, 525.

Evidence *held* to show contributory negligence as a matter of law on part of driver sideswiping rear of trailer standing on highway. *Express Co. v. Jones*, 542.

Complaint *held* to allege intervening negligence of one defendant insulating negligence of other in stopping on highway without giving signal. *McLaney v. Motor Freight, Inc.*, 714. Complaint *held* to allege joint negligence of one defendant in parking on highway and of other defendant in colliding with parked vehicle. *Bumgardner v. Fence Co.*, 698. Evidence *held* to disclose intervening negligence insulating any negligence in parking on highway. *Godwin v. Nixon*, 631. But sufficient on issue of negligence of driver of other vehicle in hitting parked car. *Ibid.*

§ 81. Intersections.

City has authority to install automatic traffic control lights. *Cox v. Freight Lines*, 72.

A motorist is guilty of negligence as a matter of law if he fails to stop in obedience to a red traffic light as required by municipal ordinance, and such negligence is actionable if it proximately causes the death or injury of another. *Ibid.*

The fact that a motorist has a green traffic light facing him as he approaches and enters an intersection does not relieve him of the duty to maintain a proper lookout, to keep his vehicle under reasonable control, and to drive his vehicle at a speed which is reasonable and prudent under the existing conditions, or exonerate him from legal liability for the death or injury of another proximately resulting from his failing to perform his legal duty in one or more of these respects. *Ibid.*

Failure of complaint to allege that traffic control lights were operated under municipal ordinance *held* cured by answer which alleged such fact. *Ibid.*

Right of motorist to rely on traffic control lights is not subject to limitation that he be free of negligence. *Ibid.*

After left-turn signal by driver of preceding car, driver of following car may pass to its right when preceding car has cleared right hand lane, but must give signal by horn of intention to pass. *Ward v. Cruse*, 400.

While driver may assume that another driver approaching from opposite direction will give left-turn signal before turning across his lane of travel, he may not indulge such assumption after he sees the other car turning left, but is under duty to exercise due care to avoid collision by maintaining proper control and not exceeding speed restrictions. *Jernigan v. Jernigan*, 430.

Evidence *held* for jury on question of negligence in failing to stop and maintain lookout before entering through street intersection. *Powell v. Daniel*, 489.

The failure of a driver along a servient highway to stop before entering an intersection with a dominant highway is not contributory negligence *per se*, but is to be considered with other facts in evidence in determining the issue. *Hawes v. Refining Co.*, 643.

A driver of a vehicle along a dominant highway is not under duty to anticipate that a driver along the servient highway will fail to stop as required by statute before entering the intersection, and in the absence of anything which gives or should give notice to the contrary, may assume and act on the assump-

AUTOMOBILES—*Continued.*

tion, even to the last moment, that the operator along the servient highway will stop in obedience to the statute. *Ibid.*

While the driver of an automobile along a servient highway is required to stop before entering an intersection with a through highway and must yield the right of way to vehicles along the dominant highway, and may not enter the intersection until he ascertains, in the exercise of due care, that he can do so with reasonable assurance of safety, he is not required to anticipate that a driver along the dominant highway will travel at excessive speed or fail to observe the rules of the road applicable to him. *Ibid.*

§ 13. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

Ordinarily, a driver who is himself observing the law of the road has the right to assume that the driver of a car approaching from the opposite direction will turn to its right so that the vehicles may pass in safety, and is not required to anticipate a negligent breach of this duty by the driver of such other vehicle, but this right is not absolute but may be qualified by particular circumstances, such as the proximity and movement of such other vehicle and the condition and width of the road. *Morgan v. Saunders*, 162.

While ordinarily a motorist may assume and act on the assumption that the driver of a vehicle approaching from the opposite direction will comply with statutory requirements as to signaling before making a left turn across his path (G.S. 20-154), he is not entitled to indulge in this assumption after he sees or by the exercise of due care ought to see that the approaching driver is turning to his left across the highway to enter an intersecting road. *Jernigan v. Jernigan*, 430.

§ 14. Passing Vehicles Traveling in Same Direction.

Where the driver of a preceding vehicle traveling in the same direction gives a clear signal of his intention to turn left into an intersecting road and leaves sufficient space to his right to permit the overtaking vehicle to pass in safety, the provisions of G.S. 20-149 (a) do not apply, and the overtaking vehicle may pass to the right of the overtaken vehicle, but this rule does not relieve the driver of the overtaking vehicle of the duty of observing other pertinent statutes, including the duty to give audible warning of his intention to pass as required by G.S. 20-149 (b). *Ward v. Cruse*, 400.

§ 16. Pedestrians.

It is unlawful for pedestrian to walk on his right hand side of highway, and when walking on his left-hand side he must yield right of way to vehicles. *Spencer v. Motor Co.*, 239.

It is unlawful for a pedestrian to cross between intersections at which traffic control signals are in operation except in a marked cross-walk, but where a pedestrian violates this provision a motorist is nonetheless required to exercise due care to avoid colliding with him. *S. v. Call*, 333.

A pedestrian crossing a street between intersections where no traffic control signals are maintained and at a place where there is no marked cross-walk is under duty to yield the right of way to vehicles. G.S. 20-174 (a). *Bank v. Phillips*, 470.

A motorist is under duty to exercise due care to avoid colliding with a pedestrian notwithstanding the failure of such pedestrian to yield the right of way as required by statute. G.S. 20-174 (e). *Ibid.*

AUTOMOBILES—*Continued.*

The failure of a pedestrian to yield the right of way as required by G.S. 20-174 (a) is not contributory negligence *per se*, but is evidence to be considered with other evidence in the case upon the issue. *Ibid.*

Intestate parked car on highway and as defendant was driving around the parked car, intestate suddenly ran across road in front of plaintiff's vehicle. *Held:* Plaintiff was not guilty of negligence. *Sechler v. Freeze*, 522.

§ 18a. Pleadings in Auto Accident Cases.

In an action based upon defendant's failure to observe and obey an automatic traffic control signal, the failure of the complaint to allege that such signal was maintained and operated under an ordinance of the municipality is a defect, but such defect is cured by the answer when it alleges this material fact. *Cox v. Freight Lines*, 72.

§ 18d. Concurring and Intervening Negligence.

Evidence *held* not to compel single conclusion that sole proximate cause of collision was illegal left turn made by driver of other car. *Jernigan v. Jernigan*, 430.

Evidence *held* to disclose intervening negligence of driver of car in which plaintiff was riding which insulated any negligence in parking on highway. *Godwin v. Nixon*, 632.

Complaint *held* to allege joint negligence of one defendant in parking without lights and of other defendant in colliding with parked vehicle. *Bumgardner v. Fence Co.*, 698.

Complaint *held* to allege intervening negligence of one defendant insulating negligence of other in stopping on highway without giving signal. *McLaney v. Motor Freight*, 714.

§ 18g (5). Evidence—Physical Facts at Scene of Accident.

The physical facts at the scene of an accident may speak louder than words. *Chesson v. Teer Co.*, 203.

But ordinarily the interpretation of the facts is the province of the jury. *Jernigan v. Jernigan*, 430.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence *held* for jury in this action involving collision at intersection controlled by automatic signals. *Cox v. Freight Lines*, 72.

Evidence *held* for jury on issues of negligence and contributory negligence in this action to recover for accident when preceding car made left turn signal and drove to middle of road and following vehicle attempted to pass on right without giving warning. *Ward v. Cruse*, 400.

While physical facts at the scene may speak louder than words, ordinarily the interpretation of the facts is the province of the jury, and therefore nonsuit may not be predicated upon the contention that the physical facts disclose that defendant was not traveling at excessive speed when there is testimony of witnesses that defendant was exceeding sixty miles per hour. *Jernigan v. Jernigan*, 430.

The evidence tended to show that defendant driver attempted to pass a car preceding him in the same direction, and that as he was drawing abreast of the car he saw a pedestrian walking away from him diagonally across the street, that he put on his brakes, but hit the pedestrian at a point ten feet from

the left curb. *Held:* The evidence was sufficient to be submitted to the jury upon the issue of defendant's negligence. *Bank v. Phillips*, 470.

Evidence *held* for jury on question of negligence in failing to stop and maintain lookout before entering through street intersection. *Powell v. Daniel*, 489.

Evidence tending to show intestate parked his car on the extreme right of the hard surface highway on a dark and misty night, alighted and walked some ten feet in front of the car, and that as defendant turned to his left to pass the parked vehicle, intestate suddenly ran in front of his car and was struck about the head and shoulders by the right front of defendant's car *is held* insufficient to be submitted to the jury on the issue of negligence. *Sechler v. Freeze*, 522.

In this action by a passenger in an automobile to recover for injuries received when the car in which she was riding collided with the rear of a tractor-trailer which was standing and blocking the right-hand traffic lane at a street intersection, *held* the evidence is sufficient to be submitted to the jury as to the negligence of the driver of the car in failing to keep a proper lookout or in failing to keep his car under such control as to be able to stop within the range of his lights, and motion to nonsuit by the owner and operator of the car was improvidently granted. *Godwin v. Nixon*, 632.

Evidence *held* for jury on issue of negligence of driver on dominant highway in approaching intersection at excessive speed. *Hawes v. Refining Co.*, 643.

§ 18h (3). Nonsuit on Issue of Contributory Negligence.

Evidence that plaintiff, driver of preceding vehicle, made left-turn signal and pulled to center of road, and that following vehicle in attempting to pass to its right was immediately to his rear and hit him just as he was looking back to see if he could abandon left-turn and drive to right, *held* not to show contributory negligence as matter of law. *Ward v. Cruse*, 400.

Evidence *held* not to show contributory negligence as matter of law on part of pedestrian in failing to yield right of way. *Bank v. Phillips*, 470.

Evidence *held* to disclose contributory negligence as matter of law on part of motorist hitting tractor across his lane of travel. *Morgan v. Cook*, 477.

Evidence *held* to show contributory negligence as a matter of law on part of driver sideswiping rear of trailer standing on highway. *Express Co. v. Jones*, 542.

§ 18h (4). Sufficiency of Evidence and Nonsuit on Issue of Intervening Negligence.

Evidence *held* to disclose intervening negligence insulating any negligence in parking on highway, and nonsuit of owner of parked vehicle should have been allowed. *Godwin v. Nixon*, 632.

§ 18i. Instructions in Auto Accident Cases.

When supported by the evidence, the court should give in substance at least a requested instruction to the effect that if the automatic signal light was green facing the driver of defendant's truck, such driver, in the absence of anything which should have given him notice to the contrary, had the right to assume and act upon the assumption that the driver of a vehicle entering the intersection along an intersecting street would not only exercise ordinary care for his own safety as well as the safety of his passengers, but would bring his car to a stop before entering the intersection in obedience to the traffic signal, and an instruction to the effect that the right of defendant's driver to rely

upon the signal device obtained only if defendant's driver was exercising due care and was free from negligence, is error. *Cox v. Freight Lines*, 72.

Instruction *held* for error in not applying law to evidence in regard to duties of pedestrian on highway. *Spencer v. Motor Co.*, 239.

Ordinarily, and except in cases of manifest factual simplicity, the rule is that it is not sufficient for the court merely to read a highway safety statute and leave the jury unaided to apply the law to the facts. *Bank v. Phillips*, 470.

A charge that, except as otherwise provided, a speed in excess of thirty-five miles an hour in a residential district is unlawful, will not be held for error when the court thereafter explains the relevant speed restrictions applicable to the evidence. *Powell v. Daniel*, 489.

§ 19a. Liability of Driver to Guest or Passenger.

Plaintiff was a passenger in defendant's car. The evidence tended to show that defendant had his car under control and was driving on the right side of the highway at a lawful speed following another car traveling in the same direction, that a third vehicle approached from the opposite direction at excessive speed in the center of the highway, forced the first car partially off the hard surface, continued in the center of the highway and struck defendant's car, resulting in personal injuries to plaintiff. *Held:* Defendant's motion to nonsuit was properly allowed. *Morgan v. Saunders*, 162.

Owner *held* not liable for injury to invitee caused when owner closed front door on hand of invitee, since owner could not foresee that invitee would have hand on center post. *Patterson v. Moffitt*, 405.

Person who is asked to ride in car as prospective purchaser is invitee. *Ibid.*

Evidence *held* not to compel single conclusion that sole proximate cause of collision was illegal left turn made by driver of other car. *Jernigan v. Jernigan*, 430.

§ 24a. Employer's Liability for Employee's Negligence in General.

An employer cannot be under duty to foresee negligence of its employee in backing his own automobile onto the highway after the end of the working day. *Rogers v. Garage*, 525.

In order to hold the owner of a vehicle liable under the doctrine of *respondeat superior*, plaintiff must allege and prove that the driver was guilty of negligence constituting a proximate cause of the injury and that the relationship of master and servant existed between the owner and the driver at the time of and in respect to the transaction out of which the injury arose. *Aiken v. Sanderford*, 760.

§ 24½a. Pleadings in Actions Against Owner Under Respondeat Superior.

Complaint alleging in effect that defendants owned the vehicle in question and that it was negligently operated by one of their drivers fails to state a cause of action against the owners under the doctrine of *respondeat superior*, it being required that it be alleged that the driver was at the time acting within the scope of his employment. *Aiken v. Sanderford*, 760.

§ 24½e. Presumptions and Sufficiency of Evidence on Issue of Respondeat Superior.

Chap. 494, Session Laws of 1951, providing that the registration of a car should be *prima facie* evidence of ownership and that ownership should be *prima facie* evidence that the vehicle was being operated and used with the

AUTOMOBILES—*Continued.*

authority, consent and knowledge of the owner, applies to an accident occurring prior to the effective date of the statute unless action was pending at the time of its effective date. G.S. 20-71.1. *Spencer v. Motor Co.*, 239.

G.S. 20-71.1 is not applicable to an action not brought within one year after the cause of action accrues. *Aiken v. Sanderford*, 760.

§ 24½f. Instructions on Issue of Respondeat Superior.

Court should charge law on defendant's evidence that he had sold car before accident. *Spencer v. Motor Co.*, 239.

§ 27. Liability of Owner for Injuries to Driver and Others—Defects in Vehicle.

It is the duty of a bailor for hire of an automobile to see that the automobile is in good condition, and while he is not an insurer, he is liable for injury to the bailee or to third persons proximately resulting from a defective condition of the car of which he had knowledge or which by reasonable care and inspection he could have discovered. *Hudson v. Drive It Yourself, Inc.*, 503.

Plaintiffs' evidence was to the effect that an employer of the bailor drove its car from its garage and stopped and delivered it to the bailee in the customary manner, with nothing to suggest in the manner of operation that the brakes were defective, and that the bailee drove the car a distance of five and one-half miles during a period of forty-five minutes without detecting anything wrong with the brakes until just before the collision with plaintiffs' car. *Held:* The evidence is insufficient to show that the bailor knew or should have known by reasonable inspection of the defective condition of the brakes, and therefore bailor's motion to nonsuit should have been allowed. *Ibid.*

§ 29b. Prosecutions for Reckless Driving and Speeding.

A warrant charging that defendant violated "Ordinance No. ....., Section ....." of a named town "by operating a motor vehicle upon the public highways of N. C. at a greater rate of speed than allowed by law, to wit: 80 miles per hour, contrary to the said ordinances, against the statute in such case made and provided, and against the peace and dignity of the said Town and State," *is held* sufficient to charge a violation of G.S. 20-141, made a misdemeanor by G.S. 20-180, the reference to the municipality and the ordinances being treated as surplusage. *S. v. Daughtry*, 316.

The State's evidence tended to show that defendant's car struck a pedestrian after she had crossed the street and was walking on the very edge of the pavement in defendant's lane of travel. The State's evidence further tended to show that the pedestrian was knocked some thirty feet down the street, and that there was no vehicle immediately in front of defendant's car and that there was nothing to obstruct his view of the pedestrian as she crossed the street. *Held:* The evidence was sufficient to take the case to the jury on the charge of reckless driving in violation of G.S. 20-140, notwithstanding that other evidence, some of which was offered by the State, was sharply conflicting. *S. v. Call*, 333.

Defendant was charged with reckless driving in violation of G.S. 20-140 as a result of his car's striking a pedestrian on the very edge of the pavement in his lane of travel. All the evidence tended to show that the injured pedestrian had crossed the street in the middle of a block between intersections at which traffic control signals were in operation, and there was no evidence that there was a marked cross-walk at the place. *Held:* An instruction to the effect that the pedestrian had a right to cross in the middle of the block and that motor-

AUTOMOBILES—*Continued.*

ists were under duty to do what was necessary for her protection, constituted prejudicial error. *Ibid.*

§ 30d. Prosecutions for Drunken Driving.

A warrant charging that defendant did unlawfully and willfully violate "Ordinance No. ....., Article ....., Section ....." of a municipality by driving "a motor vehicle on the public highways . . . while under the influence of intoxicating liquor, contrary to the said ordinance, against the statute in such case made and provided, and against the peace and dignity of the said Town and State," *is held* sufficient to charge defendant with operating a motor vehicle on the public highways of the State while under the influence of intoxicating liquors, the reference in the warrant to the ordinance and the municipality being treated as surplusage. *S. v. Tripp*, 320.

In a prosecution for drunken driving, the arresting officer may be asked his opinion as to whether at the time the arrest was made the defendant was under the influence of liquor. *S. v. Warren*, 358.

Defendant's motion for judgment of nonsuit in this prosecution for drunken driving *held* properly denied under authority of *S. v. Carroll*, 226 N.C. 237. *Ibid.*

§ 32½. Illegal Attachments.

A warrant charging that defendant did violate "Ordinance No. ....., Section ....." of a named town by operating a vehicle upon the public highways with improper muffler contrary to said ordinance, "against the statute in such case made and provided, and against the peace and dignity of the said Town and State," *is held* sufficient to charge violation of G.S. 20-128 (a), made a misdemeanor by G.S. 20-176 (a), the references to the municipality and the ordinance being treated as surplusage. *S. v. Daughtry*, 316.

BANKS AND BANKING.

§ 7a. Deposits.

The relationship between a depositor and the bank is that of debtor and creditor, and the ownership of the money deposited passes to the bank. *Lipe v. Bank*, 328.

Where a depositor's own evidence shows that he assigned his right to the entire deposit in controversy to another, he may not maintain an action against the bank for such deposit, since he is not the real party in interest, G.S. 1-57, and the bank's motion to nonsuit such action is properly allowed. *Ibid.*

BASTARDS.

§ 1. Elements of the Offense of Willful Refusal to Support Illegitimate Child.

The offense proscribed by G.S. 49-2 is the willful neglect or refusal of a parent to support his or her illegitimate child, and the question of paternity is incidental thereto, and therefore a judgment as of nonsuit in such prosecution does not constitute an adjudication on the issue of paternity and will not support a plea of former acquittal in a subsequent prosecution under the statute, the offense being a continuing one. *S. v. Robinson*, 408.

In a prosecution of a father for willful neglect or refusal to support his illegitimate child, the issue of paternity must first be determined before and separate from the determination of the issue of guilt or innocence of the offense charged. *Ibid.*

BASTARDS—*Continued.*

§ 6. Sufficiency of Evidence and Nonsuit in Bastardy Proceedings.

Where there is testimony that notice to and demand upon defendant for support of his illegitimate child was made on defendant the month prior to the issuance of the warrant, the fact that a corroborating witness testifies that the demand was made during the month warrant was issued, does not justify nonsuit even though the corroborating testimony may imply that the warrant was issued prior to demand. *S. v. Humphrey*, 608.

§ 6½. Instructions in Bastardy Proceedings.

The failure of the court to charge that there was no obligation upon defendant to support the child in question until he had been given notice that he was the father and demand made upon him for support, cannot be held prejudicial when there is evidence of notice and demand prior to the issuance of the warrant and the court categorically charges that in order to convict defendant the jury must be satisfied beyond reasonable doubt that defendant was the father of the child, and further that he knowingly, intentionally and with stubborn and willful purpose refused to support the child. *S. v. Humphrey*, 608.

§ 7. Verdict and Judgment in Prosecutions for Willful Refusal to Support Illegitimate Child.

In a prosecution under G.S. 49-2 an affirmative finding that defendant willfully failed and refused to support his illegitimate child does not constitute a verdict of guilty, but merely embraces facts upon which a verdict of guilty should be predicated, and where there is no verdict a new trial must be awarded. *S. v. Robinson*, 408.

BOUNDARIES.

§ 3b. Calls to Natural Objects.

A call in a deed for a natural boundary, such as the meandering of a particular creek, controls a call for course and distance "with the meanderings of said creek," and when the verdict of the jury, interpreted in the light of the evidence and the charge, constitutes a finding in effect that the meanderings of the creek was the true dividing line, it supports judgment in conformity therewith. *Lance v. Cogdill*, 134.

§ 7. Processioning Proceedings—Procedure.

The fact that the clerk in a processioning proceeding erroneously concludes that the answers converted the proceeding into an action to try title to realty, and thereupon transfers the cause to the civil issue docket for trial, does not deprive the Superior Court of jurisdiction to determine the processioning proceeding. *Lance v. Cogdill*, 134.

What is the true dividing line between two contiguous tracts of land is a question of law for the court; where such line is actually located on the premises is an issue of fact for the jury. *Ibid.*

BROKERS.

§ 12½. Rights of Brokers Inter Se.

Allegations to the effect that plaintiff was given the right by the owners to sell their property, and that defendant broker agreed to pay plaintiff one-half the commission if defendant procured a purchaser, with evidence that plaintiff was given exclusive right to sell the property for only forty-eight hours and that defendant procured a purchaser after the expiration of that period when

the property was listed with real estate brokers generally, *is held* insufficient to sustain recovery by plaintiff, and nonsuit was correctly entered, since there was no consideration for defendant's agreement to split the commission upon the facts alleged. Evidence to the effect that plaintiff and defendant agreed to pool their efforts and split the commission regardless of which one procured the purchaser does not alter this result, when such evidence is not based upon allegation. *Smith v. Barnes*, 176.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud.

A deed from a father to his son and daughter-in-law in consideration of the grantees' promise to support grantor for the remainder of his natural life cannot be cancelled on the ground that the promissory representation was fraudulent when it appears from grantor's own evidence that for some twelve years after the execution of the deed the grantor lived with grantees and that grantor sought cancellation at the expiration of that time because of the grantees' conveyance of the property to their minor son and the failure of the male grantee to send grantor the sum of fifty dollars for food and clothes, since the evidence does not show that grantees had no intention of supporting grantor at the time the agreement was entered into. *Davis v. Davis*, 208.

No presumption of fraud or undue influence arises from the conveyance of land by a father to his son, since the relationship is not a fiduciary one. *Ibid.*

§ 3. For Mistake.

A mistake of law, as distinguished from a mistake of fact, does not affect the validity of a contract. *Greene v. Spivey*, 435.

CARRIERS.

§ 1½. Duty to Operate and Furnish Facilities.

Under facts of this case, motion to remand to Utilities Commission for additional evidence upon petition to discontinue freight agency at station should have been allowed. *Utilities Com. v. R. R.*, 337.

§ 2. Matters Subject to State Regulation.

Commission has no jurisdiction of transportation of employees to and from work even though carrier is also common carrier. *Utilities Com. v. Coach Co.*, 583.

§ 5. Licensing and Franchise.

Where a common carrier in Interstate Commerce executes a contract to convey a bill of sale of its rights under its certificate of convenience and necessity, the proposed purchaser has the right to apply to the Interstate Commerce Commission for approval and to have the seller join in such application, and a court of equity will decree specific performance to the extent of compelling the parties to take steps necessary to effectuate transfer in accordance with the manner and form agreed upon by them. *McLean v. Keith*, 59.

The approval of the Interstate Commerce Commission is prerequisite to the transfer by a common carrier of a certificate of convenience and necessity or the operating rights evidenced thereby, 49 USCA 312 (b) and 5 (2), and where a carrier has executed a contract to convey or a bill of sale, the purchaser's contention that he acquired thereby a vested property interest in the operating

CARRIERS—*Continued.*

rights evidenced by the certificate separate and apart from operating authority thereunder, notwithstanding the want of approval of the transfer by the Interstate Commerce Commission, *is held* untenable. *Ibid.*

Where a franchise carrier in interstate commerce executes a contract to convey or bill of sale of his rights under his certificate, but the contract expressly stipulates that the transfer should be under the short form procedure set up under section 212 (b) of 49 USCA 312 (b), time being of the essence, *held:* upon compliance by the seller in duly joining in application for approval under the short form, the purchaser, upon the ultimate disapproval of the transfer by the Interstate Commerce Commission upon this application, is not entitled to specific performance to compel the seller to join in application for approval of the transfer under the long form prescribed by 49 USCA 5 (2) (a). *Ibid.*

Application for modification of franchise to permit "open door" operations between two points also served by another carrier along different route does not require that other carrier be given opportunity to remedy inadequacy in service. *Utilities Com. v. Ray*, 692. Evidence *held* insufficient to show that order denying application was arbitrary or capricious. *Ibid.*

§ 11½. C.O.D. Deliveries.

A lease of intrastate motor vehicle common-carrier operating rights, approved by the Utilities Commission, does not release lessor, the holder of the certificate of convenience and necessity, from liability for nonperformance of franchise duties or torts incident to operation, and a shipper may hold lessor liable for lessee's failure to make prompt remittance of C.O.D. collections as required by G.S. 62-121.37. In the instant case the Utilities Commission, in approving the lease, did not attempt to relieve lessors of such obligations, nor would it have the power to do so. *Hough-Wylie Co. v. Lucas*, 90.

CEMETERIES.

§ 5. Desecration of Graves.

The right of action for the desecration of the grave of an ancestor vests in the next of kin as of the time the tort is committed, ascertained in accordance with the statutes of distribution, and therefore, great-grandchildren whose parents are dead may maintain the action notwithstanding that at the time the tort was committed there was living a grandchild of the ancestor. *King v. Smith*, 170.

COMMON LAW.

The common law rule that future interests in personal property may be created by will but not by deed prevails in this State, since it has not been abrogated or repealed by statute or become obsolete, and is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State. G.S. 4-1. *Woodard v. Clark*, 190.

CONSPIRACY.

§ 3. Nature and Elements of the Crime.

A conspiracy is a combination or agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, the unlawful agreement and not the execution of the crime being the offense. *S. v. Hedrick*, 727.

CONSPIRACY—*Continued.*

§ 6. Sufficiency of Evidence and Nonsuit.

A conspiracy may be established by circumstantial evidence. *S. v. Hedrick*, 728.

Circumstantial evidence of defendants' guilt of conspiracy to procure insurance benefits by means of false claim *held* sufficient for jury. *Ibid.*

CONSTITUTIONAL LAW.

§ 8a. Legislative Power in General.

The General Assembly has the power to declare that proof or admission of certain facts shall constitute a presumption of the main or ultimate fact in issue so as to make out a *prima facie* case, provided there is a rational connection between what is proved and what is to be inferred, but in the absence of legislative enactment the courts will not invoke such presumptions or rules of evidence to declare a defendant guilty of a criminal offense. *S. v. Scoggin*, 19.

Public policy is a matter for the legislative branch of the government and not for the courts. *Trust Co. v. Green*, 654.

§ 8c. Delegation of Legislative Power.

Legislature may not delegate to rural zoning commission power to enact zoning regulations. *Harrington & Co. v. Renner*, 321.

§ 10a. Judicial Power in General.

It is the duty of the courts to interpret and apply the law as it is written; it is the function and prerogative of the Legislature to make the law. *S. v. Scoggin*, 19.

It is the prerogative of the Legislature and not the Court to modify a recognized common law rule. *Woodard v. Clark*, 190.

§ 11. Police Power in General.

The police power is subordinate to constitutional guaranties of equality of privilege and of burden. *S. v. Scoggin*, 1.

§ 14½. Police Power—Matters Subject to Regulation in Public Convenience.

The General Assembly has the power to regulate parking of automobiles in congested areas in the exercise of the State's police power to promote peace, comfort, convenience, and prosperity of its people. *S. v. Scoggin*, 1.

§ 20a. Due Process of Law—Nature and Extent of Mandate in General.

The owner of property has the right to make any lawful use of it he sees fit subject only to those limitations duly imposed by law. *Harrington & Co. v. Renner*, 321.

The denial of a carrier's application for modification of its franchise cannot amount to a confiscation of its property, since an applicant has no property rights in an ungranted franchise. *Utilities Com. v. Ray*, 692.

§ 24. Vested Rights—Remedies and Procedure.

A statute creating a presumption of evidence may be given retroactive effect, since there is no vested right in procedure. *Spencer v. Motor Co.*, 239.

CONSTITUTIONAL LAW—*Continued.*

§ 32. Necessity for Indictment.

A person charged with the commission of a capital felony can be prosecuted only on an indictment found by a grand jury. Art. I, sec. 12, of the Constitution of N. C. *S. v. Thomas*, 454.

A person charged with a noncapital felony or with a misdemeanor may be tried initially in the Superior Court only upon an indictment, except when represented by counsel he may be tried upon information signed by the solicitor when written waiver of indictment by defendant and his counsel appears on the face of the information. Art. I, sec. 12, of the Constitution of N. C. G.S. 15-140.1. *Ibid.*

Where a person has been convicted in a justice's court of a misdemeanor the punishment for which does not exceed a fine of fifty dollars or imprisonment for thirty days, he may be tried in the Superior Court upon appeal upon the original warrant without an indictment. *Ibid.*

Defendant may be tried in Superior Court for petty misdemeanor on original warrant only when there has been trial and appeal from conviction in inferior court having jurisdiction. *Ibid.*

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

The violation of a provision of a judgment which is void cannot be made the basis for contempt. *Corey v. Hardison*, 147.

CONTRACTS.

§ 4. Acceptance and Mutuality.

To constitute a valid contract, the parties must assent to the same thing in the same sense, and when it appears that a term which either party desires included in the agreement is not contained in the written memorandum, there is no complete agreement and such term is subject to further treaty between the parties to complete the contract. *Goeckel v. Stokely*, 604.

§ 5. Consideration.

Where the sole consideration for a contract is the mutual promise of the parties, it is necessary that such promise be binding on both, and where it is binding only on one it cannot constitute a sufficient consideration for the promise of the other. *Smith v. Barnes*, 176.

§ 8. General Rules of Construction.

Where the parties expressly agreed as to the procedure to be followed to effectuate a contract, it cannot be held, upon such procedure proving ineffectual, that the parties are under obligation to follow another procedure under the implication that they should do all things necessary to effectuate their agreement, since it is only when the parties do not expressly agree that the law may raise an implied promise. *McLean v. Keith*, 59.

A paragraph or excerpt from a contract must be interpreted in context with the rest of the agreement. *R. R. v. R. R.*, 247.

The legal effect of the language of a written agreement is a question of law for the court. *Brown v. Construction Co.*, 462.

Where an instrument is wholly in writing and its terms are explicit, the court determines their effect simply by declaring their legal meaning. *Strigas v. Ins. Co.*, 734.

CONTRACTS—*Continued.*

§ 10. Time and Place of Performance.

Where the agreement between the parties does not specify the time of performance, the law prescribes that the act must be performed within a reasonable time. *Metals Corp. v. Weinstein*, 558.

Supplemental agreement *held* to extend time for performance for reasonable period. *Ibid.*

§ 18. Waiver of Breach.

Notification by the purchaser that he would accept delivery if made by a specified date in accordance with an oral supplemental agreement extending the time for delivery for a reasonable period after the delivery date specified in the original contract, *held* not to constitute waiver of the seller's breach in failing to make delivery in accordance with the original contract as modified. *Metals Corp. v. Weinstein*, 558.

§ 19. Parties Who May Sue.

A third party may sue on a contract made for his benefit. *Brown v. Construction Co.*, 462.

COSTS.

§ 5. Items of Costs—Attorney Fees.

While ordinarily attorney fees are taxable as costs only when expressly authorized by statute, a court of equity, even without statutory authority, may order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit creating, preserving, protecting or increasing a common fund or common property. *Horner v. Chamber of Commerce*, 96.

COUNTIES.

§ 1. Nature, Powers and Functions in General.

A county is not a municipal corporation in a strict legal sense but is an instrumentality of the State by means of which the State performs governmental functions within its territorial limits. *Harrington & Co. v. Renner*, 321.

COURTS.

§ 2. Jurisdiction in General.

Parties cannot by consent invest a court with a power not conferred upon it by law. *Corey v. Hardison*, 147.

§ 4c. Appeals From Clerk to Superior Court.

When a civil action or special proceeding instituted before the clerk is for any ground sent to the Superior Court, the judge has authority to consider and determine the matter as if originally before him. *Langley v. Langley*, 184.

On appeal from clerk's order revoking letters of administration the Superior Court should not hear the matter *de novo* but has authority only to review the record. *In re Sams*, 228.

§ 5. Superior Courts—Jurisdiction After Orders or Judgments of Another Superior Court Judge.

Where a motion to strike a paragraph of the complaint relating to the second cause of action is made on the ground that the facts alleged therein by reference to paragraphs of the first cause of action were irrelevant, and such motion

COURTS—*Continued.*

is granted without statement of reasons, another Superior Court judge has the discretionary power to allow an amendment setting out the same facts in full instead of by reference to other parts of the complaint, when such allegations are relevant and material, since the order granting the motion to strike will be interpreted as based upon error in incorporating allegations by reference contrary to Supreme Court Rule No. 20 (2) and not on the ground that the allegations were immaterial, and thus the two orders harmonized, with the second implementing rather than repudiating the first. *Alexander v. Brown*, 212.

No appeal lies from one Superior Court Judge to another, and ordinarily one Superior Court Judge may not modify, overrule, or change the judgment of another Superior Court Judge previously made in the same action. *Neighbors v. Neighbors*, 531.

§ 12. Conflict of Laws—State and Federal.

Constitutionally enacted Federal statutes take precedence over State laws. U. S. Constitution, Art. VI, sec. 2. *Surety Corp. v. Sharpe*, 35.

State law governs incidence of Federal estate taxes. *Trust Co. v. Green*, 654.

CRIMINAL LAW.

§ 8b. Aiders and Abettors.

Husband who knows of and consents to wife's possession of illegal intoxicating liquor in the home is guilty as aider and abettor. *S. v. Avery*, 276.

§ 14. Appeals to and Review by Superior Courts.

In a hearing upon a writ of *certiorari* to a recorder's court, the Superior Court is limited to questions of law or legal inference, and must act on the facts as they appear of record, and therefore on such hearing, challenging an order of the recorder's court executing a suspended judgment, defendant is not entitled to offer evidence either in regard to the facts and circumstances relating to the violation of the conditions of the suspended judgment or to whether the court should exercise its discretion and continue defendant on probation. *S. v. Thomas*, 196.

§ 17c. Plea of Nolo Contendere.

A plea of *nolo contendere* may be entered only by leave of court, and such plea establishes the fact of guilt only for the purpose of punishment in the particular case in which it is entered, and cannot be used against the defendant as an admission in a subsequent civil action or a subsequent criminal proceeding. A finding by the court upon such plea that defendant is guilty is surplusage. *S. v. Thomas*, 196.

§ 21. Former Jeopardy—Same Offense.

The crimes of malicious injury to personal property, G.S. 14-160, and perjury, G.S. 14-209, are not the same either in fact or in law, and therefore upon a plea of former jeopardy in a prosecution for perjury, based upon testimony of defendant in a former prosecution under G.S. 14-160, the court properly determines the plea as a matter of law, there being no necessity to submit an issue to the jury. *S. v. Leonard*, 126.

In a prosecution for malicious injury to personal property defendant testified that he was not at the place in question at the time. Defendant was acquitted on this charge. This prosecution for perjury was based upon this sworn statement of defendant in the former prosecution. *Held:* The former acquittal will not support a plea of former jeopardy in the prosecution for perjury, since the

CRIMINAL LAW—*Continued.*

charge of perjury is not based on the assumption that defendant was guilty of the charge of malicious injury to personal property, and his acquittal upon that charge does not necessarily establish the fact that all material evidence given by him in that case was true. *Ibid.*

Nonsuit in prosecution for wilful refusal to support illegitimate child does not adjudicate nonpaternity, and therefore does not support plea of former acquittal, the offense being a continuing one. *S. v. Robinson*, 408.

§ 41a. Competency of Witnesses—Age.

Whether a five-year-old child is competent to testify in a rape prosecution is a matter resting in the sound discretion of the trial judge, and where the evidence upon the *voir dire* as well as the child's testimony upon the trial negates abuse of discretion, the ruling of the trial court that the child was a competent witness will not be disturbed on appeal. *S. v. Merritt*, 363.

§ 41d. Testimony by Husband or Wife of Defendant.

Since wife may not be compelled to testify against husband, testimony of an incriminating declaration by her is prohibited by statute in furtherance of public policy. *S. v. Warren*, 358.

§ 42c. Cross-Examination of Witnesses.

Whether a party should be allowed to cross-examine a witness relative to a collateral matter not contained in the witness' examination in chief rests in the sound discretion of the presiding judge, and the court's ruling thereon will not be disturbed in the absence of abuse of discretion. *S. v. Peacock*, 137.

§ 42h. Examination of Witness—Refreshing Memory From Notes.

A witness may use notes made by him, or in his presence or under his direction, for the purpose of refreshing his memory. In the instant case objection that the witness read his notes to the jury rather than used them to refresh his memory *held* not supported by the record. *S. v. Peacock*, 137.

While notes used by a witness to refresh his memory should be available to the opposing counsel for the purpose of cross-examining the witness relative thereto, it is incumbent upon counsel to request an examination of the notes or make some other effort to make them available. *Ibid.*

§ 48d. Withdrawal of Evidence.

It is the duty of court *ex mero motu* to withdraw testimony prohibited by statute in furtherance of public policy. *S. v. Warren*, 358.

§ 50d. Expression of Opinion by Court During Progress of Trial.

The trial court may propound competent questions to a witness in order to clarify what the witness has said or intended to say or to develop some relevant fact overlooked, but in doing so he must exercise extreme care that he does not express an opinion on the facts either by manner or word, and where the interrogation of a witness by the court amounts to cross-examination which impeaches the witness or depreciates his testimony before the jury, it must be held for prejudicial error. *S. v. Kimbrey*, 313.

§ 50i. Course and Conduct of Trial—Acts or Conduct of or Relating to Codefendants.

The fact that the solicitor, just as the jury was leaving the box, announced in open court that a witness, whose testimony had clearly disclosed his participation in the crime for which defendant was then on trial, entered a plea of

CRIMINAL LAW—*Continued.*

guilty in the prosecution against him, *is held* not to entitle defendant to a new trial, the court having charged the jury that if they heard the solicitor's announcement they should not consider it, and the procedure being in accordance with the accepted practice in criminal courts. *S. v. Bryant*, 745.

§ 50h. Unauthorized Exhibits.

The bringing into the courtroom of two jars of nontax-paid whiskey by an officer at the end of the solicitor's argument is improper, the exhibits not having been offered in evidence, but where it appears that the solicitor was not responsible therefore and that the trial judge categorically charged the jury not to consider the jars of whiskey and no reference thereto was made in the argument, the incident does not constitute prejudicial error. *S. v. Tyndall*, 365.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

Defendant's evidence relating to matters in defense should not be considered on motion to nonsuit. *S. v. Avery*, 276.

Exculpatory testimony of the State's witnesses may be considered on motion to nonsuit, since the State by offering such testimony presents it as worthy of belief. *S. v. Hoskins*, 412.

While defendant's failure to testify is not subject to comment or consideration, in weighing the credibility of the evidence offered by the State the jury may consider that the State's evidence is uncontradicted. *S. v. Bryant*, 745.

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

The failure of the solicitor to subpoena one of the two witnesses present at the time the offense was committed is immaterial. *S. v. Taylor*, 130.

Evidence which does no more than raise a strong suspicion of guilt is insufficient to be submitted to the jury. *S. v. Love*, 344.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

Circumstantial evidence of defendants' guilt of conspiracy to procure insurance benefits by means of false claim *held* sufficient for jury. *S. v. Hedrick*, 727.

Circumstantial evidence is sufficient to support a conviction only when the circumstances shown are sufficient to exclude every reasonable hypothesis except that of guilt. *S. v. Smith*, 748.

§ 52a (4). Nonsuit—Conflicts and Discrepancies in State's Evidence.

Conflicts in the testimony of the State's witnesses cannot justify nonsuit, it being the province of the jury to resolve such conflicts. *S. v. Humphrey*, 608.

§ 52a (8). Form and Necessity for Motions to Nonsuit.

Insufficiency of evidence must be raised by motion to nonsuit or for directed verdict, and may not be raised by motion for new trial or for arrest of judgment. *S. v. Gaston*, 499.

§ 52b. Directed Verdict and Peremptory Instructions.

Where the State's evidence is clear, unambiguous and susceptible only to the conclusion of guilt, and defendant offers no evidence, the court may charge the jury that if it finds beyond a reasonable doubt that the evidence offered by the State is true, the burden being upon the State to so satisfy them, then the jury should return a verdict of guilty as charged, otherwise to return a verdict of not guilty. *S. v. Taylor*, 130.

The withholding by the court from the jury of one of the counts in the bill of indictment has the effect of a directed verdict of not guilty upon that count, and amounts to an acquittal thereon. *S. v. Love*, 344.

Insufficiency of evidence must be raised by motion to nonsuit or for directed verdict, and may not be raised by motion for new trial or in arrest of judgment. *S. v. Gaston*, 499.

§ 53d. Instructions—Statement of Evidence and Application of Law Thereto.

While an inaccurate statement of facts contained in the evidence should be called to the court's attention in apt time, where an instruction contains a statement of material fact not shown in the evidence, it must be held for reversible error even though not called to the court's attention. *S. v. McCoy*, 121.

It is the duty of the trial judge to charge as to the law upon every substantial feature of the case embraced within the issue and arising on the evidence without any prayer for special instructions. *S. v. Brady*, 295.

While the court is not required to charge on a subordinate feature of the case in the absence of request for special instructions, when the court undertakes to do so it becomes the duty of the court to charge fully and completely on such subordinate feature. *S. v. Rainey*, 738.

§ 53h. Instructions on Right of Defendant Not to Testify.

An instruction that defendant had the prerogative not to testify and to rely on the weakness of the State's evidence, and by her plea of not guilty challenged the truthfulness and sufficiency of the testimony, *is held* incomplete and erroneous in failing to charge that her failure to take the stand did not create any presumption against her. *S. v. Rainey*, 738.

Where defendant does not testify in his own behalf, an instruction that the jury should consider all the evidence or lack of evidence of both the State and the defendant, is erroneous. *S. v. Bryant*, 745.

§ 53j. Charge on Credibility of Witnesses.

An instruction that the jury "may" scrutinize the testimony of an interested witness instead of "should" scrutinize such testimony, *held* not prejudicial. *S. v. Taylor*, 130.

§ 53l. Requests for Instructions.

A party desiring an instruction that the testimony of a biased witness should be scrutinized must aptly tender written request therefor, and his oral request made at the conclusion of the charge is too late. *S. v. Taylor*, 130.

§ 53n. Instructions on Right to Recommend Life Imprisonment.

Failure of court to state jury's right to so recommend in enumerating possible verdicts, *held* error. *S. v. Simmons*, 340.

§ 56. Motions in Arrest of Judgment.

Motion in arrest of judgment for duplicity of warrant will not lie, since objection for duplicity must be made before verdict. *S. v. Avery*, 276.

Motion in arrest of judgment can be based only on matters which appear on the face of the record proper or on matters which should appear but do not, and therefore defects which appear only by aid of evidence cannot be the sub-

CRIMINAL LAW—*Continued.*

ject of motion in arrest of judgment, since the evidence is not a part of the record proper. *S. v. Gaston*, 499.

Therefore insufficiency of evidence cannot be raised by motion in arrest of judgment. *Ibid.*

§ 57b. Motions for New Trial for Newly Discovered Evidence.

An appeal does not lie from a discretionary denial of an application for a new trial on the ground of newly discovered evidence. *S. v. Bryant*, 379; *S. v. Murphy*, 380.

§ 57c. Motions for New Trial for Error of Law.

Insufficiency of evidence to sustain verdict cannot be raised by motion for new trial. *S. v. Gaston*, 499.

§ 60b. Judgment and Sentence—Conformity to Pleadings, Pleas and Verdict.

Where defendant enters a plea of guilty to a warrant charging an assault upon a female and nothing more, the trial court is without authority, upon a later amendment of the warrant to charge that defendant was a male person over eighteen years of age, to enter judgment on the amended warrant in the absence of a verdict of a jury or a plea of guilty by defendant to the warrant as amended, and sentence in excess of that permitted by law for the offense originally charged in the warrant will be set aside and cause remanded for trial upon the warrant as amended. *S. v. Terry*, 222.

§ 62f. Suspended Judgments and Executions.

The right to appeal from order executing a suspended judgment does not apply to a person under the supervision of the Probation Commission. Chap. 1038, Session Laws of 1951. *S. v. Thomas*, 196.

A suspended judgment cannot be put into execution solely on the basis of defendant's plea of *nolo contendere* in a subsequent legal action, even though the fact of guilt in such action would be a violation of the conditions of suspension, but the solicitor must prove the fact of guilt by evidence *aliunde*. *Ibid.*

A suspended sentence should not be invoked on the unverified report of the Probation Officer. *Ibid.*

Where the evidence is insufficient to show a violation of the prohibition laws it cannot sustain a finding that defendant had violated the terms of a suspended sentence in that regard, and the order of the court executing the sentence must be reversed. *S. v. Love*, 344.

§ 67b. Judgments Appealable.

No appeal lies from discretionary denial of new trial for newly discovered evidence. *S. v. Bryant*, 379; *S. v. Murphy*, 380.

§ 76a. Certiorari to Preserve Right to Review.

Review upon *certiorari* is limited to matters of law or legal inference. *S. v. Thomas*, 196.

Where petition for writ of *certiorari* filed by defendant in apt time to bring up the record and case on appeal on his original appeal is denied, and upon a latter appeal from denial of defendant's motion in the trial court to strike out the original judgment, it appears that the Court, in denying the petition for *certiorari*, had inadvertently overlooked matters showing probable error in the

CRIMINAL LAW—*Continued.*

trial, the Supreme Court will reconsider the petition for *certiorari* and grant the petition in order to prevent injustice. *S. v. Terry*, 222.

§ 77b. Appeal—Form and Requisites of Transcript in General.

Counsel must observe the rules of court in regard to the order, form, and proper indexing of the record if they desire consideration to be given their appeals. *S. v. Avery*, 276.

§ 77c. Matters Not Appearing of Record.

Since search warrant is not part of record proper, absence of search warrant in record raises no presumption that search was made without warrant, but to the contrary, it will be presumed that warrant was issued. *S. v. Gaston*, 499.

§ 78c. Necessity for, Form and Requisites of Objections and Exceptions.

In capital cases the Supreme Court will review the record and take cognizance of prejudicial error *ex mero motu*. *S. v. McCoy*, 121.

It is not required that a defendant take exception at the time to interrogation of a witness by the court which amounts to cross-examination impeaching the credibility of the witness. *S. v. Kimbrey*, 313.

§ 78d (3). Form and Requisites of Objections and Exceptions to Evidence.

Ordinarily, where the answer of a witness to a proper question is not responsive and contains an incompetent statement beyond the scope of the question, defendant must object to the answer and move the court to strike it out or instruct the jury not to consider it, and failure to do so will be regarded as a waiver of objection. *S. v. Warren*, 358.

The rule that defendant must object to an unresponsive answer containing incompetent testimony does not apply when the answer of the witness contains evidence forbidden by statute in the furtherance of public policy, but in such instance it is the duty of the judge on his own motion to withdraw such testimony. *Ibid.*

Within this rule is admission of testimony of incriminating declaration of wife of defendant. *Ibid.*

Contention that defendants were convicted on evidence obtained by search without warrant not sustained by record which does not include search warrant, since in absence of anything to contrary it will be presumed that warrant was used. *S. v. Gaston*, 499.

§ 78e (1). Form and Sufficiency of Exceptions to Charge.

An exception to the entire charge is ineffectual as a broadside exception. *S. v. Peacock*, 137.

§ 78e (2). Necessity for Calling Court's Attention to Misstatement of Evidence.

Statement of material fact not shown in evidence must be held prejudicial even though not called to court's attention. *S. v. McCoy*, 121.

§ 79. Briefs.

Exceptive assignments of error not brought forward and discussed in the brief are deemed abandoned. *S. v. Avery*, 276.

§ 81c (1). Harmless and Prejudicial Error in General.

In order to be entitled to a new trial, defendant has the burden of establishing not only that error was committed but that such error was material and

CRIMINAL LAW—*Continued.*

prejudicial, since verdicts and judgments are not to be set aside for mere error and no more. *S. v. Rainey*, 738.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

An exception to the charge will not be sustained when the charge is without reversible error when construed contextually. *S. v. Peacock*, 137.

On the present record, the failure of the court to charge that defendant's election not to testify created no presumption against her, after undertaking to charge on defendant's right not to testify, *is held* not prejudicial in view of repeated categorical instructions that defendant's plea of not guilty raised a presumption of innocence with the burden on the State to overcome this presumption by proof of guilt beyond a reasonable doubt, and it being apparent that upon the evidence of guilt a different result would not likely ensue. *S. v. Rainey*, 738.

In this case in which defendant did not testify, error of the court in charging that the jury should take into consideration the lack of evidence of both the State and of defendant *held* not prejudicial in view of the court's repeated charge that the burden was on the State to satisfy the jury of defendant's guilt beyond a reasonable doubt and that if the jury had any doubt about defendant's guilt it should return a verdict of not guilty, and the fact that upon the State's evidence a different result would not likely ensue if a new trial should be awarded. *S. v. Bryant*, 745.

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where a general verdict of guilty is returned upon a warrant charging two counts and there is no error in the trial in respect to one of the counts, defendant is not entitled to a new trial. *S. v. Scoggin*, 1.

Where sentences on separate indictments are to run concurrently, any error relating to the lesser sentence alone cannot be prejudicial. *S. v. Daughtry*, 316.

Where concurrent sentences are imposed upon conviction of defendant on each of the counts in the bill of indictment, and there is no error in respect to the trial of any one count, any error relating to the other counts is harmless. *S. v. Hedrick*, 727.

§ 81c (7). Harmless and Prejudicial Error in Course and Conduct of Trial.

Bringing into courtroom during solicitor's argument jars of whiskey which had not been introduced in evidence *held* not prejudicial, no reference being made thereto in the argument and the court instructing the jury not to consider the jars. *S. v. Tyndall*, 365.

DAMAGES.

§ 1a. Compensatory Damages.

Compensatory damages may not be recovered for damage to a tobacco crop when plaintiff's evidence fails to establish any causal connection between the dust from defendant's chemical plant which settled on the crop and injury to the crop. *Wilson v. Geigy & Co.*, 566.

§ 7. Punitive Damages.

In this State, punitive damages may be awarded in the sound discretion of the jury in tort actions provided there be some features of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppres-

DAMAGES—*Continued.*

sion, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights. *Swinton v. Realty Co.*, 723.

Punitive damages may not be awarded in an action for fraud merely upon a showing of the misrepresentation constituting the basis of the cause of action, without more. *Ibid.*

DEEDS.

§ 4. Consideration.

Promise by grantees to support grantor for balance of his natural life is alone sufficient consideration for deed. *Davis v. Davis*, 208.

§ 6. Registration of Deeds of Gift.

The time of the execution of a deed of gift and not its date in determinative of whether it was registered within two years. *Muse v. Muse*, 182.

§ 8. Presumptions From Registration.

The public record of a registered and probated deed raises a rebuttable presumption that the original was duly executed and delivered, but the charge of the court in this case that the record constituted *prima facie* evidence that the deeds were actually executed and delivered but that the burden rests upon those claiming thereunder to prove that the originals were actually executed and delivered, even though the record was unassailed by the adverse party, *is held* not prejudicial in view of the theory of trial, the verdict and judgment. *Lance v. Cogdill*, 134.

§ 13a. Estates and Interests Created by Construction of Instrument.

Where the granting clause, the *habendum*, and the warranty are clear and unambiguous and are fully sufficient to pass immediately a fee simple estate, *held* a paragraph after the description which seeks to reserve a life estate in grantor will be rejected as being repugnant. *Kennedy v. Kennedy*, 419.

Where the granting clause conveys an unqualified fee and the *habendum* contains no limitation thereon, and grantor warrants a fee simple title, *held* a provision following the description stating that if one of the grantees died before disposing of his interest, his share should go to the other grantee. is deemed mere surplusage without force and effect as being repugnant to the fee. *Jeffries v. Parker*, 756.

§ 16b. Restrictive Covenants.

Evidence tending to show that defendants rented out two rooms in their house after certain improvements or alterations had been made, but that the roomers had no kitchen facilities and took all of their meals at restaurants and other places outside the residence, *is held* insufficient to be submitted to the jury upon the issue as to whether defendants had converted their residence into an "apartment house" in violation of covenants restricting use of the property in the area to one family dwellings. *Huffman v. Johnson*, 225.

§ 16c. Agreements by Grantee to Support Grantor.

Promise by grantees to support grantor for the balance of his natural life is alone sufficient consideration to support the deed, and where the evidence discloses that the deed was executed with the express agreement that the grantees would look after and support grantor, and also that the male grantee paid the sum of five hundred dollars to grantor and canceled a deed of trust on the property in the male grantee's favor, grantor's cause of action to cancel the deed for want of consideration is properly nonsuited. *Davis v. Davis*, 208.

DIVORCE AND ALIMONY.

§ 11. Alimony in General—Alimony After Absolute Divorce.

Since the wife's right to support after divorce *a vinculo* was unknown to the common law, no right thereto exists unless provided by statute. *Feldman v. Feldman*, 731.

The only statutory provision permitting alimony after decree of divorce *a vinculo* is provision that decree of divorce on the ground of separation shall not have the effect of impairing or destroying the right of the wife to alimony under any judgment or decree rendered before the commencement of the suit for absolute divorce. *Ibid.*

Decree does not affect provisions of prior valid separation agreement. *Howland v. Stizer*, 230.

§ 12. Alimony Pendente Lite.

In an action for alimony without divorce, the court, upon its finding that the facts alleged in the complaint are true, has jurisdiction, except upon allegation and proof of the wife's adultery, to award subsistence and counsel fees *pendente lite*, the amount thereof being in the sound discretion of the court upon consideration of the estate and earnings of the husband and the separate estate of the wife, which discretion is not reviewable on appeal in the absence of abuse. *Fogartie v. Fogartie*, 188.

§ 14. Alimony Without Divorce.

A wife is entitled to alimony without divorce under G.S. 50-16 if the husband separates himself from her and fails to provide her with necessary subsistence according to his means, but the husband in defense may show that in point of fact and legal contemplation the wife separated herself from him. *Caddell v. Caddell*, 686.

Where a suit for alimony without divorce is tried in the lower court on the theory of abandonment, the record and exceptions on appeal will be considered in the light of this theory. *Ibid.*

Abandonment as ground for alimony without divorce under G.S. 50-16 is not subject to any all-embracing definition and must be determined in large measure upon the facts of each case, but generally one spouse is not justified in withdrawing from the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, or self-respect, and constitute ground in itself for divorce at least from bed and board. *Ibid.*

In an action for alimony without divorce on the ground of abandonment, an instruction that plaintiff had the burden of proving that the defendant's separation was wrongful, without charging upon what phase or phases of the evidence defendant's separation would be wrongful, and without defining wrongful except in abstract terms, is insufficient. *Ibid.*

In an action for alimony without divorce on the ground of abandonment, an instruction that the wife had the burden of showing that the husband's separation from her was free of fault on her part and that she was blameless, is erroneous. *Ibid.*

Nonsuit *held* proper in this action for alimony without divorce because of failure of evidence to support the allegations of the complaint setting forth the cause of action. *Crouse v. Crouse*, 763.

DIVORCE AND ALIMONY—*Continued.*

§ 16. Enforcing Payment of Alimony.

Where provisions for support of wife, in accordance with terms of prior separation agreement, is later stricken out by the court originally rendering the decree, the separation agreement stands, but the provisions for her support may no longer be enforced by contempt proceedings. *Howland v. Stitzer*, 230.

§ 20½. Modification of Orders Awarding Custody of Children.

While provisions of a decree awarding custody of the minor children of the marriage is subject to modification upon a change of circumstances affecting the welfare of the children, where there had been no such change, another Superior Court Judge may not modify the provisions of the decree theretofore entered in the cause. *Neighbors v. Neighbors*, 531.

DOWER.

§ 1. Nature and Incidents of Inchoate Dower in General.

Inchoate dower cannot deprive the purchaser at tax foreclosure of present right to possession. *New Hanover County v. Holmes*, 565.

§ 2. Lands to Which Dower Attaches.

Where a clause in a deed seeking to reserve a life estate in grantor is ineffective, so that the grantee obtains the immediate fee simple title to the lands, upon the death of the grantee his widow's dower attaches thereto notwithstanding his death prior to the death of the supposed life tenant. *Kennedy v. Kennedy*, 419.

§ 8a. Proceedings to Allot Dower.

Where, in a proceeding to allot dower in certain lands, defendant widow successfully asserts her right to dower in other lands as well as those set out in the petition, the court is authorized to appoint jurors for the allotment of dower in such other lands. *Kennedy v. Kennedy*, 419.

EASEMENTS.

§ 3. Easements by Prescription.

An easement by prescription must have boundaries sufficiently definite to be located and identified with reasonable certainty, and allegations that plaintiff municipality had obtained an easement by prescription across the back part of defendant's lot for the purpose of maintaining and repairing its water and sewer mains, without any allegation as to the width of the easement or its boundaries, is insufficient to state a cause of action for an easement by prescription. *Fremont v. Baker*, 253.

EJECTMENT.

§ 14. Pleadings.

The fact that plaintiff, in her reply, admits the execution of certain instruments in the chain of title set up in defendant's answer does not entitle defendant to judgment on the pleadings when the reply also alleges matters for the purpose of avoiding such instruments and denies the defendant's averment of title and right of possession and leaves unimpaired plaintiff's allegations in the complaint of title and right of possession in herself. *Garrett v. Rose*, 299.

Allegations of answer *held* to state both defense and counterclaim and therefore motion to strike was improperly allowed. *Ibid.*

EJECTMENT—*Continued.*

§ 15. Burden of Proof.

Where, in an action to recover possession of real property and damages for trespass thereon, defendant denies plaintiff's title and defendant's trespass, nothing else appearing, plaintiff has the burden of proving title in himself and trespass by defendant, and must rely upon the strength of his own title which he may establish by any of the various methods specified in *Mobley v. Griffin*, 104 N.C. 112. *Meeker v. Wheeler*, 172.

§ 17. Sufficiency of Evidence and Nonsuit.

Where plaintiffs seek to establish title by showing a common source of title and a better title from such common source under trustee's deed pursuant to foreclosure of a deed of trust executed by the common source, *held* plaintiffs' failure to offer in evidence the deed of trust or some record of it leaves a *hiatus* in the chain of title notwithstanding the recital of the trustee's deed that it was given pursuant to foreclosure of the recorded deed of trust, and nonsuit is properly entered. *Meeker v. Wheeler*, 172.

ELECTIONS.

§ 6½. Conduct of Elections in General.

A regular election is the final choice of the electorate, while a primary election is merely a mode of choosing candidates of political parties. *Rider v. Lenoir County*, 620.

§ 9. Time of Holding Election and Notice.

The provision of a statute fixing the time for holding an election is mandatory, and an election held at any other time is absolutely void. In this case an act amending a municipal charter (Sec. 4, Chap. 596, Session Laws of 1945) so as to provide for a primary election prior to the general election (Chap. 232, Session Laws of 1951) was enacted 9 March, 1951. No primary election was held 9 April, nor general election 1 May. *Held:* The court had no authority to enter a consent judgment calling for an election in 1952, and an election held under the provisions of such consent judgment is void. *Corey v. Hardison*, 147.

A party primary is not an election within the purview of G.S. 153-93 proscribing the holding of a special bond election within one month of a regular election for county officers. *Rider v. Lenoir County*, 620.

Bond order and ballot in the election for county hospital *held* sufficiently definite and not objectionable for duplicity. *Ibid.*

§ 18a. Procedure to Test Election.

Refusal of municipal officers to surrender their offices in accordance with the results of an election held pursuant to the provisions of a decree of court cannot be made the basis for contempt proceedings, since upon the hearing of the order to show cause the court must first adjudicate the rights of the parties to the offices and such adjudication can be made only in a direct proceeding for that purpose. *Corey v. Hardison*, 147.

The result of an election held by a board having jurisdiction and legislative authority to act, is binding until set aside in a direct proceeding, and the validity of the election may not be collaterally attacked by suit to restrain its effects. *Collins v. Emerson*, 297.

ELECTIONS—*Continued.*

§ 28. Primary Elections in General.

A primary election is merely a mode of choosing candidates of political parties, while a regular election is the final choice of the electorate. *Rider v. Lenoir County*, 620.

EQUITY.

§ 3. Laches.

Suit to restrain a county from issuing hospital bonds and from disbursing county funds in accordance with a plan for the enlargement and improvement of a county hospital on the ground of the inclusion in the plan for expenditures a sum greatly in excess of that approved in the bond election for the hospital *held* not barred by laches when instituted less than two months after the county's attempt to make the supplemental appropriation and less than one month after the county had let the contract for construction. *Rider v. Lenoir County*, 620.

ESTATES.

§ 9c. Action by Remaindermen for Waste.

The right of a remainderman to maintain an action for waste is dependent upon title, and he may not maintain such action so long as a prior judgment and sale of the land pursuant thereto which divests his title remain in full force and effect, and therefore in such instance demurrer to his cause of action solely upon the allegations of trespass and waste is proper. *Narron v. Musgrave*, 388.

Since title is prerequisite to action for waste, in remainderman's action to set aside administrator's sale, judgment dismissing action for possession but retaining cause for waste, necessarily retains question of title. *Ibid.*

§ 9g. Actions by Remaindermen for Possession or to Remove Cloud on Title.

A remainderman may not maintain an action for the possession of the land until after the expiration of the life estate. *Narron v. Musgrave*, 388.

The statute of limitations will not begin to run against the right of a remainderman to maintain action to recover possession of the land until after the expiration of the life estate. *Ibid.*

A remainderman may move to vacate a void or voidable judgment affecting title to the property before the expiration of the life estate. *Ibid.*

§ 15. Estates in Personalty.

Future interest in personalty, either vested or contingent, may be created by will but not by deed. *Woodard v. Clark*, 190.

EVIDENCE.

§ 7. Burden of Proof—Prima Facie Case.

A *prima facie* case, as distinguished from a presumption, does not affect the burden of proof, but merely constitutes evidence sufficient to justify, but not compel, a favorable verdict, and places the adverse party in the position of having to go forward with the evidence or risk such adverse finding. *Fleming v. R. R.*, 568.

§ 8. Burden of Proof—Defenses.

The defendant has the burden of proving an affirmative defense, or a controverted counterclaim. *Wells v. Clayton*, 102.

EVIDENCE—*Continued.*

§ 13. Privileged Communications—Attorney and Client.

Attorney who drew will may testify as to deceased's mental capacity at that time. *In re Will of Kemp*, 680.

§ 22. Cross-Examination of Witnesses.

Objections to questions which amount only to argument with the witness are properly sustained. *In re Will of Kemp*, 680.

§ 24. Materiality in General.

The exclusion of evidence not predicated upon allegation cannot constitute prejudicial error. *Lamb v. Staples*, 179.

§ 26. Similar Facts and Transactions.

Testimony of a witness as to the condition of a spiral stairway almost two years prior to the time in question cannot be held incompetent as too remote when other witnesses have testified in substance that the condition of the stairway remained unchanged from that time down to the moment of plaintiff's injury. *Mintz v. R. R.*, 109.

In order to be competent in evidence, an experiment must be made under conditions substantially similar to those prevailing at the time and place of the occurrence in suit, and the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence, and the competency of experiment evidence is a preliminary question for the court to determine in the exercise of its discretion. *Ibid.*

Where there is no evidence of probative force tending to show that the conditions under which an experiment was made were substantially the same as those existing at the time of the occurrence in suit, the record indicates that the court's ruling in excluding the experiment evidence was proper as a strictly legal question, and certainly does not support the view that the ruling rejecting the proffered evidence constitutes abuse of discretion. *Ibid.*

§ 26½. Rebuttal of Evidence Adduced by Adverse Party.

Defendant introduced in evidence photographs of the stairway in question, taken some two and one-half years after the accident in suit. The plaintiff later introduced testimony to the effect that defendant changed or repaired the steps after the accident. *Held:* While plaintiff's evidence was not competent to show negligence on the part of defendant it was competent for the limited purpose of disproving the correctness of the photographs and to contradict defendant's witnesses who identified the photographs as true representations of the steps at the time of the accident. *Mintz v. R. R.*, 109.

§ 27½. Facts Within Knowledge of Witness.

Testimony of a witness is restricted to facts within his personal knowledge. *Lipe v. Bank*, 328.

§ 29½. Admission in Evidence of Pleadings.

Plaintiff is entitled to introduce in evidence any specific admission contained in the answer, together with such allegations of the complaint as illustrate or clarify the facts admitted, and no more, and the admission in evidence of allegations of the complaint denied by the answer and which have no direct explanatory relationship to the specific admissions in the answer, constitutes prejudicial error. *Winslow v. Jordan*, 166.

EVIDENCE—*Continued.*

§ 30. Photographs.

Photographs of the scene, when properly identified as accurate, are competent for the restricted purpose of explaining or illustrating the testimony of witnesses, but are not substantive proof. *Hawes v. Refining Co.*, 643.

§ 31½. Depositions.

Where depositions of a witness is duly taken with full opportunity of cross-examination by the adverse party, with no objection before trial, and the witness is out of the State at the time of trial, exception to the deposition at the trial is without merit. *Fleming v. R. R.*, 568.

§ 35. Documentary Evidence—Official Records and Instruments.

The introduction in evidence of the official will book from the clerk's office containing the instrument in question raises the presumption that the will had been duly proven. *Chambers v. Chambers*, 766.

Public record of registered deed raises rebuttable presumption that original was duly executed and delivered. *Lance v. Cogdill*, 134.

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Where a term is not included in the memorandum, such term is subject to further treaty between the parties. *Goeckel v. Stokely*, 604.

§ 42c. Admissions by Parties or Others Interested in the Event.

Admissions by guardian *ad litem* or next friend are not competent against infant. *Powell v. Daniel*, 489.

§ 42f. Admissions in Pleadings.

If a fact essential to plaintiff's cause of action is admitted in the answer not only is plaintiff not required to prove same, but such fact is to be taken as true for all purposes connected with the trial whether or not the admission is introduced in evidence. *Wells v. Clayton*, 102.

§ 45. Expert and Opinion Evidence in General.

A party may not testify that his written contract had never been "fulfilled," since testimony of a witness is restricted to facts within his personal knowledge and his opinion or conclusion with respect to matters in issue or relevant to the issue is incompetent. *Lipe v. Bank*, 328.

§ 46e. Opinion Evidence—Common Appearances.

In describing a spiral stairway, a witness' statement that it went up "as a corkscrew would" *is held* competent as a shorthand statement of a composite fact. *Mintz v. R. R.*, 109.

Witness may testify that defendant was under influence of intoxicating liquor. *S. v. Warren*, 358.

§ 46g. Medical Expert Testimony.

Where plaintiff introduces evidence that her physical condition was a direct result of her fall, it is competent for medical expert witnesses to testify, upon personal knowledge based upon their examination and treatment of plaintiff subsequent to the accident, as to the nature and extent of her injuries, the effect of such injuries upon plaintiff's capacity to work, and the probable result of future medical or surgical treatment of plaintiff. *Mintz v. R. R.*, 109.

EVIDENCE—*Continued.*

Where the details of the treatment and care given the patient by defendant physician are presented to an expert witness in the form of a hypothetical question, the witness should be asked whether in his opinion the treatment and care as outlined was in conformity with approved medical practices and treatment in the locality rather than whether such treatment would constitute a reasonable degree of care to be exercised by a diligent physician under the circumstances. *Jackson v. Joyner*, 259.

§ 47. Opinion Evidence as to Mental Capacity.

Lay witnesses who have had opportunity for observation may testify as to mental capacity of person in question and detail the facts upon which opinion is based. *In re Will of Kemp*, 680.

§ 51. Qualification of Experts.

The question of whether a witness should be qualified as an expert rests in the sound discretion of the trial court, and its ruling thereon, supported by evidence, will not be disturbed in the absence of abuse of discretion. *In re Humphrey*, 141.

EXECUTORS AND ADMINISTRATORS.

§ 3. Removal and Revocation of Letters.

Findings that an administrator had moved from the jurisdiction of this State and had interests antagonistic to the estate is sufficient to support the clerk's order revoking letters of administration. *In re Sams*, 228.

On appeal from the clerk's order revoking letters of administration, the Superior Court should not hear the matter *de novo* but has authority only to review the record. In this case there being no exception to the hearing *de novo* and no prejudicial error having resulted from such hearing, the judgment approving the order of the clerk is affirmed. *Ibid.*

§ 13g. Validity and Attack of Sales of Land to Make Assets.

Upon the administrator's petition to sell lands of the estate to make assets, the sale comes within the scope of his trusteeship, and his purchase at the sale in his individual capacity, even though the sale be made by a commissioner appointed by the court, is voidable irrespective of actual fraud, and where an heir at law elects to attack the sale and introduces in evidence the record in the proceedings establishing these facts, he is entitled *prima facie* to judgment setting aside the sale as against the administrator and his grantees in a deed of gift, with the burden upon defendants to show facts that would defeat the equity, and therefore nonsuit should not be entered. *Davis v. Jenkins*, 283.

Minor remainderman, upon reaching majority, may maintain action to set aside administrator's sale when he shows substantial injury and irregularities in judgment and in sale pursuant thereto sufficient to have put purchaser on notice. *Narron v. Musgrave*, 388.

FIDUCIARIES.

§ 1. The Relationship.

The relationship of father and son is not a fiduciary relationship. *Davis v. Davis*, 208.

FRAUD.

§ 2. Misrepresentation.

Ordinarily, a promissory representation cannot be made the basis of fraud unless it is made with a present intent not to carry it out, and thus amounts to a misrepresentation of existing fact. *Davis v. Davis*, 208.

§ 12. Sufficiency of Evidence and Nonsuit.

Plaintiffs' evidence to the effect that they are aged Negroes without education, that they were induced to enter a contract for the purchase of a lot 80 x 150 feet by fraudulent representation of the vendor's agent that the lot included additional lands, the corners of which were pointed out to them on the ground, *is held* sufficient to be submitted to the jury in their action for fraud. *Swinton v. Realty Co.*, 723.

FRAUDS, STATUTE OF.

§ 3. Pleading the Statute.

Defense of statute of frauds may not be raised by demurrer or motion to strike. *Wells v. Foreman*, 351.

GAMBLING.

§ 9. Sufficiency of Evidence and Nonsuit.

The only evidence tending to connect appealing defendant with the sale of lottery tickets was the circumstance that defendant, at an early hour of the morning, stopped his car at a point on a public road, alighted, walked directly to the place where officers had put "decoy tickets" beside a certain telephone pole in accordance with the custom of the "pick-up" man, and was apprehended as he was bending over. *Held:* While the evidence creates a strong suspicion of defendant's guilt it does not exclude the hypothesis that defendant's stopping and alighting at the place in question was to perform some innocent mission, and defendant's motion to nonsuit is allowed in the Supreme Court. *S. v. Smith*, 748.

HABEAS CORPUS.

§ 2. To Obtain Freedom From Unlawful Restraint.

Where the warrant sets out the charge of a criminal offense under the law but also refers to a statute not immediately pertinent, such defect is at most an irregularity which does not render the warrant and judgment void, and dismissal of petition for *habeas corpus* is without error. *In re Stoner*, 611.

HEALTH.

§ 5. Prosecution and Punishment for Violation of Regulations.

Where defendant has been found by a jury to be an active tubercular carrier in the infectious stage, and as such had willfully failed to take the precautions prescribed by the public health authorities, judgment that he be confined in the prison department of the North Carolina Sanatorium is in accord with statute, G.S. 130-225.2, and further provision of the judgment that he be released to a veterans' hospital if he could secure admission thereto is in his interest. *In re Stoner*, 611.

HIGHWAYS.

§ 4b. Highways Under Construction—Injury to Motorists.

A motorist driving upon a highway which is under construction or repair cannot assume that there are no obstructions or defects ahead, but is under duty to keep his vehicle under such control that he can stop it within the distance he can see a proper barrier. *Chesson v. Teer Co.*, 203.

Plaintiff's own evidence *held* to show that his contributory negligence in exceeding proper speed under circumstances and in failing to keep proper lookout was proximate cause of accident at barricade of highway under construction. *Ibid.*

A contractor engaged in improving a highway is not under duty to warn motorists along the highway of the entrance into the highway of cars of its employees leaving at the end of the day's work. *Rogers v. Garage*, 525.

§ 8b. Powers and Duties of State Highway Commission.

While the State Highway and Public Works Commission may be sued only in the manner expressly provided by statute, such immunity does not extend to the individuals composing the Commission, who may be sued for acts in disregard of law which invade or threaten to invade the personal or property rights of a citizen, even though the commissioners assume to act under authority of the State. *Williamston v. R. R.*, 273.

Mandamus will not lie to compel commissioners to vote for a specific project. *Ibid.*

HOMESTEAD.

§ 12. Waiver of Homestead.

An infant will not be held to an implied waiver of homestead by reason of the failure of his guardian *ad litem* to demand same in the lands of his parents, but he may not assert it after he has become of age and is no longer entitled thereto. *Narron v. Musgrave*, 388.

HOMICIDE.

§ 16. Presumptions and Burden of Proof.

Proof by the State that defendant intentionally inflicted a wound with a deadly weapon, causing death, raises the presumptions that the homicide was unlawful and was committed with malice, constituting murder in the second degree, with the burden upon the State to show premeditation and deliberation in order to constitute the offense murder in the first degree. *S. v. McCoy*, 121.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that after an altercation during which defendant knocked deceased to the floor, defendant brutally kicked deceased time after time over a period of fifteen minutes while deceased was lying helpless on the floor, inflicting injuries, including a fractured skull and broken ribs, causing death, *is held* sufficient to overrule nonsuit in a prosecution for murder in the second degree, G.S. 15-173, notwithstanding that the assault was provoked. *S. v. Griffin*, 219.

The State's evidence tending to show that defendant intentionally killed deceased with a deadly weapon takes the case to the jury on a charge of murder in the second degree notwithstanding defendant's evidence tending to show death by misadventure or possibly self-defense. *S. v. Moore*, 617.

HOMICIDE—*Continued.*

The evidence taken in the light most favorable to the State *is held* sufficient to take the case to the jury on the charge of defendant's guilt of murder in the first degree. *S. v. Walker*, 742.

§ 27a. Form and Sufficiency of Instructions in General.

In a homicide prosecution, instructions of the court that the State had offered evidence of a threat made by defendant to kill deceased, that deceased was stabbed from the rear, and that while defendant and deceased were fighting, deceased's wife was begging defendant to spare her husband's life, *held* prejudicial when such statements are not supported by the evidence. *S. v. McCoy*, 121.

Where the State does not contend that the murder was committed with a deadly weapon and is not given the benefit of any presumption of an intentional killing with such weapon, the court is not required to define the term. *S. v. Griffin*, 219.

The charge of the court upon the count of murder in the second degree and the count of manslaughter and in applying the law to the evidence in the case *held* without error. *Ibid.*

§ 27b. Instructions on Presumptions and Burden of Proof.

An instruction in a homicide prosecution to the effect that if the jury should find that at the time defendant struck the fatal blow defendant was so intoxicated that it was impossible for him to deliberate and premeditate, the law would reduce the grade of the offense from murder in the first to murder in the second degree, must be held for prejudicial error since there is no presumption of premeditation or deliberation and the burden was not upon defendant to show a reduction in the offense from first degree murder to second degree murder, but upon the State to establish premeditation and deliberation beyond a reasonable doubt. *S. v. McCoy*, 121.

§ 27c. Instructions on Question of Murder in First Degree.

An instruction to the effect that defendant's counsel had argued that the jury should return a verdict of guilty of murder in the first degree with recommendation for life imprisonment must be held for prejudicial error as tantamount to stating that counsel had tendered a plea of guilty to this offense. The error is not cured by the court's statement that if he was wrong he desired to be corrected, since a defendant will not be permitted to plead guilty to murder in the first degree, and tender of such plea would not be binding on him. *S. v. Simmons*, 340.

§ 27f. Instructions on Self-Defense.

Instructions of the court on defendant's plea of self-defense *held* without error. *S. v. Griffin*, 219.

Where defendant's evidence affords sufficient predicate, the court should charge on his right while on his own premises to fight in his own defense in the face of an unprovoked assault without retreating, regardless of the character of the assault upon him, and in such case an instruction that he had a right to stand his ground only in case the assault upon him was felonious must be held for error. *S. v. Walker*, 742.

§ 27i. Charge on Right to Recommend Life Imprisonment.

An instruction which enumerates the possible verdicts without including the right of the jury to return a verdict of guilty of murder in the first degree with recommendation of life imprisonment, and later charges the jury that upon

HOMICIDE—*Continued.*

certain facts it would be its duty to "return" a verdict of guilty of murder in the first degree, rather than that defendant would be guilty of murder in the first degree, must be held for prejudicial error, and such error is not cured by a later charge that if the jury should find the defendant guilty of murder in the first degree the jury could recommend life imprisonment. *S. v. Simmons*, 340.

HOSPITALS.

§ 6. Liability for Negligence of Employees.

Where it appears that plaintiff did not select his surgeon but was operated upon by the assistant resident in surgery who was employed and paid by the hospital, such surgeon is an employee of the hospital and it is liable for such surgeon's actionable negligence in the performance of his duties in the scope of his employment. *Waynick v. Reardon*, 116.

§ 6½. County Hospitals.

Bond election for county hospital *held* not void for alleged irregularities in bond order or election, but county could not expend materially more than amount stipulated in bond order. *Rider v. Lenoir County*, 621.

HUSBAND AND WIFE.

§ 11. Right to Maintain Action Against Spouse.

A wife may now maintain an action in tort against her husband. *Jernigan v. Jernigan*, 430.

§ 12d. Separation and Separation Agreements.

Where provisions in divorce decree for support of wife in accordance with separation agreement are stricken, separation agreement stands but may not be enforced by contempt. *Howland v. Stitzer*, 230.

Absolute divorce does not affect provisions of prior valid separation agreement for support of wife regardless of subsequent marital status. *Ibid.*

A contract between husband and wife to separate in the future is void, but an agreement executed after separation which does not release the husband from his obligation to support his wife is valid in this State and under the laws of the State of New York, and binds the husband to contribute the sums therein provided for the future support of his wife. *Ibid.*

Separation agreement not void because consideration was that wife should proceed with divorce and husband would not contest it, the grounds for divorce being true and subsisting. *Ibid.*

Where, after decree of absolute divorce, the husband recognized the validity of a separation agreement executed by them prior to the divorce decree by continuing to pay her for more than two and one-half years the amounts stipulated therein even after her remarriage, *held* the husband by ratifying and confirming the agreement is estopped from attacking it. *Ibid.*

INDEMNITY.

§ 2c. Construction and Operation of Contract—Matters Secured.

By written contract, defendant railroad company, in consideration of being allowed to cross plaintiff railroad company's tracks at grade, obligated itself to keep the crossing in repair and to indemnify defendant against loss "arising

from or growing out of the omissions or neglect" of the defendant in the construction and maintenance of the crossing. Construing the agreement contextually it is *held* defendant is not liable for damage to plaintiff's train caused by a broken rail which was entirely unexplained and not discovered until immediately after plaintiff's engine had traversed the crossing when such damage was not the result of any neglect or omission of defendant company in the performance of its duty to inspect and maintain the crossing, since under the agreement defendant was not an insurer and may not be held liable for inevitable accident, latent defect, or act of God. This result obtains even though the word "omissions" be construed as synonymous with "failure" and therefore broader in its scope than the term "negligence." *R. R. v. R. R.*, 247.

INDICTMENT AND WARRANT.

§ 7. Form, Requisites and Distinctions Between Indictment, Information and Presentment. (Necessity for indictment see Constitutional Law § 32.)

An indictment is a written accusation of crime drawn up by the public prosecuting attorney and submitted to a grand jury, and by them found and presented on oath or affirmation as a true bill. *S. v. Thomas*, 454.

A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others, without any bill of indictment, but since the enactment of G.S. 15-137 trials upon presentments have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. *Ibid.*

§ 9. Charge of Crime.

Where a warrant is sufficient to charge a violation of statute, the fact that it ineffectively refers also to a municipal ordinance will not render the warrant void, but the reference to the municipality and the ordinance will be treated as surplusage. *S. v. Daughtry*, 316; *S. v. Tripp*, 320.

A warrant for a statutory offense must charge the offense in the language of the statute or specifically set forth the facts constituting the offense as defined by the Act. *Hawkins v. Reynolds*, 422.

Where the warrant sets out the charge of a criminal offense under the law but also refers to a statute not immediately pertinent, such defect is at most an irregularity which does not render the warrant and judgment void, and dismissal of petition for *habeas corpus* is without error. *In re Stoner*, 611.

§ 11. Duplicity.

Where the indictment in one count clearly charges two separate and distinct offenses and defendant is acquitted by a verdict of the jury as to one of them, his motion in arrest of judgment for duplicity cannot be allowed. G.S. 15-153. *S. v. Avery*, 276.

Objection to the warrant on account of duplicity must be entered before verdict, and a motion in arrest of judgment on this ground after verdict comes too late. *Ibid.*

§ 11½. Waiver of Defects.

A plea of guilty waives any defect in a warrant charging a misdemeanor. *S. v. Daughtry*, 316.

A plea of *nolo contendere* waives any irregularity in a warrant for a misdemeanor. *S. v. Tripp*, 320.

INFANTS.

§ 14. Duties and Authority of Guardian Ad Litem.

Admissions by guardian *ad litem* are not competent against the infant. *Powell v. Daniel*, 489.

Guardian *ad litem* cannot waive infant's right to homestead by failing to demand same. *Narron v. Musgrave*, 388.

§ 15½. Validity and Attack of Judgments Affecting Infants.

Ordinarily a judgment against an infant will not be set aside for mere irregularity and no more, but it must be made to appear that the infant has suffered some substantial wrong and that the vacating of the judgment will not prejudice rights of innocent third parties who have purchased for value and without notice. *Narron v. Musgrave*, 388.

Where an infant is not served but his guardian *ad litem* appears and answers but interposes no real defense, and the court enters judgment on the day of the appointment of the guardian *ad litem*, the judgment against the infant is void for want of jurisdiction. G.S. 1-65. *Ibid.*

Where the record proper shows service on the general guardian of an infant but later appointment of a guardian *ad litem* upon allegation of no general guardian, the record is conflicting, and where the guardian *ad litem* files answer and decree is entered on the same day, the record fails to disclose that the decree is void but only voidable for irregularity, and in attacking the judgment the infant must show he has suffered substantial injury and that the rights of innocent purchasers for value have not intervened. *Ibid.*

INJUNCTIONS.

§ 4c. Subjects of Injunctive Relief—Trespass and Possession of Land.

Injunction will not lie to settle a dispute as to the possession of realty or to dispossess one person for the benefit of another. *Fremont v. Baker*, 253.

§ 4d. Subjects of Injunctive Relief—Nuisances.

Plaintiff instituted suit to restrain defendant from erecting and operating a proposed hammer feed mill for corn and other grains on the grounds that the operation of such business in the locality would constitute a nuisance from loud noises, and from dust and dirt in the atmosphere within the radius of plaintiffs' residences. *Held*, The basis of the suit is the mere apprehension of a nuisance, and plaintiffs are entitled to enjoin the future operation of a legitimate business only upon allegations of fact which show with reasonable certainty that such operation would constitute a nuisance, and may not be granted injunctive relief upon conflicting evidence as to whether the proper operation of such business would constitute a nuisance in fact. *Wilcher v. Sharpe*, 308.

The refusal of a court of equity to enjoin a legitimate business on allegations of apprehended injury from its future operation does not afford defendant license to operate such business so as to create a nuisance, and plaintiff would not be without remedy in case the apprehended injury should eventuate. *Ibid.*

§ 4l. Injunction to Preserve Status Pending Litigation.

By subsidiary injunction proceedings a party to an action may be restrained from committing an act respecting the subject of the action which would render judgment therein ineffective; but continuance of such restraining order must be based upon findings that there is probable cause plaintiff will be able to establish the right asserted in the main action and that there is reasonable

INJUNCTIONS—*Continued.*

apprehension of irreparable loss unless such temporary order remains in force. *Edmonds v. Hall*, 153.

§ 8. Continuance, Modification or Dissolution of Temporary Orders.

Findings that a valid controversy exists between the parties and that the rights of plaintiffs to the relief sought in the main action would be defeated if defendants were permitted to commit the act sought to be restrained *held* insufficient to support an order continuing the subsidiary injunction to the hearing, there being no finding that plaintiffs probably will be able to establish the right to the relief sought in the main action or that failure to restrain plaintiffs would probably result in irreparable loss to defendants. *Edmonds v. Hall*, 153.

Where order continuing a temporary injunction to the hearing is not based upon sufficient findings, the order continuing the temporary restraining order will be set aside, but the temporary order will remain in full force and effect pending further orders of the lower court. *Ibid.*

A temporary restraining order issued in a suit for permanent injunction will ordinarily be continued to the hearing to preserve the *status quo* when serious issues of fact are raised and plaintiff makes it appear *prima facie* that he will be able to maintain his primary equity, and there is reasonable apprehension of irreparable loss or the destruction of the subject matter of the action or wrongful injury thereto. *Fremont v. Baker*, 253.

Temporary restraining order should be dismissed when continuance is not necessary to preserve property rights or prevent irreparable injury. *Ibid.*

Where injunctive relief is not sole objective of action, and serious issues of fact are raised, court may not dismiss the action on hearing of order to show cause, even though temporary restraining order is properly dismissed. *Ibid.*

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, findings by the court in regard to the respective property rights of the parties in the subject matter are not binding on the court or the parties upon the hearing of the cause on the merits. *Ibid.*

In a suit in which the sole objective is a permanent injunction it is proper, upon the hearing of an order to show cause why the temporary order should not be continued to the hearing, to sustain defendant's demurrer to the complaint when it fails to state facts sufficient to entitle plaintiffs to equitable relief. *Wilcher v. Shape*, 308; *Harrington & Co. v. Renner*, 321.

INSANE PERSONS.

§ 4. Inquisitions of Lunacy.

In an inquisition of lunacy, conflicting evidence as to respondent's mental capacity to manage his affairs raises an issue for the jury, and the jury's negative finding in proceedings free from error is conclusive. *In re Humphrey*, 141.

A cerebral hemorrhage is a mental illness within the meaning of G.S. 35-1.1, and in an inquisition of lunacy in which there is no evidence of mental incapacity other than that resulting from a cerebral hemorrhage, a charge defining mental incapacity in the language of that statute is without error. *Ibid.*

An adjudication of insanity is conclusive as to the parties to the proceeding and their privies, but as to others it is evidence of incompetency and raises a mere presumption to that effect which is not conclusive but may be rebutted. *Medical College v. Maynard*, 506.

INSANE PERSONS—*Continued.*

Upon motion of the guardian to set aside a default judgment on notes executed by the ward on the ground that her ward had been declared incompetent some twenty-two years prior to the execution of the notes and that the adjudication of incompetency was still subsisting at the time the default judgment was rendered, *held* findings by the court to the effect that the guardianship had been inactive for twenty-nine years and that the judgment debtor had managed his own affairs with the acquiescence of the guardian for a period of at least twenty-four and one-half years, sustains the conclusion that the judgment debtor was mentally competent at the time of signing the notes, and the denial of the motion to set aside is affirmed. *Ibid.*

INSURANCE.

§ 13a. Construction and Operation of Insurance Contracts in General.

Where a contract of insurance does not contravene public policy or positive law and the language employed is plain and unambiguous, the court must construe and enforce the contract as it is written, regardless of whether such action works hardship on the one party or the other. *Ray v. Hospital Care Assn.*, 562.

§ 24e. Property Insurance—Payment, Subrogation and Actions Against Tort-Feasor.

Where insured property is destroyed or damaged by the tortious act of another, the owner of the property has a single and indivisible cause of action against the tort-feasor for the total amount of the loss. *Burgess v. Trevathan*, 157.

When insurer pays insured either in full or in part for the loss of insured property, insurer is subrogated *pro tanto* in equity to the right of the insured against the tort-feasor causing the loss. *Ibid.*

Where insurer pays the loss in full, the insurer is the real party in interest, G.S. 1-57, and must prosecute the action in its own name as a necessary party plaintiff to enforce its right of subrogation against the tort-feasor destroying the property. Even so, insured may be joined as a proper party, G.S. 1-68, since it cannot be ascertained until after verdict establishing the amount of damages whether insurer is the sole owner. *Ibid.*

Where the insurance covers only a portion of the loss, insured is a necessary party plaintiff in any action against the tort-feasor and may recover the full amount of the loss without the joinder of the insurer, even though insured would hold the proceeds of the judgment as trustee for the benefit of insurer to the extent of the insurance paid, but nevertheless insurer is a proper party to such action and may be brought into the action at the instance of insurer or the tort-feasor in the exercise of the court's discretionary power to make new parties. *Ibid.*

§ 31a (2). Life Insurance—Avoidance of Policy for Misrepresentations.

A policy of life insurance may be avoided by showing that insured made representations which were material and false, and it is not required that such representations were fraudulent in order for insurer to avoid the policy. *Tolbert v. Insurance Co.*, 416.

A representation in an application for a policy of life insurance is deemed material if the knowledge or ignorance of it would naturally influence the judgment of insurer in making the contract, and written questions relating to

INSURANCE—*Continued.*

health and their answers in an application are deemed material as a matter of law. *Ibid.*

§ 36a (2). Paid-up and Extended Term Insurance.

After lapse of the policy for nonpayment of premiums, insured's request to insurer to "hold" the insurance until insured returned from Europe and promise that insured would then settle with insurer, is not a request that insurer convert the policy into extended term insurance in accordance with an option set out in the policy, and upon the death of insured within that period, insurer is liable only for the amount of paid up insurance in accordance with the automatic option contained in the policy. *Strigas v. Ins. Co.*, 734.

§ 37. Actions on Life Policies.

Proof of the execution and delivery of the policy of life insurance sued on in consideration of premium paid, and of the subsequent death of insured, makes out a *prima facie* case, with the burden on insurer to prove its defense of false and material representations avoiding the policy, and therefore in such instance insurer's motion to nonsuit is properly denied. *Tolbert v. Ins. Co.*, 416.

Where insurer seeks to avoid a policy of life insurance on the ground of material and false representations made by insured in the written application for the policy, an instruction of the court which tends to leave the impression that it was not only necessary that insurer show that the representations were false and material but also that they were fraudulently made with intent to deceive, must be held for prejudicial error. *Ibid.*

Ordinarily, admissions by insurer of the execution of the policy and the death of the insured places the burden on insurer of proving that the policy was not in force at the time of the death of the insured, but where plaintiffs allege that premium on the policy was not paid on due date or within the grace period thereafter, and claim under the extended term insurance option, plaintiffs have the burden of showing compliance with the essential provisions of the policy necessary to convert it into extended term insurance, and upon failure of such proof by them the court may direct a verdict for insurer. *Strigas v. Ins. Co.*, 734.

§ 38. Hospital Insurance—Construction and Operation of Policy.

Where both the policy of hospital care insurance and the agreement for reinstatement after its lapse for nonpayment of premiums stipulate that the policy as reinstated should not cover subsequent hospitalization for a physical condition existing prior to reinstatement, such provision is not in contravention of public policy or positive law and must be enforced to exclude liability of insurer for hospitalization as a result of a physical condition existing prior to the date of reinstatement. *Ray v. Hospital Care Assn.*, 562.

§ 43b. Auto Collision Insurance—Risks Covered.

A policy indemnifying insured carrier against loss of cargo specifically excluded loss caused directly or indirectly by the load or any portion thereof colliding with any object unless the vehicle also collided with such object. The cargo was damaged in a collision with some part of an underpass. *Held:* By the terms of the policy, insurer was not liable if no part of the truck or trailer collided with any part of the underpass, and it is immaterial that stakes of the body holding the cargo were damaged if such damage resulted solely from the collision of the cargo alone. *Transport Co. v. Ins. Co.*, 534.

INSURANCE—*Continued.*

In determining the issue of whether some part of the vehicle collided with the underpass or whether the cargo alone collided therewith within the meaning of a policy of cargo insurance, testimony of a witness that some two weeks after the collision he found certain "scarring" on the right pier of the underpass about seven feet from the ground has no probative value and should have been excluded on insurer's objection. *Ibid.*

Evidence *held* to raise mere speculation as to whether truck or its cargo collided with object, and nonsuit was proper. *Ibid.*

§ 51. Auto Insurance—Payment, Subrogation and Action Against Tort-Feasor.

Insurer which has paid part of loss may be brought in by defendant in action by insured to recover for tortious destruction of property. *Burgess v. Trevathan*, 157.

§ 67. False Claims.

Evidence tending to show that appealing defendant transferred to his co-defendant the certificate of title to a burned, nonexistent automobile, that the codefendant procured insurance based on the certificate, following which he reported the car stolen and filed claim thereon, with other related incriminating circumstances shown in evidence, *is held* sufficient to be submitted to the jury in a prosecution for conspiracy to procure insurance benefits by means of false claim, G.S. 14-214, notwithstanding that defendants' evidence, if believed by the jury, may have diluted the probative force of the State's evidence so that it did not exclude every reasonable hypothesis of innocence and point unerringly to guilt. *S. v. Hedrick*, 727.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Statutes in General.

The Turlington Act is the law in this State except in so far as it is modified or repealed by the Alcoholic Beverage Control Act, and the two statutes must be construed *in pari materia* as constituting the law in this State as relating to the purchase, possession and sale of intoxicating liquor. *S. v. Avery*, 276; *S. v. Brady*, 295; *S. v. Hill*, 704.

The provision of the Alcoholic Beverage Control Act making it unlawful to possess any quantity of nontax-paid liquor, G.S. 18-48, must be construed with the Turlington Act, and does not create a separate offense. *S. v. Avery*, 276.

In a county not electing to operate county liquor stores, G.S. 18-11 as modified by G.S. 18-49 and G.S. 18-58, renders the possession of more than one gallon of tax-paid liquor, even though in the home of a resident, *prima facie* evidence that such liquor is kept for the purpose of sale in a prosecution under a warrant or indictment charging that offense, but nevertheless such resident may lawfully have in his home while occupied by him as his dwelling only, an unlimited quantity of tax-paid liquor for the personal consumption of himself, his family and *bona fide* guests when entertained by him therein. *S. v. Brady*, 295.

Possession and transportation of one gallon of tax-paid liquor with seals unbroken from wet county to dry county is not unlawful, the transportation not being for purpose of sale. *S. v. Love*, 344.

INTOXICATING LIQUORS—*Continued.*

§ 4a. Possession in General.

The possession anywhere in this State of any quantity of liquor upon which the Federal and State taxes have not been paid is, without exception, unlawful in this State. *S. v. Avery*, 276; *S. v. Hill*, 704.

Possession and transportation of one gallon of tax-paid whiskey from wet county to dry county is not unlawful, the transportation not being for purpose of sale. *S. v. Love*, 344.

§ 4c. Possession of Husband or Wife.

If a wife keeps liquor in the home with the knowledge and consent of the husband, the liquor is in his possession within the meaning of the law, even though she has actual custody, since one who aids, abets, or assists another in the commission of a misdemeanor is guilty as a principal. *S. v. Avery*, 276.

§ 9a. Indictment and Warrant.

Allegations in a warrant or indictment that taxes had not been paid on liquor seized in defendant's home is merely descriptive and does not limit the prosecution to any particular section of the liquor law, but merely renders it unnecessary to prove possession of any particular quantity. *S. v. Avery*, 276.

§ 9b. Presumptions and Burden of Proof.

G.S. 18-48 and G.S. 18-50 are statewide in application, and the possession of any quantity of nontax-paid liquor is without exception unlawful, and under G.S. 18-11 raises the presumption, even though less than one gallon in quantity, that possession is for the purpose of sale. *S. v. Hill*, 704.

Proof of the possession by defendant in his home of less than one gallon of legally acquired tax-paid liquor raises no presumption against him, and nothing else appearing, a verdict of not guilty should be directed in a prosecution for possession for the purpose of sale. To this extent, G.S. 18-11, raising the presumption from the possession of any quantity of liquor that such possession is for the purpose of sale, with burden upon defendant to prove that he possessed same in his private dwelling while occupied as such, for family use purposes permitted by the statute, has been modified by the Alcoholic Beverage Control Act. *Ibid.*

§ 9c. Competency and Relevancy of Evidence in Prosecutions.

The admission of testimony of an officer that he had on previous occasions examined defendant's premises for the purpose of discovering intoxicating liquor will not be held prejudicial when on cross-examination it is disclosed that no liquor was found on such occasions and that defendant was exonerated by a jury of all charges growing out of such previous examinations, since the testimony is more favorable to defendant than to the State. *S. v. Peacock*, 137.

When an officer of the law sees and recognizes nontax-paid intoxicating liquor in a car driven by defendant and admitted by him to be his automobile, it is the duty of the officer to arrest the defendant without a warrant and to complete the examination of the car for the purpose of discovering the extent to which defendant was engaged in the liquor traffic, and the defendant's motion to suppress the evidence obtained by the search without a warrant is feckless. *S. v. Harper* 371.

§ 9d. Sufficiency of Evidence, Nonsuit and Variance.

The direct, unimpeached testimony of an undercover agent for the State Alcoholic Beverage Control Board that he purchased intoxicating liquor from

INTOXICATING LIQUORS—*Continued.*

defendant is competent in a prosecution under the Turlington Act, G.S. 18-1, *et seq.*, and defendant's contention of variance between indictment and proof on the ground that the indictment related to the Turlington Act and the officer's sole duty related to the enforcement of the State Alcoholic Beverage Control Act, G.S. 18-36, *et seq.*, is feckless. *S. v. Taylor*, 130.

Direct evidence by two witnesses that they purchased one-half gallon of nontax-paid liquor from defendant is sufficient to take the case to the jury in a prosecution for unlawful possession and possession for the purpose of sale. *S. v. Peacock*, 137.

Evidence to the effect that defendant had the reputation of dispensing liquor, that when the officers attempted to search his premises defendant objected, tried to get between the officers and the whiskey, and that the officers found about a pint of nontax-paid liquor in his house and a quantity of fruit jars at the back door, *is held* sufficient to overrule defendant's motion to nonsuit in a prosecution for unlawful possession of intoxicating liquor. *S. v. Avery*, 276.

Testimony of defendant that he had rented the premises and that the liquor found therein belonged to his lessee, relates to matters in defense and should not be considered on motion to nonsuit. *Ibid.*

Evidence tending to show that officers found a still and a quantity of nontax-paid whiskey on land some three hundred yards from defendant's house, that there was a path between the house and the still, and also that sugar sacks found at defendant's house were similar to sugar sacks found at the still, but that defendant neither owned nor rented the land upon which the still was found, *is held* insufficient to sustain conviction of defendant for possession of nontax-paid whiskey and possession of nontax-paid whiskey for the purpose of sale. *S. v. McLamb*, 287.

Evidence tending to show only that a bus driver gave defendant the key to the rear baggage compartment of the bus, and that at defendant's destination a bag containing intoxicating liquor was found in the baggage compartment, without identification of the bag as the one carried by defendant and without testimony that anyone saw defendant put the bag in the compartment, *is held* insufficient to fix defendant with ownership or possession of the liquor found in the baggage compartment. *S. v. Love*, 344.

Evidence tending to show that officers with search warrant entered defendant's home, caught defendant as she was attempting to empty nontax-paid liquor from a jar, that two nonresidents of the house were there at the time with small glasses having the odor of liquor before them on the table, and that on several occasions people were seen going into the house sober and coming out drunk, *is held* sufficient to be submitted to the jury in a prosecution for possession of nontax-paid liquor for the purpose of sale. *S. v. Rainey*, 738.

§ 9f. Prosecutions—Instructions.

In a prosecution of a resident of a county which has not elected to operate county liquor stores on a charge of possession of intoxicating liquor for the purpose of sale, the court is under duty to instruct the jury upon evidence that three gallons of tax-paid liquor was found in defendant's home, that such possession by defendant in his dwelling for the personal consumption of himself, his family and his *bona fide* friends therein would be lawful, and error in failing to give such instruction is emphasized by a charge that a person has a right to have one gallon of tax-paid liquor in his home for the personal use of himself and his *bona fide* guests. *S. v. Brady*, 295.

JUDGMENTS.

§ 3½. Conditions, Effect and Enforcement of Consent Judgments.

The unambiguous terms of a consent judgment must be given effect until such judgment is modified or set aside in a proper proceeding. *Peace v. High Point*, 619.

§ 9. Rendition of Default Judgments in General.

No judgment by default, whether by default final or by default and inquiry, may be entered so long as answer remains filed of record, regardless of whether it was filed within time or not, and where the clerk cannot determine whether answer was filed before or after he signed the default judgment, his order setting aside the default judgment on proper motion will be upheld. In such instances G.S. 1-220 is not applicable and movant is not required to show excusable neglect and a meritorious defense. *White v. Southard*, 367.

§ 17d. Effect and Interpretation of Judgments and Orders.

Where a judicial ruling is susceptible of two interpretations, the court will adopt the one which makes it harmonize with the law properly applicable to the case. *Alexander v. Brown*, 212.

In an action by a remainderman to set aside decree of sale of land to make assets by the administrator and sale pursuant thereto on the ground of irregularity, and for possession of the land, and for trespass and waste, *held*, a judgment sustaining demurrer on the ground that petitioner was not presently entitled to possession, but retaining the petition in so far as it alleged acts of trespass and waste must be interpreted as dismissing only the action for possession, since the action for trespass and waste is dependent upon title, and therefore the demurrer could not have been sustained as to those allegations which were necessary to establish title in petitioner as remainderman. *Narron v. Musgrave*, 388.

§ 25. Attack of Judgments—Direct and Collateral Attack.

When a court has no authority to act, its acts are void and may be treated as nullities anywhere, at any time, for any purpose. *Corey v. Hardison*, 147.

§ 27a. Motions to Set Aside for Surprise and Excusable Neglect.

In order to be entitled to have a default judgment set aside under G.S. 1-220, movant must show excusable neglect and also that he has a meritorious defense. *Stephens v. Childers*, 348.

Upon motion to set aside judgment under G.S. 1-220, the absence of a sufficient showing of excusable neglect renders the question of meritorious defense immaterial. *Ibid.*

Where the insurance carrier has all the papers sent to it and undertakes with the knowledge and consent of insured to defend a suit against insured, insurer is insured's responsible agent and its neglect to file answer in time will be imputed to insured, and the court's findings to the effect that insurer was guilty of neglect and that such neglect was inexcusable sustains judgment refusing to set aside the judgment by default and inquiry. *Ibid.*

Findings of fact to the effect that defendant's counsel did not appear until after adjournment of the term at which the cause was regularly calendared because he was engaged in the trial of causes in another county, but that he did not request a continuance, *held* to show absence of excusable neglect and to justify the refusal of motion to set aside the judgment, it being required that a party give to his case that degree of diligence ordinarily employed by

JUDGMENTS—*Continued.*

men of reasonable prudence in looking after business matters of the same or similar importance. *Whitley v. Caddell*, 516.

§ 27d. Attack of Judgments for Irregularity.

Ordinarily, judgment will not be set aside for mere irregularity and no more, but movant must show he has suffered substantial wrong and that vacating judgment will not prejudice rights of innocent third parties. *Narron v. Musgrave*, 388.

§ 27e. Attack of Judgment for Fraud.

A separation agreement executed by husband and wife after separation and pending her divorce action is not subject to attack under the laws of the State of New York for fraud and collusion on the ground that its real consideration was that the wife would proceed with the divorce action without delay and that the husband would not defend it, there being no attack of the ground on which the divorce was granted or contention that the decree was not justified by the real facts. *Howland v. Stitzer*, 230.

§ 33c. Judgments as Bar to Subsequent Action—Judgments of Retraxit and Dismissal.

An action to recover for cutting and stacking lumber was dismissed on the ground that although plaintiff was entitled to a stipulated sum therefor, such amount was not recoverable under the contract until the lumber had been sold, and that defendant had not arbitrarily neglected or refused to sell the lumber, and that plaintiff was not entitled to a lien on the lumber. The judgment directed that defendants were under legal duty to use due diligence to sell the remaining lumber. *Held:* The judgment does not estop plaintiff from maintaining a subsequent action for the balance due him upon his contentions that subsequent to the judgment defendant failed to use due diligence to sell the lumber but had arbitrarily and unreasonably neglected to sell same. *Macon v. Murray*, 484.

LIMITATION OF ACTIONS.

§ 5a. Accrual of Right of Action in General.

Statutes of limitation begin to run against a tort from the time the tort is committed with the sole exception of torts grounded on fraud or mistake. G.S. 1-15, G.S. 1-52 (9). *Lewis v. Shaver*, 510.

§ 5b. Accrual of Right of Action—Fraud and Ignorance of Cause of Action.

Where it is established that the person under whom plaintiffs claim was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to the property for fraud and undue influence, plaintiffs' claim is barred. *Muse v. Muse*, 182.

Mere lack of knowledge of the facts constituting a cause of action in tort, in the absence of fraudulent concealment of the facts by the tort-feasor, does not postpone the running of the statute. *Lewis v. Shaver*, 510.

Plaintiffs, aged Negroes without education, instituted this action to recover damages for fraudulent representations as to the amount of land included in a lot purchased by them. *Held:* Their testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered, or should have been discovered by them in the exercise of reasonable diligence. *Swinton v. Realty Co.*, 723.

LIMITATION OF ACTIONS—*Continued.*

§ 5d. Accrual of Right of Action by Remaindermen.

Right of action to recover possession does not accrue in remaindermen until the falling in of the life estate. *Narron v. Musgrave*, 388.

But remaindermen may move to vacate a void or voidable judgment affecting title before the expiration of the life estate. *Ibid.*

§ 6b. Accrual of Right of Action—Continuing and Recurrent Trespass.

Plaintiff instituted this action to recover damages to his land caused by the seeping of gasoline from defendant's underground storage tank. Defendant pleaded the statute of limitations because the action was not instituted within three years from the first injury alleged. By reply, plaintiff alleged that on three separate occasions defendant dug up and reinstalled the tank to stop the leakage, the last of which was within three years of the institution of the action. *Held:* Construing the reply liberally, it is sufficient to allege recurring acts of negligence or wrongful conduct, each causing a renewed injury to plaintiff's property, and therefore demurrer to the reply should have been overruled. *Oakley v. Texas Co.*, 751.

§ 7. Disabilities.

The suit instituted by an heir at law shortly after becoming of age to set aside sale of lands of the estate to make assets to pay debts, is not barred by any statute of limitations or laches. *Davis v. Jenkins*, 283.

§ 15. Pleading the Statute.

Statutes of limitation cannot be taken advantage of by demurrer but only by answer. G.S. 1-15. *Lewis v. Shaver*, 510.

Plaintiff's right to prosecute his cause is not barred unless and until the appropriate statute of limitations is expressly pleaded, even though upon the pleading of the statute the burden is on plaintiff to show that his action was instituted within the time allowed by the statute. *Ibid.*

§ 16. Burden of Proof.

The burden is upon plaintiffs to show that their action was brought within the time allowed by law. *Muse v. Muse*, 182.

MALICIOUS PROSECUTION.

§ 2. Nature and Essentials of Cause of Action—Valid Process.

An action for malicious prosecution must be based upon a valid process, and where the warrant under which plaintiff was arrested fails to charge him with any crime, defendant's motion to nonsuit should be allowed. *Hawkins v. Reynolds*, 422.

§ 7. Pleadings.

In an action for malicious prosecution, plaintiff is entitled to allege the fact of his arrest and all circumstances of aggravation attending it as bearing upon the issue of damages. *Alexander v. Brown*, 212.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus lies only to compel the performance of a ministerial act by those under a present legal duty to perform the act. *Williamston v. R. R.*, 271.

MANDAMUS—*Continued.*

§ 2b. Discretionary Duty.

Mandamus will not lie to control exercise of discretion and judgment on part of State officer. *Williamston v. R. R.*, 271.

MASTER AND SERVANT.

§ 2b. Construction and Operation of Contract of Employment.

Where a letter offering employment states in detail the proposed terms of employment but makes no reference to the expense of moving the recipient's family to the place of employment, and the letter of acceptance states that the recipient would like to supplement the terms by including the expense of moving the recipient's family in accordance with prior verbal negotiations, *held* the item of the expense of moving was left open to further treaty between the parties, and the employee's testimony that the employer later verbally agreed to pay such expense takes to the jury the question of whether such expense was included in the contract of employment. *Goeckel v. Stokely*, 604.

§ 13½. Contractor's Liability to Third Parties Injured by Independent Contractor.

In an action by a tenant against the contractor for the State Highway Commission to recover for the loss of his goods by fire during the moving of the leased buildings incident to highway construction, *held* the contract between lessors and the Highway Commission which stipulated that the buildings should be moved without prejudice to occupancy and rights of the tenants and at the expense of the Commission as a part of the consideration for the right of way, is competent to show protection of the rights of the tenants by lessors, it further appearing that the Highway Commission inserted special provisions of like character for the protection of the tenants in its contract with defendant contractor for the moving of the buildings. *Brown v. Construction Co.*, 462.

Under terms of contract, main contractor *held* liable to third persons for negligence of subcontractor in performance of the work. *Ibid.*

§ 22d. Liability Under Respondeat Superior When Employee Has More Than One Employer.

Where an employee is in the general employment of one person, but in the performance of a particular duty is under the immediate direction and control of another, the latter is liable for the servant's negligence under the doctrine of *respondeat superior*. *Jackson v. Joyner*, 259.

§ 39b. Compensation Act—Independent Contractors and Sub-Contractors.

G.S. 97-19 is applicable only to subcontractors as defined by the statute and was enacted for the purpose of protecting employees of irresponsible and uninsured subcontractors and to prevent an employer from evading the Workmen's Compensation Act by subdividing his regular operations, and the statute has no application to an independent contractor whose sole connection with the principal contractor is the sale of goods which the principal contractor purchases on the open market. *Greene v. Spivey*, 435.

§ 40a. Workmen's Compensation—Injuries Compensable in General.

In order to be compensable, an injury must be the result of an accident which arises out of and also in the course of the employment. *Bell v. Dewey Bros.*, 280.

MASTER AND SERVANT—*Continued.*

§ 40c. Workmen's Compensation—Whether Accident "Arises Out of the Employment."

The words "arising out of" as used in the North Carolina Workmen's Compensation Act relate to the origin or cause of the accident, and require that the accident arise out of the work the employee is employed to do and be incidental thereto. *Bell v. Dewey Bros.*, 280.

Claimant, employed as a night watchman, was injured on the employer's premises during his hours of duty when his trouser leg caught on the bumper of his car, causing him to fall, as he was washing his personal car for his own purposes with the implied consent of the employer. *Held:* There was no causal relationship between his employment and the injury, and therefore the injury did not arise out of the employment and is not compensable. *Ibid.*

§ 40d. Workmen's Compensation—Whether Accident Arises "in Course of the Employment."

The words "in the course of" as used in the North Carolina Workmen's Compensation Act refer to the time, place, and circumstances under which the accident occurs. *Bell v. Dewey Bros.*, 280.

§ 41. Workmen's Compensation—Actions Against Third Person Tort-Feasor.

An action in behalf of an injured employee against a third person tort-feasor is governed by G.S. 97-10 and not the code of civil procedure. *Lovette v. Lloyd*, 663.

A right of action exists in behalf of an injured employee against the third person tort-feasor causing the injury even though the injury is compensable under the Compensation Act and the employee has actually received compensation therefor under the Act. *Ibid.*

The employer or insurance carrier who has paid or become obligated to pay compensation to the injured employee has initially the exclusive right to maintain an action in its own name or the name of the employee against the third person tort-feasor, but if neither institutes action within six months from the date of the injury the right of action passes to the employee. *Ibid.*

Where the plaintiff is the party authorized by G.S. 97-10 to maintain the action against the tort-feasor, he is entitled to prosecute same to final judgment, and the court may not interfere with this privilege by the joinder of wholly unnecessary additional parties. *Ibid.*

In an action on behalf of the injured employee against the third person tort-feasor, plaintiff, regardless of whether the suit is maintained by the employer, the employee, or the insurance carrier, is entitled to recover the full amount of damages, since judgment in the action bars any other person from thereafter maintaining an action on the same cause of action, and it is the duty of the court, without a jury, to order the disbursement of the funds among the parties entitled to share in the recovery in the event of a favorable verdict. *Ibid.*

Contributory negligence of the injured employee constitutes a complete defense to an action against a third person tort-feasor, and may be pleaded and proved by such third person irrespective of whether the action is instituted by the employer, the insurance carrier, or the employee. *Ibid.*

Independent negligence of the employer, as distinguished from negligence of the injured employee imputed to the employer under the doctrine of *respondeat superior*, may be pleaded and proved by the third person tort-feasor as a

MASTER AND SERVANT—*Continued.*

bar, complete if the sole proximate cause of the injury, or, if constituting concurring negligence, *pro tanto* against the recovery of compensation paid or payable by the employer or the insurance carrier, even though action be prosecuted by the injured employee alone. *Ibid.*

Liability for contribution under G.S. 1-240 or for indemnity under the doctrine of primary and secondary liability cannot be invoked except among joint tort-feasors, and the Workmen's Compensation Act not only abrogates all liability of the employer to the employee under the law of negligence but also limits the liability of the employer to the employee to the payment of compensation under the Act, and therefore in an action against the third person tort-feasor by the employee, the defendant is not entitled to join the employer or the insurance carrier for contribution or to set up the defense that its liability is secondary and that of the employer primary. *Ibid.*

In an action instituted by the employee alone more than six months after the injury, against the third person tort-feasor, defendant is not entitled to the joinder of the employer and the insurance carrier, except in extraordinary circumstances, since defendant may plead all available matters in defense and mitigation in regard to them notwithstanding that they are not parties. *Ibid.*

While ordinarily an order providing for the joinder of additional parties is not appealable, in an action by an injured employee against a third person tort-feasor, in accordance with the provisions of G.S. 97-10, an order joining the employer and insurance carrier affects the substantial right of the employee to prosecute the action to a final determination without the presence of wholly unnecessary parties, and therefore is appealable. *Ibid.*

§ 42b. Compensation Act—Coverage of Policy and Insurers Liable.

Findings *held* to support conclusion that main contractor was agent of insurer in effecting compensation insurance for independent contractor. *Greene v. Spivey*, 435.

Insurer admitted coverage and acknowledged receipt of premiums of the employer during the period the employer was selling his total output of logs to the main contractor and also for several weeks during which the employer was selling his logs to another. *Held:* Insurer may not deny liability for an accident occurring during a subsequent period when no logs were being sold or delivered to the main contractor, since a person may not ratify a portion of a contract and reject the rest. *Ibid.*

§ 45. Functions and Jurisdiction of Industrial Commission in General.

The jurisdiction of the Industrial Commission to hear and determine all questions arising under the Compensation Act ordinarily includes the right and duty to hear and determine questions of law and fact respecting the existence of insurance coverage and the liability of the insurance carrier, G.S. 97-91, in furtherance of the legislative intent that the provisions of the Act be administered under summary and simple procedure to afford complete relief to parties bound by the Act. *Greene v. Spivey*, 435.

§ 55d. Compensation Act—Appeal and Review.

A general exception to the decision and award of the Industrial Commission, without any specific exception to any finding of fact, presents for review in the Superior Court only whether the facts found by the Commission support the decision and award. *Greene v. Spivey*, 435.

Where, on appeal from the Industrial Commission, no finding of fact is presented for a ruling by the Superior Court, and only a general exception to

MASTER AND SERVANT—*Continued.*

the judgment of the Superior Court is entered, the sufficiency of the evidence to support any particular finding may not be raised for the first time upon further appeal to the Supreme Court. *Ibid.*

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

Money paid to the use of another may be recovered when the beneficiary promises to repay the money so expended or induces the expenditure or consciously receives the benefits. *Wells v. Foreman*, 351.

Ordinarily, in the absence of fraud or mistake, money voluntarily expended or a payment voluntarily made to the use of another is not recoverable. *Ibid.*

Party expending money pursuant to contract precluded by statute of frauds may recover same from party knowingly accepting benefits. *Ibid.*

§ 3. Pleadings and Evidence.

In an action by parties to a contract unenforceable by reason of the statute of frauds to recover money expended in reliance on the agreement, allegations relating to the contract as the inducement to plaintiffs to make the expenditures, the conscious acceptance by defendant of the benefits thereof, and the breach of the contract by defendant, are competent to rebut any presumption that the expenditures were gratuitous, and motion to strike on the ground that such allegations related to an unenforceable contract are properly denied. *Wells v. Foreman*, 351.

MORTGAGES AND DEEDS OF TRUST.

§ 27. Satisfaction of Debt and Cancellation of Mortgage.

Where the verdict of the jury establishes that the asserted mortgagor is not indebted to the mortgagee in any amount, the mortgage has no validity, and decree of cancellation is proper. *Bradham v. Robinson*, 589.

§ 32f. Presumption of Regularity of Foreclosure.

Presumption of regularity in foreclosure of a deed of trust does not arise until the deed of trust or some record thereof is offered in evidence, and mere recital in the trustee's deed that it was given pursuant to foreclosure of a registered deed of trust is insufficient for this purpose. *Meeker v. Wheeler*, 172.

MUNICIPAL CORPORATIONS.

§ 1. Nature and Definition of Municipal Corporation.

A rural zoning commission is not a municipal corporation. *Harrington & Co. v. Renner*, 321.

§ 5. Powers of Municipalities in General; Legislative Control and Supervision.

A municipality is a mere creature of the Legislature with only such powers as are delegated to it, which delegated powers must be exercised strictly within the limitations prescribed by the General Assembly. *S. v. Scoggin*, 1.

A municipal corporation exercises two classes of powers, one governmental as an agency of the State and the other proprietary as a private corporation. *Britt v. Wilmington*, 446.

MUNICIPAL CORPORATIONS—*Continued.*

§ 7a. Governmental Powers in General.

Any activity of a municipality which is discretionary, political, or legislative and undertaken in behalf of the State in promoting or protecting the public health, safety, security, or general welfare, is a governmental function. *Britt v. Wilmington*, 446.

§ 8a. Proprietary Powers in General.

Any activity of a municipality which is commercial or chiefly for the private advantage of the compact community, is a proprietary function, but even a private or proprietary function of a municipality must be for a public purpose and at least incidentally promote the general health, safety, security, or general welfare of its residents. *Britt v. Wilmington*, 446.

§ 11e. Criminal Liability of Officers and Agents.

Use of public car by policeman must be for private purpose in order to constitute offense under G.S. 14-247; 14-252. *Hawkins v. Reynolds* 422.

§ 14a. Defects or Obstructions in Streets.

A contractor constructing a sewer line along a city street under contract with the municipality is under substantially the same duty to the traveling public as the municipality would be if it were doing the work itself. *Broadaway v. King-Hunter, Inc.*, 673.

In excavating a ditch along a street for a sewer line, the contractor, though not an insurer of the safety of travelers, is under duty, in the exercise of due care commensurate with the circumstances, to warn travelers of the existence of the open ditch and otherwise protect them against injury therefrom. *Ibid.*

Evidence of negligence of contractor in failing to maintain sufficient flares along excavation in street *held* for jury, and evidence did not establish contributory negligence as matter of law on part of pedestrian falling into the excavation. *Ibid.*

§ 36. Nature and Extent of Municipal Police Power in General.

The General Assembly may delegate to a municipality, as a governmental agency or arm of the State, authority to enact ordinances in the exercise of the police power for the government of those within its limits, including the right to prescribe rules or standards of conduct, the violation of which shall constitute a criminal offense. *S. v. Scoggin*, 1.

The police power is subordinate to the constitutional guarantee of equality of privilege and of burden, and any attempted exercise thereof which results in the denial of equal protection or application of the law is invalid. Fourteenth Amendment to the Federal Constitution. *Ibid.*

An ordinance adopted by a municipality in the exercise of delegated police power must be uniform and apply alike to all within a designated class and must have a reasonable relation to the evils sought to be remedied. *Ibid.*

A municipality may not bind itself to enact or enforce on street and off-street parking regulations by penal ordinance for the period during which bonds issued to provide off-street parking facilities should be outstanding, since it may not contract away or bind itself in regard to its freedom to enact governmental regulations. *Britt v. Wilmington*, 446.

§ 37. Zoning Ordinances and Building Permits.

An ordinance of a municipality prohibiting the erection of gins or mills within the corporate limits without the consent of property owners within

three hundred feet of each proposed site is void, since it involves the delegation of legislative power to private individuals. *Wilcher v. Sharpe*, 308.

The General Assembly may not delegate to a zoning commission the power to promulgate zoning regulations within a rural section of a county, since such commission is not a municipal corporation and therefore cannot be delegated the authority to exercise a portion of the State's police power. *Harrington & Co. v. Renner*, 321.

In an action by a municipality to enforce a zoning ordinance, complaint of individuals, joined as parties plaintiff, which fails to show that such individuals were citizens or property owners of the municipality, or that they would be injuriously affected by the defendants' alleged nonconforming use, is demurrable for failure to state a cause of action in favor of such individuals. *Shelby v. Lackey*, 369.

But action should not be dismissed on such demurrer. *Ibid.*

Court may not direct verdict that defendants had violated ordinance. *Ibid.*

§ 38½. Municipal Police Power—Public Convenience.

A municipality in the exercise of the police power delegated to it by G.S. 160-200 (31) may require a motorist who parks his vehicle in a parking meter zone to set the meter in operation by deposing a coin, provided that the deposit of the coin is the method selected by its governing body in the exercise of its discretion for the purpose of regulating parking in the interest of the public convenience and not as a revenue raising measure. *S. v. Scoggin*, 1.

Where a municipal ordinance prescribes that parking in a designated zone should be limited to one hour, a motorist cannot be convicted of overtime parking when he parks in such zone for less than the prescribed one hour period, and a provision of the ordinance that a motorist should be subject to criminal prosecution if he parks in the one hour zone for longer than twelve minutes upon the deposit of a one-cent coin, or twenty-four minutes upon the deposit of two one-cent coins for successive periods, *is held* unconstitutional as being discriminatory and as making the period of time dependent not upon public convenience but upon the amount of money deposited. *Ibid.*

Where a municipal ordinance prescribes one-hour and two-hour parking meter zones upon the deposit of a five-cent coin, the ordinance may permit by nonpenal provisions that a motorist may deposit a one-cent coin for a shorter length of time, provided the motorist may, by depositing additional pennies, not to exceed a total of five, remain in the parking space for the total length of time prescribed by the ordinance for such zone. *Ibid.*

A municipality has no authority to charge a fee or toll for the parking of vehicles upon its streets or to lease or let its system of on-street parking meters for operation by a private corporation or individual. Therefore, it may not pledge revenue derived from on-street meters to the payment of proposed bonds for off-street parking arrangements, or consolidate into one project on-street and off-street parking. G.S. 160-414 (d) and G.S. 160-415 (g) as they relate to on-street parking are void. *Britt v. Wilmington*, 446.

On-street parking meters are maintained by a municipality in the exercise of its governmental powers in the regulation of traffic on its streets, and the requirement of the deposit of a coin is in the nature of a tax and is not a fee or toll but simply the method for putting the meter into operation, and the revenue therefrom must be set apart and used for expenses incurred in the regulation and limitation of vehicular traffic on its streets. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

The regulations of a municipality for off-street parking meters maintained by it in its proprietary capacity may not be enforced by criminal prosecutions. *Ibid.*

§ 39. Police Power—Public Safety.

A municipal corporation is given authority by statute to install automatic traffic control signals and to compel their observance by ordinance. *Cox v. Freight Lines*, 72.

A municipality is not entitled to a mandatory injunction to compel a railroad company to widen and improve an underpass in the interest of public safety when such underpass, although within the municipality, constitutes a part of a State highway, since the exclusive control over the underpass in such instance is vested in the State Highway and Public Works Commission. *Williamston v. R. R.*, 271.

§ 40. Violation and Enforcement of Police Regulations.

The proof or admission that defendant owned an automobile registered in his name and that such automobile was parked on a city street in violation of its parking meter ordinance without evidence or admission tending to show who parked the automobile at the time and place in question, *is held* insufficient to sustain a conviction of defendant of parking or permitting his vehicle to be parked in violation of the ordinance. *S. v. Scoggin*, 19.

NEGLIGENCE.

§ 4a. Invitees.

Person asked to ride in car as prospective purchaser is invitee. *Patterson v. Moffitt*, 405.

§ 4f. Injury to Patrons of Store.

While a proprietor of a store is not an insurer of the safety of its customers, he is under duty to exercise ordinary care to keep the aisles and passageways where customers are expected to go in a reasonably safe condition and to give warning of hidden dangers or unsafe conditions of which he knows or in the exercise of reasonable supervision and inspection should know. *Lee v. Green & Co.*, 83.

The doctrine of *res ipsa loquitur* does not apply to injuries resulting from slipping or falling on the oiled floor of a store. *Ibid.*

In order for a customer to recover for injuries sustained in falling upon an oiled floor of a store, the customer must introduce evidence tending to show that the proprietor had the floor oiled or permitted it to be oiled in an improper manner so as to leave it in an unsafe condition. *Ibid.*

Plaintiff's evidence was to the effect that she slipped and fell on an aisle in defendant's store at a place that was slick with excessive oil or grease, that all of the floor in this portion of the store appeared to have been oiled or greased, and that the application was fresh at some spots and dry at others, with greater accumulations of oil or grease at some places than at others. *Held:* The evidence was sufficient to make out a *prima facie* case and take the issue of negligence to the jury. *Ibid.*

Where the evidence tends to show that the floor of an entire portion of a store had been given some general type of oil treatment, improperly applied so that more oil was allowed to accumulate at some places than at others, *held:* It is not incumbent upon plaintiff to show when or by whom the treat-

NEGLIGENCE—*Continued.*

ment was applied or the mode of procedure followed in applying it, since the fact of its general application supports the inference that it was oiled by or under the direction or supervision of the proprietor, and therefore knowledge of the proprietor of the hazardous condition may be inferred, since no one needs notice of that which he knows. *Ibid.*

§ 7. Intervening Negligence.

Intervening act of third person which independently and proximately produces the injury insulates the negligence of defendant. *McLaney v. Motor Freight*, 714.

§ 8. Primary and Secondary Liability.

In employer's action against third person tort-feasor, defendant may not set up doctrine of primary and secondary liability as between himself and employer. *Lovette v. Lloyd*, 663.

Primary and secondary liability for negligent injury is based on active and negative negligence of joint tort-feasors, and where an answer contains no factual averments tending to show that the negligence of the pleader was negative in character, it is insufficient to call the doctrine into play. *Ibid.*

§ 9. Foreseeability and Anticipation of Injury.

Negligence does not create liability unless it is the proximate cause of the injury complained of, and foreseeability is an essential element of proximate cause. *Deaver v. Deaver*, 186.

Proximate cause is an essential element of actionable negligence and foreseeability is an essential element of proximate cause. *Patterson v. Moffitt*, 405.

§ 9½. Anticipation of Negligence on Part of Others.

The rule that a party is not under duty to anticipate disobedience of law or negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, is entitled to assume and act on the assumption that others will obey the law and exercise ordinary care, *held* not subject to the limitation that such party be absolutely free of negligence on his own part, although such rule would not absolve him from liability if his own negligence constitutes the proximate cause, or one of the proximate causes, of the injury. *Cox v. Freight Lines*, 72.

Person is not under duty to anticipate negligence on part of others. *Morgan v. Saunders*, 162.

§ 16. Pleadings in Negligence Actions.

In an action for negligence, the defendant may show under a general denial that the sole proximate cause of the injury in suit was the negligence of some third person, and therefore an allegation to that effect, while ordinarily surplusage, is harmless. *Lovette v. Lloyd*, 663.

Plaintiff may properly describe the wounds inflicted upon his intestate as a result of the accident in suit as bearing upon the allegations of negligence, and motion to strike same on the ground that they tended to create passion or prejudice is properly denied. *Bumgardner v. Fence Co.*, 698.

Where it appears from the facts alleged in the complaint that the injury was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person, defendant's demurrer to the complaint should be sustained. *McLaney v. Motor Freight*, 714.

NEGLIGENCE—*Continued.*

§ 19a. Negligence—Questions of Law and of Fact.

What is negligence is a question of law, and when the facts are admitted or established, the court may say whether negligence does or does not exist and, if so, whether it was the proximate cause of the injury. *Godwin v. Nixon*, 632.

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence tending to show that defendant contractor was operating a small electric circular saw on a bench near his house, that there was sawdust and scrap lumber around the bench, that when plaintiff went out to deliver a business message to defendant, she stepped on something, lost her balance, and grabbed a piece of board on the saw bench which jerked her hand into the saw, causing serious injury, *is held* insufficient to overrule nonsuit, since under the evidence defendant could not have rasonably foreseen a mishap of such kind and nature. *Deaver v. Deaver*, 186.

Plaintiff's evidence tended to show that he was an invitee in defendant's car, that after a trip, defendant, who was driving, first alighted, and that plaintiff, who was sitting on the back seat, in attempting to alight, put his hand on the center post in such manner that when defendant closed the front door, the plaintiff's fingers were caught between the center post and the door, causing painful and serious injury. *Held:* Defendant was not under duty to anticipate or foresee before closing the door that plaintiff's hand was on the door jamb in such manner that his fingers would be caught and crushed by the closing door, and nonsuit was properly entered. *Patterson v. Moffitt*, 405.

Plaintiff in an action to recover for negligent injury must show failure on the part of defendant to exercise due care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty, acting in continuous sequence, produced the injury, and that such result could have been reasonably foreseen by a man of ordinary prudence under the existing conditions. Nonsuit is proper if plaintiff's evidence fails to establish any one of these essential elements. *Godwin v. Nixon*, 632.

§ 19c. Nonsuit on Ground of Contributory Negligence.

Plaintiff's own evidence *held* to establish contributory negligence proximately causing accident at barricade of highway under construction. *Chesson v. Teer Co.*, 203.

§ 19d. Nonsuit on Ground of Intervening Negligence.

Where it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of any outside agency or responsible third person, defendant's motion to nonsuit is properly sustained. *Godwin v. Nixon*, 632.

§ 20. Instructions in Actions for Negligence.

An instruction which in effect charges that if defendant failed to avail himself of the last clear chance to avoid the injury to answer the issue of contributory negligence in the negative, must be held for error as making the conduct of the defendant determinative of the question of whether plaintiff was contributorily negligent. *Spencer v. Motor Co.*, 239.

The charge of the court in this case defining contributory negligence and placing the burden of proof on the issue upon defendant *held* without error. *Anderson v. Office Supplies*, 519.

NUISANCES.

§ 3b. Acts or Conditions Constituting Nuisance—Noise and Disturbance.
(Abatement of, see Injunctions.)

The operation of a hammer feed mill for the processing of corn and other grains is not a nuisance *per se*. *Wilcher v. Sharpe*, 308.

PARTIES.

§ 10a. Joinder of Additional Parties.

It is the purport of the code of civil procedure that all persons having interests in the action either by way of rights or by way of liabilities be joined so that a single judgment may be rendered effectively determining all such rights and liabilities, and to this end the court has discretionary power to bring in additional parties plaintiff or defendant. *Burgess v. Trevathan*, 157.

Under G.S. 1-73 the trial court should bring in all parties who have such interest in the subject matter of the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without their presence. Art. I, sec. 17, of the State Constitution. *Garrett v. Rose*, 299.

Defendant in ejectment set up the defense of title in himself subject to a charge upon the land in a specified amount payable to the contingent remaindermen, share and share alike. *Held:* It was error for the court to refuse to permit the administrator of two of such remaindermen to intervene in order that their rights to their respective shares of the consideration could be determined. *Ibid.*

Action in behalf of injured employee against third person tort-feasor is governed by G.S. 97-10 and not code of civil procedure. *Lovette v. Lloyd*, 663.

Employee bringing action under G.S. 97-10 is entitled to prosecute action to judgment without joinder of employer or insurance carrier, and may appeal from order of joinder. *Ibid.*

PARTITION.

§ 4e. Distribution of Proceeds of Sale and Adjustment of Rights of Parties.

In a suit for partition, a tenant in common may assert in her pleading that she has paid off an encumbrance on the property and ask that she be reimbursed for such sum in the adjustment of the rights of the parties, since the proceeding is equitable in nature and the court has jurisdiction to adjust all equities in respect to the property. *Henson v. Henson*, 429.

§ 4g (2). Actual Partition Under Decree—Hearing of Exceptions by Clerk.

While the clerk, upon hearing of exceptions to the report of the commissioners for actual partition, may recommit for correction or further consideration, or vacate the report and direct a reappraisal, or vacate the report, discharge the commissioners and appoint new commissioners to make partition, the clerk is without authority to alter the report either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners. *Langley v. Langley*, 184.

§ 4g (3). Actual Partition Under Decree—Appeals to Superior Court.

Upon appeal to the Superior Court from the disposition made by the clerk upon exceptions to the commissioners' report for actual partition, the judge has jurisdiction to review the report in the light of the exceptions filed, hear evidence, and render such judgment, within the limits provided by law, as he

PARTITION—*Continued.*

deems proper under all the circumstances made to appear to him. *Langley v. Langley*, 184.

§ 8. Partition by Acts of Parties—Operation and Effect.

Where each tenant in common owns a defeasible fee with limitation over to his cotenants in the event of his death without issue, and such tenants voluntarily partition the property by the exchange of deeds conveying all their right, title, and interest in the lands allotted to the others, their deeds defeat the limitation over and each holds the fee simple absolute in his share. *Sutton v. Sutton*, 495.

PHYSICIANS AND SURGEONS.

§ 11½. Scope of Employment and Unauthorized Operations.

Evidence tending to show that a surgeon was authorized only to remove an ovarian cyst and that he removed the ovary and ligated the Fallopian tubes, rendering the patient sterile, is sufficient to make out a case of technical assault or trespass upon the person of the patient. *Lewis v. Shaver*, 510.

In this action against a surgeon for a technical assault in performing an operation beyond the scope of the one authorized some seven years prior to the institution of the action, plaintiff alleged that she did not discover the facts until shortly before instituting suit, and also that defendant fraudulently concealed and withheld from plaintiff knowledge of the extent of the operation performed by him. Plaintiff's own evidence disclosed that she did not see or consult with the surgeon in respect to her condition or the operation after it had been performed. *Held:* There being no evidence of fraudulent concealment, plaintiff's cause is barred by the three-year, G.S. 1-52 (5), if not the one-year, G.S. 1-54 (3), statute of limitations. *Ibid.*

§ 16½. Liability of Surgeon for Negligence of Nurses and Attendants.

Where the evidence tends to show that the physician performing the operation selected and arranged for the help of an anaesthetist employed by the hospital and had full power and control over him in the performance of his duties during the operation, *held* the anaesthetist was, during the period of the operation, the agent of the physician, and the physician is liable for the negligence of the anaesthetist in the administration of the anaesthetic. *Jackson v. Joyner*, 259.

Where in an action to recover for the death of a child following an operation, the complaint alleges that the defendant physician permitted an overdose of anaesthetic to be administered to the patient, and upon the trial there is substantial evidence to the effect that the anaesthetist who performed his duties under the direction and control of the physician was negligent, error in the charge to the effect that the physician would not be liable for the negligence of the anaesthetist must be held prejudicial. *Ibid.*

§ 20. Sufficiency of Evidence of Malpractice.

The evidence tended to show that plaintiff underwent a lumbar sympathectomy for peripheral vascular disease, which he was advised would take only some forty-five minutes, that he was in the operating room over seven hours, that during the course of the operation a vein was inadvertently punctured, that in an attempt to control the bleeding other perforations of the blood vessel occurred, that thereupon the chief of the surgical service of the hospital was called in, who, upon ascertaining the patient's condition, abandoned all efforts to repair the blood vessels, but tied off and cut the torn vessels together

with connecting fibrous tissue *en masse*. The evidence further tended to show that the resulting interference with circulation caused gangrene in the patient's left leg, making it necessary to amputate it, first below the knee and later after a debridement, above the knee, and that later a blood clot in the right leg caused gangrene, making it necessary to amputate plaintiff's right leg. *Held:* The evidence was sufficient to be submitted to the jury on the issue of the surgeon's negligence in an action against the surgeon and against the hospital employing him. *Waynick v. Reardon*, 116.

PLEADINGS.

§ 2. Joinder of Causes.

Ordinarily, only matters which are germane to the original or primary cause of action and in which all the parties have a community of interest may be litigated in the same action. *Wrenn v. Graham*, 719.

The personal injuries and property damage suffered by a party, and not the accident causing them, is the subject of his action in tort, and his right to compensation therefor is the claim he asserts, and only such torts as arise immediately and directly out of the subject of the original or primary action and which have such relation thereto that their adjustment is necessary to a full and final determination of that cause may be joined in the complaint or pleaded as a cross action. *Ibid.*

§ 3a. Complaint—Statement of Cause of Action in General.

The plaintiff must allege in his complaint every fact necessary to constitute his cause of action. *Wells v. Clayton*, 102.

Complaint may not allege facts by reference to another paragraph of the complaint in which the facts are alleged. *Alexander v. Brown*, 212; *Wrenn v. Graham*, 719.

The function of the complaint is to present a statement of the material, essential, or ultimate facts upon which plaintiff's claim to relief is founded; it should not allege evidentiary facts or throw charges not essential to statement of cause. *Spain v. Brown*, 355.

§ 7. Answer—Defenses in General, Form and Contents.

To be sufficient, the answer must contain a denial of each material allegation of the complaint controverted by defendant, or a statement of new matter constituting an affirmative defense, or a statement of new matter constituting a counterclaim, G.S. 1-135. Such new matter may constitute both an affirmative defense and a counterclaim. *Wells v. Clayton*, 102.

The answer must either admit or deny the several allegations contained in the complaint; in addition defendant may allege new matter in confession and avoidance or constituting a setoff, or an affirmative defense, or a cross action or counterclaim; it should not allege evidentiary matter, or throw charges or countercharges not essential to the statement of the defense or counterclaim. *Spain v. Brown*, 355.

§ 9. Answer—Pleas in Confession and Avoidance.

A plea in confession and avoidance admits the cause of action alleged by plaintiff and sets up some new affirmative matter in avoidance of same. *Wells v. Clayton*, 102.

PLEADINGS—*Continued.*

§ 10. Counterclaims and Cross-Actions.

Under G.S. 1-137 (1) defendant may set up as a counterclaim an action existing in his favor either by himself or together with the other defendants against plaintiff, or all plaintiffs, if there be more than one, upon which a several judgment might be had, provided such cause of action arises out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim. *Garrett v. Rose*, 299.

A party may not bring forward allegations contained in prior paragraphs of the pleading by referring to such paragraphs by number and stating that pleader repleads them. Rule of Practice in the Supreme Court 20 (2). *Wrenn v. Graham*, 719.

Ordinarily, only matters which are germane to the original or primary cause of action and in which all the parties have a community of interest may be litigated in the same action. *Ibid.*

The personal injuries and property damage suffered by a party, and not the accident causing them, is the subject of his action in tort, and his right to compensation therefor is the claim he asserts, and only such torts as arise immediately and directly out of the subject of the original or primary action and which have such relation thereto that their adjustment is necessary to a full and final determination of that cause may be joined in the complaint or pleaded as a cross action. G.S. 1-123. *Ibid.*

Defendant may not set up cross action against his codefendants to recover for his own injuries or damage. *Ibid.*

§ 13. Office and Necessity for Reply.

New matter in an answer constituting a counterclaim is to be taken as true for the purposes of the action unless it is actually controverted by a reply, G.S. 1-159, or by implication of law because not served upon plaintiff or his counsel as required by G.S. 1-140. *Wells v. Clayton*, 102.

New matter in the answer not relating to a counterclaim is deemed controverted by plaintiff as upon direct denial or avoidance as the case may be without a formal reply, G.S. 1-159, although the court may require plaintiff, on defendant's motion, to reply to new matter constituting a defense by way of avoidance, G.S. 1-141. *Ibid.*

The function of a reply is limited to an admission or denial of new matter set up in the answer and to such amplification of plaintiff's cause of action as may be rendered necessary by such new matter, and no reply is necessary or proper when the answer consists only of admissions or denials, and thus closes the issues. *Spain v. Brown*, 355.

§ 14. Form and Contents of Reply.

The rule which prohibits the incorporation of extraneous, evidential, irrelevant, impertinent, or scandalous matter in a complaint or answer applies with equal force to a reply. G.S. 1-153. This is particularly true if such matter may well tend to prejudice defendant when read to the jury. *Spain v. Brown*, 355.

The function of a pleading is not to narrate the evidence nor to throw charges and countercharges not essential to the statement of a cause of action, affirmative defense, or counterclaim; only the facts to which the pertinent, legal, or equitable principles of law are to be applied should be stated in the pleadings. *Ibid.*

PLEADINGS—*Continued.*

§ 15. Office and Effect of Demurrer.

A demurrer admits the truth of the allegations of fact contained in the complaint together with relevant inferences of fact necessarily deducible therefrom, but does not admit conclusions or inferences of law. *Bumgardner v. Fence Co.*, 698; *McLaney v. Motor Freight*, 714.

Upon demurrer, the complaint will be liberally construed, giving the pleader every reasonable intendment in his favor, and the demurrer overruled unless the pleading be fatally defective. *Ibid.*

Upon demurrer, a pleading will be liberally construed in favor of the pleader. *Oakley v. Texas Co.*, 751.

§ 16. Time of Demurring and Waiver of Right to Demur.

The filing of answer does not waive the right to demur on the ground that the complaint fails to state a cause of action. *Harrington & Co. v. Renner*, 321.

§ 17c. Defects Appearing on Face of Pleading and "Speaking Demurrers."

A demurrer tests the legal sufficiency of the facts as alleged in the pleading challenged, and the demurrer may not incorporate a supposed fact not shown by the pleading for the purpose of attack. The allegation of fact in the demurrer constitutes it a "speaking demurrer." *McDowell v. Blythe Brothers Co.*, 396.

§ 19b. Demurrer for Misjoinder of Parties.

Where the complaint fails to state a cause of action in favor of additional parties plaintiff, demurrer should be sustained as to such additional parties, but demurrer to the complaint for misjoinder of parties should be denied. *Shelby v. Lackey*, 369.

§ 19f. Demurrer—Aider of Complaint by Answer.

A fatal omission in the complaint is cured if such omission is supplied by an affirmative allegation of the answer. *Cox v. Freight Lines*, 72.

§ 22b. Amendment by Permission of Trial Court.

Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. *Alexander v. Brown*, 212.

§ 23. Amendment After Decision on Appeal.

Upon sustaining demurrer to the complaint for its failure to state a cause of action, the plaintiff may move to amend within the time allowed by G.S. 1-131. Upon its failure to do so, the cause will be dismissed. *Builders Corp. v. Casualty Co.*, 513.

§ 24. Variance Between Allegation and Proof.

Proof without allegation is as unavailing as allegation without proof. *Smith v. Barnes*, 176; *Lamb v. Staples*, 179; *Fremont v. Baker*, 253; *Aiken v. Sanderford*, 760.

§ 25. Questions and Issues Raised by Pleadings.

An issue of fact is raised for the determination of the jury whenever a material fact, which is one constituting a part of plaintiff's cause of action or the

PLEADINGS—*Continued.*

defendant's defense, G.S. 1-172, G.S. 1-196, is alleged by one party and denied by the other. *Wells v. Clayton*, 102.

§ 25½. Admission or Denial and Necessity for Proof.

Plaintiff must prove every material fact alleged by him if it is denied by the answer of defendant, but this rule does not apply to an immaterial allegation. *Wells v. Clayton*, 102.

If a fact essential to plaintiff's cause of action is admitted in the answer not only is plaintiff not required to prove same, but such fact is to be taken as true for all purposes connected with the trial whether or not the admission is introduced in evidence. *Ibid.*

Allegations constituting counterclaim deemed admitted in absence of reply unless not served on plaintiff, in which event they are denied by implication of law. *Ibid.*

Allegations in answer not constituting counterclaim deemed denied without formal reply. *Ibid.*

§ 27. Motion for Bill of Particulars.

Motion for bill of particulars is addressed to the sound discretion of the trial judge, and his ruling thereon is not reviewable in the absence of abuse. *Tillis v. Cotton Mills*, 533.

§ 28. Judgment on Pleadings.

Even though an issue of fact be raised by the pleadings, if the party having the burden of proof thereon fails to introduce any evidence, the adverse party is entitled to judgment on the issue. *Wells v. Clayton*, 102.

Plaintiff is entitled to judgment as a matter of law upon a plea in confession and avoidance if defendant fails to prove the new matter alleged by him to avoid the confessed cause of action, regardless of whether the new matter constitutes a counterclaim or an affirmative defense. *Ibid.*

Admissions in answer which do not amount to admissions of ultimate facts constituting plaintiff's cause cannot support judgment on pleadings. *Garrett v. Rose*, 299.

In determining a motion for judgment on the pleadings, the court's decision must be based upon facts alleged on the one hand and admitted on the other, and it is error for the court to hear evidence and find facts in support of its judgment upon the motion, since if the pleadings raise any issues of fact they must be tried by a jury in the absence of waiver of jury trial and agreement that the court should find the facts. *Remsen v. Edwards*, 427; *Crew v. Crew*, 528.

§ 31. Motions to Strike.

The wife's motion to strike allegations in her husband's reply attacking the validity of a separation agreement entered into by the parties should have been allowed under the facts of this case, it appearing that the agreement was not subject to attack on the grounds alleged and that the husband was estopped from attacking it by his ratification and confirmation of the agreement, leaving for adjudication the respective rights of the parties under the terms of the agreement. *Howland v. Stitzer*, 230.

Allegations of an answer which either in themselves or in connection with other averments tend to state a defense or a counterclaim cannot be held irrelevant and should not be stricken upon motion. *Garrett v. Rose*, 299.

PLEADINGS—*Continued.*

The defense of the statute of frauds cannot be raised by demurrer or by motion to strike, notwithstanding that evidence in support of the contract may be inadmissible because the agreement was not in writing. *Wells v. Foreman*, 351.

In action to recover money expended in reliance on oral contract to convey, allegations relating to the contract, acceptance of benefits by promisor and breach of the agreement are competent to rebut presumption that expenditures were gratuitous, and motion to strike was properly denied. *Ibid.*

Allegations in reply that defendant had pleaded guilty in criminal prosecutions to matter forming basis of cause of action and knew allegations of his answer were absolutely untrue *held* properly stricken on motion. *Spain v. Brown*, 355.

Where the financial condition of a party is material to the inquiry the adverse party may allege such fact, but allegations of particular judgments and claims and indebtedness should be stricken on motion as being evidentiary or relating to matters immaterial to the issue. *Crew v. Crew*, 528.

In action by employee under G.S. 97-10, allegations of answer which set up independent negligence of employer and contributory negligence of employee should not be stricken on motion, but allegations setting up primary negligence of employer and right to contribution against him as joint tort-feasor should be stricken. *Lovette v. Lloyd*, 663.

Motion to strike allegations describing injuries in negligence case *held* properly denied. *Bumgardner v. Fence Co.*, 698.

PRINCIPAL AND AGENT.

§ 7d. Ratification and Estoppel.

A principal may not ratify that part of a contract favorable to him and reject that part which is unfavorable, but by electing to retain the benefits, ratifies the entire transaction. *Greene v. Spivey*, 435.

PRINCIPAL AND SURETY.

§ 8. Bonds for Private Construction.

The fact that a contractor's performance bond, executed in favor of the owner by the contractor as principal and a corporation as surety, stipulates that all persons furnishing labor or material for the job should have a direct right of action on the bond, does not change the *status* of the surety or make it a principal debtor. *Builders Corp. v. Casualty Co.*, 513.

A contractor's performance bond must be construed with the building contract to which it refers and relates since the obligations of the surety are to be measured by the terms of the principal's agreement with the owner, and therefore complaint in an action by a material furnisher against the surety which fails to attach the contract between the builder and the contractor or allege the material terms thereof so that the liability of the contractor to the owner may be ascertained, is demurrable notwithstanding that the bond gives material furnishers right of direct action on the bond. *Ibid.*

PUBLIC OFFICERS.

§ 1. Nature and Definition.

Where an office created by the General Assembly imposes duties involving decisions as to property from which an appeal would lie, the office is a public

PUBLIC OFFICERS—*Continued.*

office notwithstanding the absence of substantial compensation, and notwithstanding a legislative declaration that the incumbents should be considered as holding offices as commissioners for a special purpose. *Harrington & Co. v. Renner*, 321.

§ 2. Appointment or Election by Boards or Commissions.

Procedure to fill vacancy in membership on county board of education. *Atkins v. Fortner*, 264.

§ 4b. Prohibition Against Holding More Than One Public Office.

A statute set up a zoning commission and provided that four of its commissioners should be appointed by the board of commissioners of the county, and that one of its number should be appointed by the commanding officer of a nearby air base. The commanding officer appointed a naval officer to the commission. *Held:* A naval officer holds office under the United States Government and therefore under the provision of Art. XIV, sec. 7, of the State Constitution, he could not hold the office of zoning commissioner under the statute, and was neither a *de facto* nor a *de jure* commissioner. *Harrington & Co. v. Renner*, 321.

§ 6c. Vacancies in Public Office.

A public office is vacant when it is without an incumbent who has the legal right to exercise its functions, and a vacancy occurs as of the time of the happening of the event which is the cause of the vacancy. *Atkins v. Fortner*, 264.

Where a vacancy in a public office occurs by virtue of the constitutional provision against double office holding, Constitution of North Carolina, Art. XIV, Sec. 7, such vacancy occurs as of the date of the acceptance of the second office unaffected by the fact that the person accepting the second office continues to discharge the duties of the office in good faith, since ignorance of the law excuses no man. *Ibid.*

§ 7a. Performance of Public Duties.

Mandamus will not lie to control discretion of public officer in exercise of judgment and discretion. *Williamston v. R. R.*, 271.

§ 7½b. Unauthorized Use of Public Property.

The elements of the offense created by G.S. 14-247 and G.S. 14-252 are (1) the use of a vehicle belonging to the State or one of the political subdivisions named in the statute (2) by a public official or employee answering to the statutory description (3) for a private purpose, and a warrant which fails to charge that the use of a police car by a policeman of a municipality was for a private purpose, is insufficient to charge the offense. *Hawkins v. Reynolds*, 422.

§ 9. Attack and Validity of Public Acts.

In the absence of evidence to the contrary, it will be presumed that the acts of public officers are in all respects regular. *S. v. Gaston*, 499.

QUIETING TITLE.

§ 2. Suits to Quiet Title.

In a suit under G.S. 41-10 to quiet title, plaintiff is required to allege ownership of the land in controversy or that he has some estate or interest in it and

QUIETING TITLE—*Continued.*

that defendant has asserted some claim adverse to plaintiff's title, estate or interest, but plaintiff is not required to allege or show the specific circumstances giving rise to defendant's adverse claim unless it is essential for plaintiff to overcome such claim in order to establish his own title, estate or interest. *Wells v. Clayton*, 102.

Where defendant in action to quiet title fails to offer any evidence in support of plea in confession and avoidance, plaintiff is entitled to judgment. *Ibid.*

RAILROADS.

§ 3. Condition and Maintenance of Underpasses.

Municipality cannot compel railroad to widen and improve underpass forming part of State highway; *mandamus* will not lie to compel State Highway Commissioners to vote for such project. *Williamston v. R. R.*, 271.

§ 4. Accidents at Grade Crossings.

Evidence tending to show that defendant's shifting engine approached the grade crossing during the dark hours of early morning, down grade with a minimum of noise, without lights and without any warning signal, and struck the car in which plaintiff was riding as a passenger, *held* to take the case to the jury on the issue of defendant's negligence and plaintiff's contributory negligence in failing to see the train and give warning thereof to the driver in time for the driver to have avoided the accident, and nonsuit was improperly granted. *James v. R. R.*, 290.

Both the engineer and passengers in motor vehicles are held to the rule of a reasonably prudent man to avoid accidents at grade crossings. *Ibid.*

Evidence *held* to show contributory negligence as matter of law on part of motorist driving across tracks without looking. *Woodall v. R. R.*, 548.

§ 7. Fires From Right of Way.

A railroad company is not an insurer against loss by fire originating from sparks from its engines, but may be held liable therefor only on the ground of negligence, with the burden on plaintiff to prove such negligence by the preponderance of the evidence. *Fleming v. R. R.*, 568.

And also that fire which burned timber originated on defendant's right of way. *Ibid.*

In an action against a railroad company to recover for loss of timber by fire, evidence that the fire originated on defendant's right of way from sparks emitted by defendant's engine, makes out a *prima facie* case, placing defendant in the position of having to go forward with the evidence or risk an adverse verdict, but does not create a presumption of fact that defendant's engine was not handled by a skillful engineer in a reasonably careful manner. *Ibid.*

RECEIVERS.

§ 7. Nature and Grounds of Remedy of Receivership.

G.S. 55-147 to G.S. 55-160, inclusive, are applicable as near as may be to a receivership under G.S. 1-502. *Surety Corp. v. Sharpe*, 35.

§ 9. Title to and Possession of Property.

A receiver takes the property of the insolvent debtor subject to the mortgages, judgments and other liens existing at the time of his appointment, and

upon the sale of encumbered property by the receiver free of such liens, the liens are transferred to the proceeds of sale. G.S. 55-149, G.S. 55-154. *Surety Corp. v. Sharpe*, 35.

§ 12c. Receivership of Insolvents—Priorities of Payment of Debts.

Priority of payment of lienholders, indebtedness incurred in operation of business by receiver, costs of administration, taxes, etc. *Surety Corp. v. Sharpe*, 35.

Receivership of an insolvent is an act of bankruptcy which puts into operation 31 U.S.C.A. 191, which stipulates that debts due the United States shall have priority, but does not create a lien upon the debtor's property in favor of the United States, and therefore does not give the United States priority over a *bona fide* conveyance made by the debtor before receivership or over a prior specific lien embracing specific property of the debtor as contradistinguished from a general lien covering all his property. *Ibid.*

Preferences are not favored and can only arise by reason of some definite statutory provision or some fixed principle of common law. *Ibid.*

An item of operating expense, even though it is incurred by the receiver in conformity with an order of the court for the operation of the business by the receiver, is not entitled to priority over non-consenting lienholders who were given no notice. *Ibid.*

G.S. 55-136 gives priority to laborers for wages due for work performed during the period of the two months prior to the date proceedings in insolvency were instituted, and does not apply to wages during the period the business is operated by the receiver. *Ibid.*

The contract price for repairing machinery of the concern on a single occasion is not a claim for "wages" within the purview of G.S. 55-136, and cannot be entitled to preference under that statute regardless of whether the contract was executed prior to, or subsequent to the operation of the business by the receiver. *Ibid.*

A judgment rendered in favor of a claimant after the appointment of a receiver for the debtor cannot create a lien against the debtor's property because such property is vested in the receiver at the time of the rendition of the judgment. *Ibid.*

Indebtedness incurred by a receiver in operating the business of a private concern owing no duty to the public has priority over the claim of a lienholder when such lienholder expressly or impliedly consents to such operations by the receiver. *Ibid.*

The courts will not direct a receiver as to the distribution of a fund before the receiver has such fund in hand. *Ibid.*

§ 12d. Exceptions to Receiver's Report and Proof of Claims.

The United States filed claim against the receiver for damages for breach of contract by receiver in failing to deliver goods in accordance with contract executed with the receiver in the operation of the business. The claim was challenged, but the other claimants failed to demand jury trial on their exceptions. G.S. 55-153. *Held:* It was incumbent on the United States to establish its claim before the judge in conformity with the practice where jury trial is waived, and when it presents no evidence thereon it fails to establish the claim in fact, and the order of the judge allowing same without evidence and finding by the court thereon is ineffective. *Surety Corp. v. Sharpe*, 35.

RECEIVING STOLEN GOODS.

§ 4. Presumptions and Burden of Proof.

Possession of recently stolen property, without more, raises no presumption that the possessor received it with knowledge that it had been feloniously stolen. *S. v. Hoskins*, 412.

§ 6. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence *held* insufficient to be submitted to jury in this prosecution for receiving stolen tires with knowledge they had been stolen. *S. v. Hoskins*, 412.

REFERENCE.

§ 3. Compulsory Reference.

An action on a note given to finance an automobile, in which all payments alleged by defendant are admitted by plaintiff, does not involve a long account with charges and discharges as contemplated in G.S. 1-189 and is not subject to compulsory reference notwithstanding further counterclaims for usury and damage for the mortgagee's alleged breach of his agreement to procure insurance on the car. *Finance Co. v. Culler*, 758.

§ 9. Exceptions to Report and Preservation of Grounds of Review.

Where motion to remove the referee is made prior to the time his report is filed, and an appeal is taken from the granting of the motion, the Superior Court, upon the certification of the decision of the Supreme Court reversing the judgment, has discretionary power to allow the filing of exceptions to the report, even though the report was filed prior to the hearing of the motion for removal. *Keith v. Silvia*, 293.

SALES.

§ 27. Actions and Counterclaims for Breach of Warranty.

Where the sole defense to an action on a note for the purchase price of an article is breach of warranty in the sale of the article, the jury should be instructed to answer the issue as to the amount plaintiff is entitled to recover in the amount of the note, with damages on the counterclaim to be ascertained under a subsequent issue, but where under instructions of the court the jury applies the counterclaim to a reduction in the amount due on the note, and there is no error in the court's charge as to the measure of damages for breach of warranty, the result is not prejudicial and a new trial will not be awarded. *Harris v. Canady*, 613.

SCHOOLS.

§ 3a. Consolidation of Districts.

This action was instituted to enjoin school authorities from consolidating a non-special tax district for administrative and attendance purposes with a special tax district having no special tax under G.S. 115-189, G.S. 115-361, plaintiffs alleging that the consolidation was not authorized by law and that such consolidation, under the circumstances, amounted to abuse of discretion. *Held:* It having been determined on a former appeal that the County Board of Education had authority to order the consolidation under the provisions of G.S. 115-99, and it appearing from the facts alleged that there were cogent reasons for consolidating the schools negating abuse of discretion in the decision to consolidate, defendants' demurrer *ore tenus* to the complaint was properly sustained. *School District Committee v. Board of Education*, 216.

SCHOOLS—*Continued.*

§ 4b. County Boards of Education.

Procedure to fill vacancy in membership of county board of education. *Atkins v. Fortner*, 264. Acceptance of another office creates vacancy as of time of acceptance of second office. *Ibid.*

§ 6a. Selection of School Sites.

While school authorities have the discretionary power to select sites for new schools and to change the location of existing schools, G.S. 115-85, their action in this regard may be enjoined when it is without authority of law, or when the selection of a proposed site is so clearly unreasonable as to amount to a manifest abuse of their discretion. *Brown v. Candler*, 576.

A "school district" is the equivalent of a "township" within the meaning of G.S. 115-61, and therefore the selection of a site by the school authorities for the sole high school within a school district is not forbidden by the statute even though it result in two high schools within the township. *Ibid.*

Even though a county home be construed a county building within the purview of G.S. 153-9 (9), the statute refers to a change in the location of a county building, which embraces the space occupied by the building and such adjacent land as is reasonably required for its convenient use, and not to changes in the use of a part of the site of a county building, and therefore the statute does not preclude school authorities from selecting, without advertising, a part of the grounds of a county home for the site of a high school when its use would not interfere with the use of the remainder of the site for a county home. *Ibid.*

The fact that the site for a high school selected by the school authorities in a mountainous section of the State may be approached only by a crooked highway and over a narrow bridge, and that there may be other satisfactory sites for such school, does not compel or support the conclusion that the school authorities abused their discretion in selecting the site. *Ibid.*

SEARCHES AND SEIZURES.

§ 1. Necessity for Warrant.

Where officer sees nontax-paid liquor in car driven by defendant and admitted by him to be his, officer may complete search and seize contraband. *S. v. Harper*, 371.

§ 2. Requisites and Validity of Warrant.

Where the peace officer duly swears to and signs the complaint-affidavit made out on his information, the fact that the oral information upon which it is based was given prior to the taking of the oath is not an irregularity, but is in accordance with statutory procedure. *S. v. Rainey*, 738.

SPECIFIC PERFORMANCE.

§ 1a. Specific Performance in General.

The remedy of specific performance is available only to compel a party to do precisely what he is obligated to do under the terms of the contract, and it cannot be used to make a new or different contract for the parties simply because the one made by them proves ineffectual. *McLean v. Keith*, 59.

STATE.

§ 3. Claims and Actions Against State or Political Subdivisions.

While a State agency may be sued only in the manner provided by statute, such immunity does not extend to State officers, who may be sued for acts in disregard of law which invade or threaten to invade personal or property rights of citizens. *Williamston v. R. R.*, 271. But the courts will not control the exercise of judgment or discretion by a State officer in the discharge of his duties. *Ibid.*

STATUTES.

§ 5a. Construction and Operation of Statutes in General.

Where the same statute contains a particular provision, which embraces the matter under consideration, and a general provision, which includes the same matter and is incompatible with the particular provision, the particular provision must be regarded as an exception to the general provision, and the general provision must be held to cover only such cases within its general language as are not within the terms of the particular provision. *Utilities Com. v. Coach Co.*, 583.

§ 10. Effective Date of Statutes.

Where a statute expressly provides that it should not apply to pending litigation, such limitation will not be enlarged to exclude from its operation causes of action arising prior to its effective date when action thereon is not brought until subsequent to its effective date. The maxim *expressio unius est exclusio alterius* applies. *Spencer v. Motor Co.*, 239.

Statute creating presumption of evidence may be given retroactive effect. *Ibid.*

§ 11. Construction of Criminal Statutes.

Penal statutes are construed strictly against the State and liberally in favor of the private citizen with all conflicts and inconsistencies resolved in his favor. *S. v. Scoggin*, 1.

TAXATION.

§ ¼. Debts Within Meaning of Constitutional Restrictions.

A municipality may pledge the revenues from a proper proprietary undertaking to the payment of bonds issued in connection therewith, since in such instance no debt is incurred within the meaning of the Constitution. *Britt v. Wilmington*, 446.

§ 4. Necessary Expenses and Necessity for Vote.

Ballot and bond order *held* sufficiently definite to submit question of enlargement and improvement of county hospital. *Rider v. Lenoir County*, 620.

While unallocated nontax moneys may be expended by county for the public purpose of a county hospital, where the question of issuing bonds therefor is submitted to a vote by bond order stipulating maximum amount of funds to be used, the county may not supplement bond funds by large amount of nontax revenue. *Ibid.*

§ 38a. Recovery of Illegal Expenditures or Enjoining Issuance of Bonds.

A suit instituted by a taxpayer to recover moneys illegally expended by a municipality upon refusal of the authorities to act, is basically equitable in nature, and where the taxpayer has successfully prosecuted the suit the court should allow a reasonable fee to his attorney out of the funds actually received

TAXATION—*Continued.*

by the city as a result of the suit, but no compensation or allowance of any kind may be made to the suing taxpayer for his time or effort. *Horner v. Chamber of Commerce*, 96.

An action to determine the right of a municipality to issue certain bonds will be treated as an adversary proceeding and will be decided irrespective of any stipulations of legal conclusions by the parties, since in no event could plaintiff taxpayer stipulate away the rights of all the taxpayers of the municipality. *Britt v. Wilmington*, 446.

Action to enjoin issuance of hospital bonds and to restrain disbursement of county funds therefor on the ground of those irregularities in the bond order and form of ballot asserted in this case *held* precluded by G.S. 153-90 or G.S. 153-100 because not instituted until after thirty days subsequent to the statement of the result of such election. *Rider v. Lenoir County*, 620.

County should be restrained from supplementing bond revenue with nontax funds greatly in excess of total maximum expenditures set forth in the bond order, and suit in this case *held* not barred by laches. *Ibid.*

§ 40h. Title and Rights of Purchaser at Tax Foreclosure.

Inchoate dower cannot deprive the purchasers at a tax foreclosure from the present right of possession. *New Hanover County v. Holmes*, 565.

TORTS.

§ 4. Determination of Whether Tort is Joint or Several.

In employee's action against third person tort-feasor, defendant may not join employer as joint tort-feasor, since Compensation Act abrogates tort liability of employer to employee. *Lovette v. Lloyd*, 663.

TRIAL.

§ 5. Time of Trial.

Trial prior to the expiration of the time for filing answer is at least a material irregularity, since the cause is not then at issue. *Warshaw v. Warshaw*, 754.

§ 16. Withdrawal of Evidence.

Where, upon objection, the court withdraws an unresponsive answer of a witness and categorically instructs the jury not to consider it, the action of the court in striking out the answer and withdrawing it from the jury precludes prejudicial error. *Mintz v. R. R.*, 109.

§ 17½. Admission of Evidence After Verdict.

Additional evidence may not be introduced after judgment, and no appeal lies from the denial of a party's motion to be permitted to introduce such evidence. *New Hanover County v. Holmes*, 565.

§ 19. Province of Court and Jury in Regard to Evidence.

The truth or falsity of the evidence and what it proves are the exclusive province of the jury. *James v. R. R.*, 290.

§ 21. Office and Effect of Motion to Nonsuit.

An order overruling demurrer does not preclude motion for judgment as in case of nonsuit upon the trial, since the demurrer tests the sufficiency of the pleadings, G.S. 1-127, while the motion to nonsuit tests the sufficiency of the

evidence, G.S. 1-183, and the two are dissimilar in purpose and effect. *Lewis v. Shaver*, 510.

§ 22a. Consideration of evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff's evidence and so much of defendant's evidence as tends to support plaintiff's case must be accepted as true and liberally construed in plaintiff's favor, giving him every reasonable inference and intendment which may be logically drawn therefrom. *James v. R. R.*, 290.

On motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom. *Hawes v. Refining Co.*, 643.

§ 22b. Consideration to Be Given Defendant's Evidence on Motion to Nonsuit.

Only so much of defendant's evidence as is favorable to plaintiff or tends to explain or make clear plaintiff's evidence may be considered upon defendant's motion to nonsuit, and evidence offered by defendant in conflict with or contradictory to plaintiff's evidence may not be considered. *Ward v. Cruse*, 400.

Defendant's evidence which is not at variance with plaintiff's evidence but which tends to explain and implement it, may be considered on motion to nonsuit. *Sechler v. Freeze*, 522; *Transport Co. v. Ins. Co.*, 534.

Where plaintiff's witness testifies as to statements made by defendant, and defendant testifies in explanation and clarification thereof, defendant's testimony is competent to be considered on plaintiff's motion to nonsuit. *Express Co. v. Jones*, 542.

§ 22c. Nonsuit—Contradictions and Discrepancies in Evidence.

Upon motion to nonsuit, the credibility of witnesses and the weight to be given their testimony are matters within the province of the jury, and it may accept as true a part of the testimony offered by a party and reject as false the remainder of such testimony. *Cox v. Freight Lines*, 72.

§ 23a. Nonsuit—Sufficiency of Evidence in General.

Nonsuit may not be entered upon a particular theory of liability unless such theory is not supported by the pleadings, liberally construed in favor of the plaintiff, or by the evidence, considered in the light most favorable to plaintiff. *Cox v. Freight Lines*, 72.

If plaintiff's evidence and so much of defendants' evidence as is favorable to plaintiff, amounts to more than a scintilla of evidence tending to establish the affirmative of the issue, defendants' motions to nonsuit are properly overruled. *Waynick v. Reardon*, 116.

More than a scintilla of evidence in support of plaintiff's claim takes the issue to the jury. *James v. R. R.*, 290.

Even though on motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, it must do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury. *Transport Co. v. Ins. Co.*, 534.

While the evidence must be considered in the light most favorable to plaintiff on motion to nonsuit, the evidence must tend to prove the fact in issue as a fairly logical and legitimate deduction, and evidence which raises merely a speculation, conjecture or possibility is insufficient to justify the submission of the issue to the jury. *Fleming v. R. R.*, 568.

TRIAL—*Continued.*

Where permissible conflicting inferences are supported by the evidence the issue is for the jury and not the court. *Broadaway v. King-Hunter, Inc.*, 673.

§ 24a. Nonsuit in Favor of Party Having Burden of Proof.

Nonsuit may not be entered in favor of the party upon whom rests the burden of proof unless plaintiff's own evidence establishes the truth of an affirmative defense relied on by defendant. *Davis v. Jenkins*, 283.

§ 28. Form of Directed Verdict and Peremptory Instructions.

While in proper instances the court may give a peremptory instruction that if the jury finds the facts to be as all the evidence tends to show to answer the issue as indicated, the court must leave it to the jury to determine the credibility of the testimony, and the failure of the court to do so must be held for error. *Shelby v. Lackey*, 369.

§ 29. Directed Verdict in Favor of Party Having Burden of Proof.

A directed verdict may not be entered in favor of the party upon whom rests the burden of proof. *Shelby v. Lackey*, 369.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

Where a defendant sought to be held under the doctrine of *respondeat superior* introduces in evidence bill of sale, recorded conditional sales contract, etc., tending to show that at the time of the accident in suit defendant had sold the automobile involved in the accident, it is error for the trial court to fail to declare and explain the law arising upon such evidence even in the absence of request for instructions. *Spencer v. Motor Co.*, 239.

The trial judge is required to declare and explain the law as it relates to the various aspects of the evidence offered bearing on all substantive phases of the case. G.S. 1-180. *Bank v. Phillips*, 470.

Ordinarily, general definitions and abstract explanations of the principles of law involved together with the summation of the evidence and a statement of the contentions on each side is not sufficient, but the trial court must declare the law of the case and apply it to the different phases of the evidence. *Ibid.*

An instruction about a material matter not based on sufficient evidence is erroneous. *Ibid.*

§ 31g. Instructions on Credibility of Witnesses.

The court's instruction to the effect that the jury should scrutinize the testimony of interested witnesses, but if after such scrutiny the jury were satisfied the witnesses were telling the truth, to give the testimony of the witnesses the same weight as that of any other witness, *is held* without error. *Anderson v. Office Supplies*, 519.

§ 36. Form and Sufficiency of Issues.

The refusal of the court to submit an issue to the jury cannot be held for error when there is no evidence upon the trial in support of such issue. *Goeckel v. Stokely*, 604.

In action on note for purchase price, damages on counterclaim for breach of warranty should be separately submitted. *Harris v. Canady*, 613.

§ 49. Motions to Set Aside Verdict as Contrary to Weight of Evidence.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the presiding judge, and the

TRIAL—*Continued.*

court's denial of the motion will not be disturbed on appeal in the absence of a showing of abuse. *Poniros v. Teer Co.*, 144.

§ 55. Trial by Court Under Agreement—Findings and Judgment.

The judge, in the trial of an issue of fact under agreement of the parties, is required to state his findings of fact and his conclusions of law separately and adjudicate the rights of the parties accordingly, all in writing. *Bradham v. Robinson*, 589.

The findings of fact by the trial court under agreement will be construed to uphold the judgment if this may reasonably be done. *Ibid.*

Where the issue of fact submitted to the judge is whether persons purporting to execute a mortgage on church property as trustees were in fact authorized to do so, the court's findings to the effect that the instrument was executed by individuals and that in so far as the church is concerned the instrument is void, will be construed as findings that such persons were not authorized to execute the instrument, and thus support the decree that the instrument be canceled. *Ibid.*

Where the judge dictates his findings to the court reporter and causes the reporter to transcribe them, it amounts to a finding of the facts by the judge in writing. *Ibid.*

The failure of the judge to sign his findings of fact and incorporate them into the formal judgment rendered in the cause does not render the judgment void, there being a substantial compliance with G.S. 1-85. *Ibid.*

TRUSTS.

§ 5c. Actions to Establish Constructive Trusts.

Defendant, an attorney in fact for the handling of all business transactions of plaintiff, acquired property of plaintiff at foreclosure sale of a mortgage thereon executed by plaintiff, and thereafter plaintiff executed a quitclaim deed to him. *Held:* Whether a fiduciary relationship existed between the parties in respect to these transactions, which would raise a presumption of fraud, is an issue for the determination of the jury when the predicative facts are controverted by defendant, and the granting of the defendant's motion for judgment on the pleadings was error. *Crew v. Crew*, 528.

UTILITIES COMMISSION.

§ 2. Jurisdiction.

The North Carolina Utilities Commission does not have regulatory supervision of operations devoted exclusively to the transportation by motor vehicle of the *bona fide* employees of industrial plants to and from the places of their employment even in cases where the persons conducting such operations are engaged at the same time or at other times in carrying on the callings of common carriers by motor vehicle. *Utilities Com. v. Coach Co.*, 583.

§ 5. Appeal and Review.

Under facts of this case, motion to remand to Utilities Commission for additional evidence on petition to discontinue freight agency at station should have been allowed. *Utilities Commission v. R. R.*, 337.

Upon appeal from the denial by the Utilities Commission of a petition for amendment of certificate to permit petitioner, an irregular route common carrier of property, to interchange traffic with named interstate common carriers

UTILITIES COMMISSION—*Continued.*

of property, *held* review in the Superior Court is limited to the record as certified and to questions of law therein presented, and where the decision in the Superior Court is based on additional findings made by the court, the cause will be remanded to the Superior Court for judgment on the questions of law presented by the record as certified or for remand to the Utilities Commission for additional findings if any be deemed necessary. *Utilities Comm. v. Fox*, 553.

On appeal from Utilities Commission, Superior Court may not find additional facts and order is *prima facie* valid, just and reasonable, and may not be set aside except for arbitrary or capricious judgment, or error of law. *Utilities Commission v. Ray*, 692.

VENDOR AND PURCHASER.

§ 25a. Action Against Vendor for Breach.

Where plaintiff purchaser alleges an agreement by defendant to convey to plaintiff at a stipulated price a certain tract of timber subject to a registered Federal tax lien, with further provision that plaintiff should procure the approval of the Collector of Internal Revenue to such sale within thirty days from the date of the execution of the contract, *held*, upon failure of plaintiff to offer evidence that he obtained approval of the Collector of Internal Revenue within the period stipulated, nonsuit was properly entered, nor would evidence of waiver of the thirty day limitation alter this result in the absence of allegation of waiver. *Lamb v. Staples*, 179.

WAIVER.

§ 4. Pleading and Proof.

As a general rule, when waiver is not pleaded evidence of waiver is inadmissible. *Lamb v. Staples*, 179.

WILLS.

§ 15a. Proof of Will and Probate Proceedings.

The introduction in evidence of the official will book from the clerk's office containing the instrument in question raises the presumption that the will had been duly proven. *Chambers v. Chambers*, 766.

§ 23b. Caveat Proceedings—Evidence on Issue of Mental Capacity.

The striking of testimony of a witness that deceased, who was a friend, failed to recognize him when he met her on the street shortly after the date of the script, will not be held for prejudicial error justifying a new trial when the record contains the further testimony of the witness that during the course of the conversation immediately ensuing she did recognize him. *In re Will of Kemp*, 680.

Testimony that a brother of deceased had been treated at a hospital for a mental disorder is incompetent on the issue of deceased's mental capacity when the evidence further shows that the mental disorder with which he was suffering was not hereditary in character. *Ibid.*

Lay witnesses who have had reasonable opportunity for observation may express their opinions as to the mental capacity of the alleged testator in a caveat proceeding, and may also detail observed facts about deceased's conduct or language upon which their opinions are based. *Ibid.*

In a caveat proceeding, the attorney who drew the script for deceased is competent to give his opinion that deceased was of sound mind at the time of

the execution of the script, and may detail the basis for his conclusion, the testimony not being within the rule of privileged communications between attorney and client. *Ibid.*

Objections to questions which amount only to argument with the witness are properly sustained. *Ibid.*

The paper writing purported to dispose of deceased's property to a named hospital. In this caveat on the ground of mental incapacity, the cross-examination of witnesses for propounder in regard to whether the hospital had any public funds was properly excluded as irrelevant. *Ibid.*

§ 25. Caveat Proceedings—Instructions.

The inadvertent use of the words "will" and "testatrix" in the charge of the court in a caveat proceeding will not be held for reversible error when the charge construed as a whole is not prejudicial and the jury is emphatically instructed that it was the sole judge of the facts. *In re Will of Kemp*, 680.

§ 31. General Rules of Construction.

The intent of testator as gathered from the four corners of the instrument is the polar star in the interpretation of a will, and such intent will be given effect unless contrary to some rule of law or at variance with public policy. *Voncannon v. Hudson-Belk Co.*, 709.

In construing a will to effectuate the intent of testator, apparent repugnancies should be reconciled and effect given to every clause or phrase or word, whenever possible, and to this end the court may transpose words, phrases or clauses, supply or disregard punctuation, or even supply words, phrases or clauses when necessary to effectuate the manifest intent. *Ibid.*

§ 33a. Estates and Interests Created in General.

In North Carolina the common law rule prevails that legal future interests in personal property may not be created by deed but may be created by will, either by vested or contingent limitation over after a life estate or defeasible fee. *Woodard v. Clark*, 190.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

Where there is a devise to testator's sons with proviso that should any son die "without lawful heirs" his share should go to the surviving sons, the words "without lawful heirs" will be construed "without lawful issue." *Sutton v. Sutton*, 495.

§ 33f. Devises With Power of Disposition.

Testator devised to his wife the tract of land in question and by following sentence stated "For the remainder of her natural life and then at her death to be disposed of according to her wishes." *Held:* The will devised only a life estate to the widow, and the general power of disposition did not enlarge it into a fee. *Voncannon v. Hudson-Belk Co.*, 709.

A devisee of a life estate with general power of disposition not coupled with any trust or beneficial interest to others, has the option to exercise the power or not, and upon her failure to exercise the power, the lands will descend at her death to the heirs at law of testator. *Ibid.*

A devisee of a life estate with power of disposition not coupled with any trust or beneficial interest to others may release or extinguish the right to exercise the power of appointment, and the execution and delivery of a warranty deed by her constitutes an estoppel and precludes her from thereafter exercising such power. *Ibid.*

WILLS—*Continued.*

Where the widow having a life estate with power of disposition not coupled with any trust or beneficial interest to others, together with the heirs at law of testator, executes a warranty deed to the property, the deed is sufficient to convey the fee simple title thereto. *Ibid.*

§ 33k. Renunciation of Life Estate and Acceleration of Remainder.

Widow's dissent from will terminates her life estate thereunder and accelerates vesting or remainders free from contingent limitations over. *Bank v. Easterby*, 599; *Trust Co. v. Johnson*, 594.

§ 34g. Inheritance and Estate Taxes.

The ultimate incidence of the federal estate tax is a matter of state law, and no provision of a federal statute can have the effect of controlling the state's statutes, power in this respect not having been granted the Federal Government but being reserved to the states. Tenth Amendment to the Constitution of the United States. *Trust Co. v. Green*, 654.

The federal estate tax should be paid before allotting the widow dissenting from her husband's will her statutory share of the estate notwithstanding that this precludes the application of the marital deduction provision of U.S.C.A. Title 26, sec. 812 (3), since the estate tax is a "debt" within the meaning of G.S. 28-105 and must be paid under the state law prior to the distribution of the surplus, G.S. 28-149, the ultimate incidence of the federal estate tax being determinable under state law unaffected by any federal statutory provisions. *Ibid.*

The widow's dissent from her husband's will is a rejection of it as far as her rights are concerned, and having elected to treat it as a nullity, she may not assert any benefits thereunder, even in regard to direction in the will for the payment of estate taxes. *Ibid.*

§ 39. Actions to Construe Wills.

Where, in an action to construe a will, it appears of record that infant plaintiffs who are necessary parties were not represented by a next friend, and that other parties having an interest in the *res* dependent upon the interpretation of the will, were not made parties, and that the person having possession of the personalty and who would have to account therefor in accordance with the judgment was also not a party, the cause must be remanded, since a full and final determination of the cause cannot be had until all interested parties are brought in and given an opportunity to be heard. *Costner v. Children's Home*, 361.

§ 40. Right of Widow to Dissent and Effect Thereof.

The right of a widow to dissent from the will is given by law, and she may exercise such right within the time fixed by statute without assigning any reason therefor. *Bank v. Easterby*, 599.

The fact that the widow's unconditional dissent from the will and election to take her statutory rights is based upon separate agreement with the vested remaindermen that they pay her a specified sum, does not affect the validity of the dissent, the dissent being valid unless she is induced to dissent in ignorance of her rights to her prejudice. *Ibid.*

Widow's dissent from will terminates her life estate thereunder and accelerates vesting of remainder. *Trust Co. v. Johnson*, 594; *Bank v. Easterby*, 599.

Upon dissenting from her husband's will, the widow has the same rights and estates as if the husband had died intestate, G.S. 30-2, and takes such share as

is provided for her by the statute of distribution, G.S. 28-149. *Trust Co. v. Green*, 654.

Federal estate tax must be paid before allotting share of estate to dissenting widow. *Ibid.*

§ 46. Nature of Title and Right of Devisees to Convey.

Where each tenant in common owns a defeasible fee with limitation over to his cotenants in the event of his death without issue, and such tenants voluntarily partition the property by the exchange of deeds conveying all their right, title, and interest in the lands allotted to the others, their deeds defeat the limitation over and each holds the fee simple absolute in his share. *Sutton v. Sutton*, 495.

GENERAL STATUTES CONSTRUED.

G.S.

1-15. Statutes of limitation cannot be taken advantage of by demurrer. *Lewis v. Shaver*, 510.

1-52 (3). Action *held* for recurrent trespass and therefore not barred by statute. *Oakley v. Texas Co.*, 751.

1-52 (9). Statutes run against torts from time tort is committed with sole exception of torts grounded on fraud or mistake; fact that patient did not know that surgeon performed unauthorized sterilization operation does not toll running of statute. G.S. 1-52 (5). *Lewis v. Shaver*, 510. Evidence *held* sufficient on question of whether action was begun within three years from time facts should have been discovered. *Swinton v. Realty Co.*, 723. Action for fraud barred in three years after person mentally competent had knowledge of facts. *Muse v. Muse*, 182.

1-57. Depositor who has assigned deposit may not maintain action thereon against bank. *Lipe v. Bank*, 328.

1-57; 1-68. Even though insurer which has paid loss must maintain action, insured may be joined as proper party. *Burgess v. Trevathan*, 157.

1-65. Judgment rendered on day of appointment of guardian *ad litem* is void. *Narron v. Musgrave*, 388. Where there is general guardian he must defend. *Ibid.*

1-73. Trial court should bring in all parties necessary to final determination of controversy. *Garrett v. Rose*, 299.

1-122. Plaintiff must allege every fact necessary to constitute his cause of action. *Wells v. Clayton*, 102.

1-123. Defendant may not set up cross action against his codefendant to recover for his own injuries or damage. *Wrenn v. Graham*, 719.

1-127; 1-133. Where pendency of prior action appears on face of complaint, demurrer is proper; when it does not so appear, defense must be raised by answer. *McDowell v. Blythe Brothers Co.*, 396.

1-127; 1-183. Order overruling demurrer does not preclude motion for nonsuit. *Lewis v. Shaver*, 510.

1-131. Upon decision sustaining demurrer, plaintiff may move to amend. *Builders Corp. v. Casualty Co.*, 513.

1-135. Answer must contain denial of each material fact controverted, or statement of new matter constituting defense or counterclaim. *Wells v. Clayton*, 102; *Spain v. Brown*, 355.

1-137 (1). Allegation of answer *held* to state both defense and counterclaim and therefore motion to strike was improperly allowed. *Garrett v. Rose*, 299.

1-150. Motion for bill of particulars is addressed to discretion of court, and its ruling thereon is not subject to review. *Tillis v. Cotton Mills*, 533.

1-153. Rule prohibiting allegations of irrelevant and scandalous matter applies to reply. *Spain v. Brown*, 355.

1-159. Essential fact alleged which is not denied is deemed true regardless of whether admission is introduced in evidence. *Wells v. Clayton*, 102.

1-159; 1-140. New matter in answer constituting counterclaim is taken as true if not controverted by reply or by implication of law because not served. *Wells v. Clayton*, 102. But not new matter constituting defense by way of avoidance, G.S. 1-141. *Ibid.*

GENERAL STATUTES—*Continued.*

G.S.

1-163; 1-152. Even though amended complaint is filed after expiration of time allowed, trial court may extend time to date of hearing. *Alexander v. Brown*, 212.

1-172. Court may not hear evidence and find facts in determining motion for judgment on pleadings. *Remsen v. Edwards*, 427; *Crew v. Crew*, 528.

1-172; 1-196. Issue of fact is raised whenever material fact is alleged by one party and denied by other. *Wells v. Clayton*, 102.

1-180. Court's interrogation of witness amounting to cross-examination constitutes prohibited expression of opinion. *S. v. Kimrey*, 313. Court must charge law on all substantive phases of evidence. *Bank v. Phillips*, 470. Instruction *held* not prejudicial in view of evidence and theory of trial. *Fleming v. R. R.*, 568. Exception to charge for failure to "give the contentions of plaintiffs with equal dignity with those of defendant" *held* ineffectual as "broadside." *Poniros v. Teer Co.*, 144.

1-185. Failure of judge to sign findings of fact and incorporate them into formal judgment is not fatal. *Bradham v. Robinson*, 589.

1-189. Action on note given for automobile *held* not subject to compulsory reference notwithstanding counterclaim for usury and for damages for failure to obtain insurance on car. *Finance Co. v. Culler*, 758.

1-194. Trial court may allow filing of exceptions to report after certification of decision on appeal denying motion to remove referee. *Keith v. Silvia*, 293.

1-207. Motion to set aside verdict as against weight of evidence is addressed to discretion of court and its ruling is not reviewable. *Poniros v. Teer Co.*, 144.

1-220. Failure of insurance carrier to defend is not excusable. *Stephens v. Childers*, 348. Even if answer is not filed within time, plaintiff is not entitled to judgment so long as it is filed of record. *White v. Southard*, 367. And when clerk cannot tell whether answer was filed before entering order for default judgment, order setting aside the default judgment is proper. *Ibid.*

1-234; 47-20; 44-1. Priority of mortgage, chattel mortgage and judgment as against receiver. *Surety Corp. v. Sharpe*, 35.

1-276. Superior Court has jurisdiction of entire matter when special proceeding instituted before clerk comes before it. *Langley v. Langley*, 184.

1-277. In employee's action against third person tort-feasor, joinder of employer as codefendant is appealable. *Lovette v. Lloyd*, 664.

1-284; 6-34. Cost of transcript includes only transcribing judgment roll and case on appeal, and not cost of transcribing testimony preliminary to making up case on appeal. *Ward v. Cruse*, 400.

1-485 (2). Continuance of order enjoining party from committing act respecting subject of action which would render judgment ineffective must be based on showing that right asserted in main action probably could be established and reasonable apprehension of irreparable injury. *Edmonds v. Hall*, 153.

1, Art. 41. Refusal of municipal officers to surrender office in accordance with decree cannot be made basis of contempt proceedings. *Corey v. Hardison*, 147.

GENERAL STATUTES—*Continued.*

G.S.

1-502. G.S. 55-147 to 55-160 are applicable as near as may be to receivership under G.S. 1-502. *Surety Corp. v. Sharpe*, 35.

4-1. Common law rule that future interest in personalty may be created by will but not by deed prevails in this State. *Woodard v. Clark*, 190.

6-33. Cost of preparing transcript is part of cost in Supreme Court and Superior Court has no jurisdiction thereof. *Ward v. Cruse*, 400.

8-54. Instruction of defendant's right not to testify *held* incomplete. *S. v. Rainey*, 738.

8-57. Testimony of incriminating statement made by defendant's wife entitled defendant to new trial even though no objection was entered. *S. v. Warren*, 358.

8-82. Exception to deposition untenable when not taken before trial. *Fleming v. R. R.*, 568.

13-225.2. Tubercular carrier is properly confined in prison department of the N. C. Sanatorium upon conviction under the statute. *In re Stoner*, 611.

14-17. Charge on right of jury to recommend life imprisonment *held* erroneous. *S. v. Simmons*, 340.

14-71. Possession of stolen property raises no presumption that it was received with guilty knowledge. *S. v. Hoskins*, 412.

14-160; 14-209. Acquittal in prosecution for malicious injury to personal property will not support plea of former jeopardy in prosecution for perjury. *S. v. Leonard*, 126.

14-214. Circumstantial evidence of defendants' guilt of conspiracy to procure insurance benefits by means of false claim *held* sufficient for jury. *S. v. Hedrick*, 727.

14-247; 14-252. Offense defined. *Hawkins v. Reynolds*, 422.

15-27. Where it does not appear of record that search was made without warrant, it will be presumed that proper warrant was used. *S. v. Gaston*, 499.

15-137. Trials upon presentments have been abolished. *S. v. Thomas*, 454.

15-140. Plea of guilty waives defect in warrant charging misdemeanor. *S. v. Daughtry*, 316; *S. v. Tripp*, 320.

15-140.1. Indictment may be dispensed with in Superior Court only when waived in manner prescribed by statute. *S. v. Thomas*, 454.

15-153. Indictment *held* not objectionable for duplicity. *S. v. Avery*, 276.

15-172. Instruction that defendant's counsel had argued for verdict of first degree murder with recommendation for mercy *held* error. *S. v. Simmons*, 340.

15-173. Insufficiency of evidence may not be raised by motion for new trial or in arrest of judgment. *S. v. Gaston*, 499. Defendant's evidence relating to matters in defense should not be considered on motion to nonsuit. *S. v. Avery*, 276. Circumstantial evidence of defendant's guilt on conspiracy or participation in lottery *held* insufficient. *S. v. Smith*, 748. Evidence of guilt of murder in second degree *held* sufficient. *S. v. Griffin*, 219.

18-1, *et seq.* Direct, unimpeached testimony of undercover agent is competent in prosecution for illegal possession of whiskey. *S. v. Taylor*, 130.

18-6. Where officer sees nontax-paid liquor in car, search warrant is not necessary. *S. v. Harper*, 371.

GENERAL STATUTES—*Continued.*

G.S.

18-11. Possession of any quantity of nontax-paid liquor raises presumption of possession for purpose of sale. *S. v. Hill*, 704. Possession of more than one gallon of tax-paid liquor raises presumption; possession of less than one gallon of tax-paid liquor raises no presumption. *Ibid.*

18-11; 18-49; 18-58. Possession of more than one gallon of tax-paid liquor raises presumption of possession for sale, even though person may possess any quantity of such liquor for family use. *S. v. Brady*, 295.

18-13; 15-27. Where officer swears to complaint-affidavit, fact that oral information upon which it was based was given prior to taking oath is not irregularity. *S. v. Rainey*, 738.

18-48. Possession of any quantity of nontax-paid liquor is unlawful. *S. v. Avery*, 276.

18-49. Transportation of one gallon of tax-paid liquor into dry county for lawful purpose is not illegal. *S. v. Love*, 344.

20-49 (a); 20-49 (b). Where driver of preceding vehicle signals left turn and clears right traffic lane, following vehicle may pass on right but should give signal. *Ward v. Cruse*, 400.

20-71.1. Is not applicable to action not brought within one year after the cause of action accrued. *Aiken v. Sanderford*, 760. Applies to accident occurring prior to effective date provided action thereon was not pending at that time. *Spencer v. Motor Co.*, 239.

20-138. Arresting officer may give opinion as to whether defendant was under influence of liquor. *S. v. Warren*, 358.

20-140. Evidence *held* sufficient for jury in this prosecution growing out of striking pedestrian. *S. v. Call*, 333.

20-141 (a) (b) (c). Driver along servient highway is not required to anticipate that driver along dominant highway will drive at excessive speed or disregard rules of road. *Hawes v. Refining Co.*, 643.

20-141; 20-180. Warrant *held* sufficient to charge speeding, and ineffectual reference to municipal ordinance was surplusage. *S. v. Daughtry*, 316.

20-154. While motorist may assume that driver approaching from opposite direction will give signal before turning left, he may not indulge this assumption after he sees that driver is turning left. *Jernigan v. Jernigan*, 430.

20-158. Evidence *held* for jury on question of negligence in failing to stop and maintain lookout before entering through street intersection. *Powell v. Daniel*, 489.

20-158 (a). Failure to stop before intersection with dominant highway is not negligence *per se*. *Hawes v. Refining Co.*, 643.

20-161 (a). Evidence *held* to show contributory negligence as matter of law on part of driver side-swiping rear of trailer standing on highway. *Express Co. v. Jones*, 542.

20-169. Municipality may install traffic control lights. *Cox v. Freight Lines*, 72.

20-174 (a). Pedestrian crossing between intersection where there is no crosswalk must yield right of way to vehicles. *Bank v. Phillips*, 470. Failure to do so is not negligence *per se*. *Ibid.*

20-174 (a) (d). Instruction *held* for error in not applying law to evidence in regard to duties of pedestrian on highway. *Spencer v. Motor Co.*, 239.

GENERAL STATUTES—*Continued.*

G.S.

20-174 (c). Motorist must exercise due care not to strike pedestrian crossing highway in violation of statute. *S. v. Call*, 333.

20-174 (e). Motorist is under duty to use due care to avoid hitting pedestrian notwithstanding pedestrian fails to yield right of way. *Bank v. Phillips*, 470.

28-32; 28-8 (2). Findings that administrator had moved from jurisdiction and had interests antagonistic to estate *held* sufficient to support order revoking letters. *In re Sams*, 228.

28-149; 30-2. Upon widow's dissent, Federal estate tax must first be paid before allotting her distributive share. *Trust Co. v. Green*, 654.

30-1. Widow is given right to dissent from will by statute, and she need not give reason therefor. *Bank v. Easterby*, 599. Widow's dissent terminates her life estate under will and accelerates vesting of remainder. *Bank v. Easterby*, 599; *Trust Co. v. Johnson*, 594.

35-1.1. Cerebral hemorrhage is mental illness within meaning of statute. *In re Humphrey*, 141.

41-10. Where defendant fails to offer any evidence in support of plea in confession and avoidance, plaintiff is entitled to judgment. *Wells v. Clayton*, 102.

47-26. Time of execution of deed of gift and not its date is determinative of whether it was registered within two years. *Muse v. Muse*, 182.

49-2; 49-7. Begetting child is not offense, and question of paternity should be first determined; acquittal does not constitute adjudication of question of paternity. *S. v. Robinson*, 408.

50-11. Decree of absolute divorce renders wife's judgment for support ineffective unless entered prior to suit for divorce. *Feldman v. Feldman*, 731.

50-16. Wife is entitled to alimony without divorce if husband separates himself from her and fails to provide her with necessary subsistence or if he is guilty of acts constituting cause for divorce. *Caddell v. Caddell*, 686. Amount of alimony *pendente lite* is in discretion of court. *Fogartie v. Fogartie*, 188.

55-136. Does not apply to wages during period business is operated by receiver. *Surety Corp. v. Sharpe*, 35.

55-149; 55-154. Upon sale of encumbered property by receiver, lien attaches to proceeds of sale. *Surety Corp. v. Sharpe*, 35.

55-153. Even when other parties fail to demand jury trial on contested claim, claimant still must prove claim before judge. *Surety Corp. v. Sharpe*, 35.

55-155. Costs of administration may be charged against interests of prior lienholders. *Surety Corp. v. Sharpe*, 35.

62-18. Burden is on applicant to support application for modification of franchise. *Utilities Com. v. Ray*, 692.

62-26.10. Review is limited to record as certified and to questions of law therein presented; Superior Court may not find additional facts. *Utilities Com. v. Ray*, 692.

62-121.37. Lease of operating rights does not release lessor of liability for failure to make prompt remittance of C.O.D. collections. *Hough-Wylie Co. v. Lucas*, 90.

GENERAL STATUTES—*Continued.*

G.S.

62-121.47 (1) (3). Commission has no jurisdiction of transportation of employees to and from work even though carrier is also common carrier. *Utilities Com. v. Coach Co.*, 583.

65-15. Right of action for desecration of grave vests in next of kin as determined by statute of distribution. *King v. Smith*, 170.

97-10. In employee's action against third person tort-feasor, defendant is not entitled to have employer or insurance carrier joined as codefendant. *Lovette v. Lloyd*, 664.

97-19. Findings *held* to support conclusion that main contractor was agent of insurer in effecting compensation insurance for independent contractor. *Greene v. Spivey*, 435.

97-77. Industrial Commission has jurisdiction to determine insurance coverage. *Greene v. Spivey*, 435.

115-42; 115-37; 115-38. Procedure to fill vacancy in membership of county board of education. *Atkins v. Fortner*, 264.

115-61. "School district" is equivalent to "township" within meaning of statute. *Brown v. Candler*, 576.

115-85. Selection of school site will not be disturbed except for want of authority or abuse of discretion. *Brown v. Candler*, 576.

115-99; 115-189; 115-361. Complaint *is held* insufficient to state cause of action to restrain consolidation of schools either for want of authority or abuse of discretion. *School District Committee v. Board of Education*, 216.

136-20 (f). Municipality may not compel railroad to widen underpass forming part of highway, since exclusive control is in State Highway Commission. *Williamston v. R. R.*, 271.

153-9 (9). Authorities may select part of site of county home for a school without advertising. *Brown v. Candler*, 576.

153-90; 153-100. Objection to bond order or ballot *held* barred because action not instituted within 30 days after result of election. *Rider v. Lenoir County*, 620.

153-93. Primary is not election within meaning of statute. *Rider v. Lenoir County*, 620.

160-172. General Assembly may not delegate to zoning commission the power to promulgate zoning regulations within rural section of county. *Harrington & Co. v. Renner*, 321.

160-200 (31). City may enact uniform parking meter ordinances. *S. v. Scoggin*, 1. Revenue from on-street parking meters must be set aside for expenses incurred in regulating traffic. *Britt v. Wilmington*, 446.

160, Art. 33. Pledge of revenues derived from proprietary function to payment of bonds is not debt within meaning of Constitution. *Britt v. Wilmington*, 446.

160-414 (d); 160-415 (g). *Held* void as they relate to on-street parking. *Britt v. Wilmington*, 446.

163-117, *et seq.* Primary election is mode of choosing candidates; regular election is final choice of electorate. *Rider v. Lenoir County*, 620.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, sec. 12. Person charged with capital felony may be prosecuted only upon indictment. *S. v. Thomas*, 454. Person may not be tried initially in Superior Court except upon indictment unless indictment is waived in manner provided. *Ibid.* Defendant may be tried in Superior Court for petty misdemeanor on original warrant only when there has been trial and appeal from conviction in inferior court having jurisdiction. *Ibid.*

I, sec. 17. Persons who are not made parties are not bound by judgment. *Garrett v. Rose*, 299.

I, sec. 35. To allow appeal from denial of motion for judgment on pleadings would delay administration of justice in contravention of Constitution. *Garrett v. Rose*, 299.

IV, sec. 8. Where lower court has made no ruling on particular matter, Supreme Court may not rule thereon on appeal. *Greene v. Spivey*, 435.

XIV, sec. 7. Vacancy occurs as of date of acceptance of second office. *Adkins v. Fortner*, 264. Naval officer holds office under United States within meaning of this section. *Harrington & Co. v. Renner*, 321.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

ART.

VI, sec. 2. Constitutionally enacted Federal statutes take precedence over State laws. *Surety Corp. v. Sharpe*, 35.

Tenth Amendment. Incidence of Federal estate tax is governed by State law. *Trust Co. v. Green*, 654.