NORTH CAROLINA REPORTS
VOL. 237

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1952

SPRING TERM, 1953

REPORTED BY
JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
1953

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OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1952—SPRING TERM, 1953

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WILLIAM T. HATCH	Raleigh.
HOWARD G. GODWIN	Dunn.

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ZEB V. NETTLES	Nineteenth	Asheville.
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ALLEN H. GWYN	Twenty-first	Reidsville.

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A. R. CRISP	Lenoir.
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THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, SPRING TERM, 1953

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

EASTERN DIVISION

FIRST JUDICIAL DISTRICT
Judge Bone

Beaufort—Jan. 12*; Jan. 19; Feb. 16† (2); Mar. 16* (A); Apr. 6†; May 4† (2); June 22.
Camden—Mar. 9.
Chowan—Mar. 30; Apr. 27†.
Currituck—Mar. 2.
Dare—May 25.
Gates—Mar. 23.
Hyde—May 18.
Pasquotank—Jan. 5†; Feb. 9†; Feb. 16* (A) (2); Mar. 16†; May 4† (A) (2); June 1*; June 8† (2).
Perquimans—Jan. 26†; Apr. 13.
Tyrrell—Feb. 2†; Apr. 20.

SECOND JUDICIAL DISTRICT
Judge Parker

Edgecombe—Jan. 19; Mar. 2; Mar. 30† (2); June 1 (2).
Martin—Mar. 16 (2); Apr. 13† (A) (2); June 15.
Nash—Jan. 26; Feb. 16† (2); Mar. 9; Apr. 20† (2); May 25.
Washington—Jan. 5 (2); Apr. 13†.
Wilson—Feb. 2†; Feb. 9*; May 4* (2); May 18†; June 22†.

THIRD JUDICIAL DISTRICT
Judge Williams

Bertie—Feb. 9 (2); May 11 (2).
Halifax—Jan. 26 (2); Mar. 9†; Mar. 16‡; Apr. 27; June 1†; June 8.
Hertford—Feb. 23; Apr. 13 (2).
Northampton—Mar. 30 (2).
Vance—Jan. 12*; Mar. 2*; Mar. 23†; Jan. 15*; June 22†.
Warren—Jan. 5*; Jan. 19†; May 4†; May 25*.

FOURTH JUDICIAL DISTRICT
Judge Frizzelle

Chatham—Jan. 12; Mar. 2†; Mar. 16†; May 11.
Harnett—Jan. 5*; Feb. 2† (2); Mar. 16* (A); Mar. 30† (A) (2); May 4†; May 18*; June 8† (2).
Johnston—Jan. 5† (A) (2); Feb. 9 (A); Feb. 16†; Feb. 23; Mar. 2 (A); Mar. 9; Apr. 13 (A); Apr. 20† (2); June 22*.
Lee—Jan. 26† (A); Feb. 2 (A); Mar. 23*; Mar. 30†; June 15† (A).
Wayne—Jan. 19; Jan. 26†; Feb. 2† (A); Mar. 2† (A) (2); Apr. 6; Apr. 13†; Apr. 20† (A); May 25; June 1†; June 8† (A).

FIFTH JUDICIAL DISTRICT
Judge Stevens

Carteret—Mar. 9; June 8 (2).
Craven—Jan. 5; Jan. 26†; Feb. 2†; Feb. 9; Apr. 6; May 11†; June 1.
Greene—Feb. 23; Mar. 2; June 22.
Jones—Mar. 30.
Pamlico—Apr. 27 (2).
Pitt—Jan. 12†; Jan. 19; Feb. 16†; Mar. 16; Mar. 23; Apr. 13 (2); May 4† (A); May 18†; May 25‡.

SIXTH JUDICIAL DISTRICT
Judge Harris

Duplin—Jan. 5† (2); Jan. 26*; Mar. 9† (2); Apr. 6; Apr. 13†.
Lenoir—Jan. 19*; Feb. 16†; Feb. 23†; Mar. 16 (A); Apr. 20; May 11†; May 18†; June 8†; June 15†; June 22*.
Onslow—Jan. 12 (A) (2); Mar. 2; May 25 (2).
Sampson—Feb. 2 (2); Mar. 23† (2); Apr. 27; May 4†; June 8† (A) (2).

SEVENTH JUDICIAL DISTRICT
Judge Burney

Franklin—Jan. 19† (2); Feb. 9*; Apr. 13*; Apr. 27† (2).
Wake—Jan. 5*; Jan. 12†; Jan. 19† (A) (2); Feb. 16† (2); Mar. 2* (2); Mar. 16† (2); Mar. 30*; Apr. 13† (A); Apr. 20†; Apr. 27† (A); May 4* (A); May 11† (3); June 1* (2); June 15† (2).

EIGHTH JUDICIAL DISTRICT
Judge Nimocks

Brunswick—Jan. 19; Feb. 9†; Apr. 6†; May 11.
Columbus—Jan. 5† (A); Jan. 26* (2); Feb. 16† (2); May 4*; June 15.
New Hanover—Jan. 12*; Feb. 2† (A) (2); Feb. 23* (A); Mar. 2*; Mar. 9† (2); Apr. 13† (2); May 18*; May 25† (2); June 8*.
Pender—Jan. 5; Mar. 23† (2); Apr. 27.

NINTH JUDICIAL DISTRICT
Judge Carr

Bladen—Jan. 5; Mar. 16*; Apr. 27†.
Cumberland—Jan. 12*; Feb. 9† (2); Mar. 2* (A); Mar. 9*; Mar. 23† (2); Apr. 27* (A); May 4† (2); June 1*.
Hoke—Jan. 19; Apr. 20.
Robeson—Jan. 19† (A); Jan. 26* (2); Feb. 23† (2); Apr. 6* (2); Apr. 20† (A); May 4* (A) (2); May 18† (2); June 8†; June 15*.

TENTH JUDICIAL DISTRICT
Judge Morris

Alamance—Jan. 12† (A); Jan. 19† (A); Feb. 2* (A); Mar. 23† (A); Mar. 30†; Apr. 13* (A); May 18† (A); May 25†; June 8* (A).
Durham—Jan. 5*; Jan. 12† (2); Jan. 26; Feb. 9* (A); Feb. 16*; Feb. 23† (3); Mar. 23*; Mar. 30* (A); Apr. 6† (A) (2); Apr. 20 (A); Apr. 27† (2); May 11*; May 18*; May 25† (A); June 1†; June 8 (A); June 15* (A); June 22*.
Granville—Feb. 2 (2); Apr. 6.
Orange—Mar. 16; May 11†; June 8; June 15†.
Person—Jan. 26; Apr. 20.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Armstrong

Ashe—Apr. 13*; May 25† (2).
Alleghany—Jan. 26 (A); Apr. 27.
Forsyth—Jan. 5* (2); Jan. 12† (A); Jan. 19† (2); Feb. 2* (2); Feb. 9† (A); Feb. 16†; Feb. 23; Mar. 2* (2); Mar. 9† (A); Mar. 16† (2); Mar. 30* (2); Apr. 13 (A); Apr. 20; Apr. 27 (A); May 11* (2); May 25† (A) (2); June 8* (2); June 15† (A) (2).

TWELFTH JUDICIAL DISTRICT
Judge Rudisill

Davidson—Jan. 26; Feb. 16† (2); Apr. 6† (A) (2); May 4; May 25† (A) (2); June 22.
Guilford, Greensboro Division—Jan. 5† (A); Jan. 5*; Jan. 12† (2); Feb. 2† (A) (2); Feb. 2* (2); Mar. 2† (2); Mar. 2* (A); Mar. 16* (2); Mar. 30† (A) (2); Apr. 13† (2); Apr. 20* (A); Apr. 27† (A) (2); May 11* (A) (2); June 1† (3); June 8* (A) (2).
Guilford, High Point Division—Jan. 12* (A) (2); Jan. 26† (A); Feb. 16* (A) (2); Mar. 9* (A); Mar. 16† (A) (2); Mar. 30* (2); Apr. 27*; May 11† (2); May 25*; June 22† (A).

THIRTEENTH JUDICIAL DISTRICT
Judge Rousseau

Anson—Jan. 12*; Mar. 2†; Apr. 13 (2); June 8†.
Moore—Jan. 19*; Feb. 9†; Mar. 23†; May 18*; May 25†.
Richmond—Jan. 5*; Mar. 16†; Apr. 6*; May 25† (A); June 15† (2).
Scotland—Mar. 9; Apr. 27†.
Stanly—Feb. 2†; Mar. 30; May 11†.
Union—Feb. 16 (2); May 4.

FOURTEENTH JUDICIAL DISTRICT
Judge Pless

Gaston—Jan. 12*; Jan. 19† (2); Mar. 9* (A); Mar. 16† (2); Apr. 20*; May 18† (A) (2); June 1*.
Mecklenburg—Jan. 5*; Jan. 5† (A) (2); Jan. 19* (A) (2); Jan. 19† (A) (2); Feb. 2† (3); Feb. 2† (A) (2); Feb. 16† (A) (2); Feb. 23*; Mar. 2† (2); Mar. 2† (A) (2); Mar. 16* (A) (2); Mar. 16† (A) (2); Mar. 30† (2); Mar. 30† (A) (2); Apr. 13* (A); Apr. 13†; Apr. 20† (A); Apr. 27† (2); Apr. 27† (A) (2); May 11*; May 11† (A) (2); May 18† (2); May 25† (A) (2); June 8*; June 8† (A) (2); June 15†; June 22* (2).

FIFTEENTH JUDICIAL DISTRICT
Judge Nettles

Alexander—Feb. 2 (A).
Cabarrus—Jan. 5 (2); Feb. 23†; Mar. 2† (A); Apr. 20 (2); June 8† (2).
Iredell—Jan. 26 (2); Mar. 9†; May 18 (2).
Montgomery—Jan. 19*; Apr. 6†; Apr. 13† (A).
Randolph—Jan. 26† (A) (2); Mar. 16† (2); Mar. 30*; June 22*.
Rowan—Feb. 9 (2); Mar. 2†; Mar. 9† (A); May 4 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Moore

Burke—Feb. 16; Mar. 9 (2); June 1 (3).
Caldwell—Jan. 5† (A) (2); Feb. 23 (2); Apr. 27† (A) (2); May 18 (2); June 1† (A) (2).
Catawba—Jan. 12† (2); Feb. 2 (2); Apr. 6 (2); May 4† (2).
Cleveland—Jan. 5; Feb. 2† (A) (2); Mar. 23 (2); May 18† (A) (2).
Lincoln—Jan. 19 (A); Jan. 26†; Apr. 27.
Watauga—Apr. 20*; June 8† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT
Judge Clement

Avery—Apr. 13 (2).
Davie—Mar. 23; May 25†.
Mitchell—Mar. 30 (2).
Wilkes—Jan. 12† (3); Mar. 2 (3); Apr. 27† (2); June 1 (2); June 15† (2).
Yadkin—Jan. 5; Feb. 9 (2); May 11.

EIGHTEENTH JUDICIAL DISTRICT
Judge Sink

Henderson—Jan. 5† (2); Mar. 2 (2); Apr. 27† (2); May 25† (2).
McDowell—Jan. 12* (A); Feb. 9† (2); June 8 (2).
Polk—Jan. 26 (2).
Rutherford—Feb. 23†; Apr. 13† (2); May 11 (2); June 22† (2).
Transylvania—Mar. 30 (2).
Yancey—Jan. 19†; Mar. 16 (2).

NINETEENTH JUDICIAL DISTRICT
Judge Phillips

Buncombe—Jan. 5†* (2); Jan. 19*†; Jan. 26; Feb. 2†* (2); Feb. 16*†; Feb. 16 (A) (2); Mar. 2†* (2); Mar. 16*†; Mar. 16 (A) (2); Mar. 30†* (2); Apr. 13*†; Apr. 13 (A) (2); Apr. 27; May 4†* (2); May 18*†; May 18 (A) (2); June 1†* (2); June 15*†; June 15 (A) (2).
Madison—Jan. 26† (A); Feb. 23; Mar. 30 (A) (2); May 25; June 22.

TWENTIETH JUDICIAL DISTRICT
Judge Gwyn

Cherokee—Mar. 30 (2); June 15† (2).
Clay—Apr. 27.
Graham—Mar. 16 (2); June 1† (2).
Haywood—Jan. 5† (2); Feb. 2 (2); May 4† (2).
Jackson—Feb. 16 (2); May 18 (2).
Macon—Apr. 13 (2).
Swain—Mar. 2 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Bobbitt

Caswell—Jan. 5† (s); Mar. 16*; Apr. 6† (A).
Rockingham—Jan. 19* (2); Mar. 2†; Mar. 9*; May 4† (2); May 18* (2); June 15†.
Stokes—Jan. 5*; Mar. 30*; Apr. 6†; June 22*.
Surry—Jan. 5 (A); Jan. 12; Feb. 9; Feb. 16 (2); Apr. 20; Apr. 27; June 1.

*For criminal cases.
†For civil cases.
‡For jail and civil cases.
No designation for mixed terms.
(A) Judge to be assigned.
(s) Special term.
(2) or (3) Indicates two or three-week terms.

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., Assistant United States Attorneys.
F. S. WORTHY, United States Marshal, Raleigh.
A. HAND JAMES, Clerk United States District Court, Raleigh.

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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.
WM. B. SOMERS, United States Marshal, Greensboro, N. C.
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. THOS. E. RHODES, 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. THOS. E. RHODES, Clerk.

Bryson City, fourth Monday in May and November. THOS. E. RHODES, Clerk.

OFFICERS

JAMES M. BALEY, JR., United States Attorney, Asheville, N. C.
FATE BEAL, Ass't U. S. Attorney, Charlotte, N. C.
ROY A. HARMON, United States Marshal, Asheville, N. C.
THOS. E. RHODES, Clerk, Asheville, N. C.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1952

STATE v. FRANCIS DUVAL SMITH, ALIAS GEORGE SMITH, R. L. PASCHAL, R. L. FERRELL, J. H. ADAMS AND F. B. MONEY.

(Filed 30 January, 1953.)

1. Bribery § 2—

Evidence in this case of one defendant's guilt of paying or delivering money or merchandise, directly and through agents, to each of defendant policemen to influence them in the performance of their duties, and of the acceptance by each defendant policeman of such payments or deliveries with intent and understanding that his actions as a police officer would be influenced thereby, *is held* sufficient to be submitted to the jury as to each defendant.

2. Criminal Law § 52a (2)—

The unsupported testimony of an accomplice, while it should be received with caution, if it produces convincing proof of the defendant's guilt, is sufficient to sustain conviction.

3. Criminal Law § 52a (1)—

On motion to nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to every reasonable intendment from the evidence, and every reasonable inference to be drawn therefrom.

4. Same—

On motion to nonsuit, defendant's evidence in conflict with that of the State is not to be considered, but defendant's evidence which explains or makes clear that which has been offered by the State may be considered.

5. Criminal Law § 52a (2)—

Evidence which tends to prove the fact in issue and which reasonably conduces that conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, should be submitted to the jury.

6. Criminal Law § 52a (6)—

A fatal variance between *allegata et probata* may be taken advantage of by motion for judgment as of nonsuit.

7. Conspiracy § 6—Evidence need not show that each conspirator agreed with all his co-conspirators, agreement with any one of them being sufficient.

In this prosecution of defendants for conspiracy to offer and receive bribes, the evidence tended to show that one defendant did offer and pay bribes through an agent to each defendant policeman with intent to influence the performance of his official duties and that each policeman accepted a bribe with knowledge that it was intended to influence the performance of his duties as a police officer. *Held:* Defendants' motion to nonsuit on the ground that the indictment was for a common design among all defendants and that the evidence failed to disclose that any one policeman knew that any other of the policemen received a bribe, and that therefore there was a fatal variance between allegation and proof, is untenable, it not being necessary to prove that each conspirator conspired with all of the others but it being sufficient if he made any agreement with any one of the others showing his intention to participate in the unlawful design. Moreover, in this case there was evidence that the first defendant offered bribes not only through an agent but also directly, and that at least some of the policemen knew that the others were receiving bribes.

8. Same—

Direct evidence of conspiracy is not required, but a conspiracy may be established by a number of indefinite acts, which standing alone may be of little probative force, but which taken collectively point unerringly to the existence of the conspiracy.

9. Conspiracy § 3—

A criminal conspiracy is an unlawful concurrence of two or more persons in an agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and since the unlawful agreement itself is the crime, no overt act in the execution of the agreement is necessary.

10. Criminal Law § 29b—

While ordinarily evidence of guilt of a crime other than that charged in the indictment is not competent, proof of the commission of other like offenses is competent when such proof tends to show *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect to the matter on trial.

11. Conspiracy § 5—

In this prosecution for conspiracy to bribe police officers to afford protection for defendant's lottery operations, testimony tending to show that during the period in question defendant had paid another witness not to testify against him in a previous prosecution for gaming, *is held* competent for the purpose of showing *quo animo*, intent, design, guilty knowledge or *scienter* and also as a circumstance so connected with the offense charged as to throw light thereon, even though the bribery of the witness was not included in the indictment.

12. Criminal Law § 37—

Testimony that the incriminating writing in question had been destroyed lays the foundation for the introduction of testimony as to its purport.

13. Criminal Law § 50d—

The discretionary act of the court in ordering defendant into custody during the progress of the trial cannot be held prejudicial when the record discloses that the court was careful to do so in the absence of the jury and that there was no conduct thereafter in the presence of the jury to indicate that defendant was in custody.

14. Criminal Law § 50f—

Where several defendants offer evidence, the State has the right to open and conclude the argument to the jury, and the one defendant who offers no evidence may not object to the refusal of the court to permit his counsel to make the concluding argument.

15. Criminal Law § 53j—

Where the testimony of accomplices is introduced as substantive proof of guilt, and any corroboration of the one by the other is purely incidental, the court is not required to give any instructions in regard to corroborative evidence by accomplices.

16. Criminal Law § 53l—

The court is not required to give requested instructions verbatim but it is sufficient if the court give the requested instructions substantially.

17. Same—

The court correctly refuses to give requested instructions embodying an erroneous statement of the law.

18. Criminal Law § 53j—

The court's charge on the credibility to be given the testimony of accomplices *held* without error in this case.

19. Criminal Law § 81c (2)—

A *lapsus linguae* which, when the charge is construed contextually, could not have misled the jury, will not be held for prejudicial error.

20. Criminal Law § 53j—

Instructions of the court in one part of the charge as to the credibility to be given the testimony of accomplices, and in a subsequent part of the charge as to the credibility to be given the testimony of witnesses generally, *held* not to result in misleading or inconsistent statements, the charge being read contextually.

21. Conspiracy § 7—

An instruction defining conspiracy as an agreement to do an unlawful thing or an agreement to do a lawful thing in an unlawful manner, with further instructions that the jury must find that at least two of defendants combined and agreed in order to constitute the offense of conspiracy, *is held* sufficient, in the absence of request for special instructions.

22. Criminal Law § 53j—

A requested instruction at variance with the evidence in the case is properly refused.

23. Criminal Law § 53f—

The fact that the court necessarily takes more time in giving the contentions of the State than in giving those of the defendants will not be held for error when the court gives equal stress to the contentions of both parties and instructs the jury that the fact that it had taken longer to give a summary of the State's evidence than that of defendants was to be given no significance.

24. Bribery § 2: Conspiracy § 7—Instruction in this prosecution for conspiracy and bribery held without error when construed as a whole.

In this prosecution of one defendant for conspiracy to bribe and with bribery, and of the other defendants, policemen, for conspiracy to receive bribes and with receiving bribes, the charge of the court construed contextually *is held* not to instruct the jury that if it should find any two of defendants guilty it might find all the others guilty, it appearing that while the charge was not as full as might be desirable, the court correctly instructed the jury that a conspiracy required the concurrence of two or more persons in the unlawful scheme and that the first defendant could not be convicted of giving a bribe to any one of the other defendants unless such other defendant was convicted of accepting same with knowledge that it was intended to influence his official conduct, and the jury being further instructed as to the presumption of innocence as to each defendant with the burden upon the State to prove guilt beyond a reasonable doubt. G.S. 1-180.

APPEALS by defendants from *Pless, J.*, February Criminal Term, 1952, of GUILFORD (Greensboro Division).

Criminal prosecution on an indictment containing nineteen counts, which may be summarized as follows:

Count One—That on or about 1 January, 1945, as well before as after that date, the defendants Smith, Paschal, Ferrell, Adams and Money did with common design, confederate, scheme, agree and conspire together and with each other and divers other persons, to unite for the common object and purpose of offering and receiving bribes by police officers of the City of Greensboro, said bribes being in the form of money, whiskey, groceries and other things of value and received by Paschal, Ferrell, Adams and Money to influence them in the performance of their duties as police officers of the City of Greensboro.

Count Two—That on or about 1 June, 1944, Smith, directly and through his agents, paid Paschal a bribe of $100.00 to influence him in the performance of his duties as a police officer.

Count Three—That on or about 15 February, 1947, in furtherance of said conspiracy, Smith, directly and through his agents and co-conspirators, paid Paschal a bribe of several monthly payments of approximately

$80.00 with intent to influence him in the performance of his duties as a police officer.

Count Four—That on or about 1 January, 1948, Smith, in furtherance of said conspiracy, directly and through his agents and co-conspirators, at various times and places, delivered money, whiskey and other things of value to Paschal as a bribe with intent to influence him in the performance of his duties as a police officer.

Count Five—That on or about 1 January, 1948, Smith, in furtherance of said conspiracy, through his agents and co-conspirators, over a period of about one year, delivered food, meat and other groceries to Ferrell as a bribe with intent to influence him in the performance of his duties as a police officer.

Count Six—That on or about 24 December, 1949, Smith, in furtherance of said conspiracy, directly and through his agents and co-conspirators, paid a bribe of $50.00 and one bottle of whiskey to Ferrell, with intent to influence him in the performance of his duties as a police officer.

Count Seven—That on or about 1 September, 1948, Smith, in furtherance of said conspiracy, directly and through his agents and co-conspirators, from time to time over a period of about six months, delivered two or more bottles of whiskey each month as a bribe to Adams, with intent to influence him in the performance of his duties as a police officer.

Count Eight—That on or about 24 December, 1949, Smith, in furtherance of said conspiracy, directly and through his agents and co-conspirators, paid $100.00 and two bottles of whiskey as a bribe to Adams, with intent to influence him in the performance of his duties as a police officer.

Count Nine—That on or about 1 June, 1947, Smith, in furtherance of said conspiracy, directly and through his agents and co-conspirators, delivered over a period of about three years, two or more bottles of whiskey per month as a bribe to Money with intent to influence him in the performance of his duties as a police officer.

Count Ten—That on or about 20 December, 1949, Smith, in furtherance of said conspiracy, directly and through his agents and co-conspirators, paid $100.00 as a bribe to Money, with intent to influence him in the performance of his duties as a police officer.

Count Eleven—That Paschal accepted the bribe described in Count Two with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Twelve—That Paschal accepted the bribe described in Count Three with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Thirteen—That Paschal accepted the bribe described in Count Four with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Fourteen—That Ferrell accepted the bribe described in Count Five with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Fifteen—That Ferrell accepted the bribe described in Count Six with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Sixteen—That Adams accepted the bribe described in Count Seven with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Seventeen—That Adams accepted the bribe described in Count Eight with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Eighteen—That Money accepted the bribe described in Count Nine with the intent and understanding that his actions as a police officer would be influenced thereby.

Count Nineteen—That Money accepted the bribe described in Count Ten with the intent and understanding that his actions as a police officer would be influenced thereby.

STATEMENT OF THE CASE.

It was stipulated between the solicitor and counsel for all the defendants that the City of Greensboro is a municipal corporation formed under the laws of the State of North Carolina, and has been such continuously since 1805; that the defendant F. B. Money was a duly sworn and acting police officer of said city from January, 1934, and continuously thereafter until 9 November, 1950; that the defendant R. L. Paschal was a duly sworn and acting police officer of said city from 20 August, 1936, and continuously thereafter until 9 November, 1950; that the defendant R. L. Ferrell was a duly sworn and acting police officer of said city from 1 January, 1939, and continuously thereafter until 9 November, 1950; and that the defendant J. H. Adams was a duly sworn and acting police officer of said city from 16 November, 1944, and continuously thereafter until 9 November, 1950; and that all four were police officers of said city from 16 January, 1951, until 14 August, 1951.

The principal witnesses for the State were C. A. (Shug) York, a "finger man" or an eliminator of competition for Smith, a donor of gifts of money and whiskey to police officers for Smith, his chauffeur and general handy man; and W. C. Coble, a headman for Smith, at first an organizer of "sub writers" and "head writers," and donor for Smith of whiskey and groceries at his store. York and Coble at the time of the trial were serving time for violating the lottery laws of the State. Both had been convicted several times before for violating the criminal law.

Neither Paschal, Ferrell, Adams or Money ever arrested Smith, Coble or York for lottery operations.

EVIDENCE AGAINST FRANCIS DUVAL SMITH, ALIAS GEORGE SMITH.

From about 1940 until 1950 and later, Smith, as banker, was operating butter and eggs and race horse lotteries in Greensboro of colossal size. York pleaded guilty in Superior Court before Judge Clement for operating a lottery in 1949. He made out he was the banker, taking the "rap" for Smith at his instructions. At this trial York testified Smith is still the kingpin; that the defendant Adams got some of his, York's, writers and "Adams and Smith was the basis of it." In 1940 the average daily take to the bank was $700.00 or $800.00 or maybe $900.00. York testified he had seen the take in the neighborhood of $5,000.00 per day coming to Smith as banker after "the writer" had deducted his 25% commission and the headman his 10% to 15%. During the years 1943 up to 1948, it probably averaged somewhere close to $4,000.00 per day. Smith had five or six "headmen" all the time, 200 to 300 "writers" and "pick-up-men." The *modus operandi* of the butter and eggs lottery is described below. The "writers" collected the money bet, and wrote tickets—the "writer" and player each getting a copy of the ticket. The writer then turned over the money collected, less his commission, to a "headman," who in turn turned it over, less his commission, to a "pick-up man." The "pick-up man" carried the money to the bank. The player selects a number of 3 digits, which is written on the ticket. The lead number of the winning number is taken from the number of tubs of butter sold that day on the Chicago market. The first figure to the right of the thousand mark comma is the first digit of the winning number. To illustrate, if 450,309 tubs of butter were sold, the first digit of the winning number would be 3. The second and third digits of the winning number are taken from the first and second digits to the right of the thousand mark comma of the number of crates of eggs sold that day on a certain market. If 876,421 crates were sold, the second and third digits of the winning number would be 4 and 2. The winning number for the butter and eggs lottery that day would be 342. Quotations as to the tubs of butter and crates of eggs sold are received from Western Union and are published in the daily papers. The player can play several numbers. If so, all are written on the same ticket. The winning number paid off 500 to 1, with some exceptions. Double numbers like 442 paid off 400 to 1; triple numbers like 444 paid off 300 to 1. The chance of selecting a winning number was one out of a thousand.

In 1940 York started a small lottery. He was banker, and had a few "writers." In about a month ten of his "writers" were arrested. Shortly

after York saw Smith at a filling station; Smith came to his car laughing, and asked how he was getting along. York told him he was not doing so well; he was losing "writers." Smith replied: "Don't you know you can't buck me? Me and my brother have got too much money." After further talk there, York went to work for Smith in his lottery operations. York worked for Smith from 1940 until January, 1949. He quit for two weeks, and went back to work for Smith until he broke with him in 1950. York received $60.00 a week and $2,500.00 bonus every six months beginning about 1945. He received the bonus about four years. York performed many duties for Smith. He was his "finger man." In lottery argot the "finger man" puts the finger on rival competitors and subordinates, and has them arrested and tried. A "finger man" is also called "an enforcer." Smith told York to give whiskey and money and favors to police officers, as he could not operate profitably without protection; if he could not contact him (Smith) to use his own judgment in such transactions. Smith told York "for years that Money was all right, and wouldn't bother the operations, unless he had to do so. As far back as 1945 and many times since he also said that I need not be afraid of Adams, as he was his man . . . Smith made these same statements in reference to Ferrell and Paschal."

Coble operated a grocery store in the Negro section of Greensboro. When he met George Smith in December, 1940, he was engaged in lottery operations with George's brother, Dutch Smith. Coble worked for George Smith in his lottery operations from 1940 until December, 1948. George Smith, as banker, also operated from 1940 through 1948 and later a race horse numbers lottery. The only difference in the race horse lottery and the butter and eggs lottery is the method of obtaining the winning number. The figures in the race horse lottery were derived from the parimutuel odds on horse races at a certain track, as carried in the racing papers.

Coble's store "was more or less general headquarters for the lottery, for all 'headmen' to congregate there, also a lot of police officers." Coble kept what he called a "Jeep Account" of two to three or four or five hundred dollars a month from monies received by him for Smith in his lottery operations. Coble paid out money to police officers, and delivered groceries and whiskey to police officers charging all to the "Jeep Account." He gave Smith itemized statements of all these acts.

The State's witness R. A. Craig was in Smith's house in or near Greensboro in 1947, and saw an account or record book there. In this book Craig saw "a notation on Jeep for $80.54." The witness believed he saw the entry twice.

Smith told Coble that Dutch (his brother) did not know how to run the town—he was afraid to give away anything; that you had to give stuff,

whiskey, to police officers to keep them from catching so many people. Smith told Coble to give whiskey to police officers. Coble did, and Smith paid for the whiskey.

EVIDENCE AGAINST R. L. PASCHAL AND SMITH.

Counts One, Two and Eleven—In about 1944 Smith told York, his "finger man," another bank had opened up, and asked him to check on it. Smith said he understood a "fellow Wells" was banker. York investigated, and told Smith what he had learned. Smith replied: "Knock the pick-up man off, Wells or anybody. I had rather have Wells, but he can wait a day or two." York asked Smith "whom do you want to use for the knock-off, what officer?" Smith replied: "Well, how about that Paschal? As much money as he has been getting, and all, he would make a good man to catch him." Smith told him to contact Paschal. This conversation was admitted against Smith alone. York called Paschal, and met him on Forbis Street. He had two or three meetings there with Paschal. York told Paschal that they had a pick-up man lined up of the new bank that Smith wanted knocked off. Paschal replied: "I'm getting damn tired of doing George's dirty work without ample pay" or something to that effect; and further said: "Tell George I want some money." York replied he would tell Smith anything he wanted him to. It was agreed there, to York's best recollection, that Paschal would accept $100.00. York called Smith. Smith replied: "Go ahead, and give it to him. He ain't nothing but a damn leech noway." Then York met Paschal, and told him this pick-up man could be caught on the corner of Lindsay and Forbis Streets. In the next day or two Paschal caught this pick-up man, and York gave Paschal $100.00 of Smith's money. Smith planted a man in Wells' outfit, and the officers caught five or six of Wells' writers. A week or ten days after Paschal caught the pick-up man, Wells was picked up by the officers. On the morning the writers were picked up, Wells' house was searched by the officers, and Paschal was in the raid. Paschal's conversation with York was admitted against Paschal alone.

Counts One, Three and Twelve—In 1946 Paschal came by Coble's store, and told Coble that Smith had promised him something, and he couldn't get it straightened out. Paschal said he would see York. He further said: "I went into it with both of them together. I'll see Shug, and see if he can get it straightened out. If he don't, I'll come back and talk to you." In a day or two Paschal returned, and said he couldn't get anything out of Smith or York. Coble replied: "Tell me what it is, maybe I can help you." Paschal said they had promised him an automobile for knocking out an "opposition banker, opposition bankers"; that

Smith "had offered him a car if he would knock out opposition bankers." Paschal said he had already done the job, and they didn't want to come across with the car. Coble called Smith, and asked him about it. Smith replied: "Yes, I promised him a car, but I am not going to pay cash for it. I will buy it, and pay monthly payments." A day or two later Paschal met Smith at Coble's store. They went out of the store for twenty or thirty minutes. When they came back, Smith told Coble he had it straightened out; that he was going to buy the car, and make the payments. The payments were $80.00 and some cents a month. Smith told Coble to take the payments out of Smith's money from the afternoon races. Once a month, between 15 and 18 months, Paschal came to the store, and Coble gave him the payments. Smith told York he had bought Paschal a Plymouth car. After Paschal's car was paid for Smith asked York to get in touch with Paschal, and see if he could not get Paschal to stop getting payments. York talked with Paschal, and Paschal said he had only received one payment since the car was paid for—$70.00 or $80.00—and he had done a lot of favors for Smith. This money was charged to the "Jeep Account." Smith's conversation was admitted against him alone. Paschal's conversation was admitted against him alone.

Counts One, Four and Thirteen—During the period immediately before and after 1 January, 1948, York got money from Smith for Paschal twenty-five or more times. Every ten days or two weeks Paschal would contact York for money. York would call Smith. If he could not reach him, he used his own judgment about giving it to him. Smith told York not to make Paschal mad; he was a dangerous man. This was admitted against Smith alone. The payments ranged from $25.00 to $50.00 to $75.00, and possibly $100.00. York gave Paschal whiskey from 1942 or 1943 as long as he was in Smith's employ. Smith paid for the whiskey. Paschal would never go over two weeks during the years York worked for Smith without getting whiskey—usually a bottle, sometimes two. Around 1946 Paschal got York to get $100.00 from Smith to pay off a bad cheque of Paschal's. Smith gave York $100.00; York gave Paschal $75.00 and pocketed $25.00. Coble gave Paschal whiskey a number of times. It was paid for by Smith's money and charged to the "Jeep Account." Smith told Coble in 1946 or 1947 he was giving away whiskey three ways; Coble was giving it away, York was, and he was.

EVIDENCE AGAINST R. L. FERRELL AND SMITH.

Counts One, Five and Fourteen—Smith told York that Ferrell was getting groceries and occasionally liquor, and that he, Smith, was paying for it. Smith further told York that Ferrell was on our side, and

wouldn't bother York or any of the lottery operators connected with him. Smith made this statement over and over. These statements of Smith were admitted in evidence against Smith alone. York testified that he observed Ferrell getting groceries at Coble's store, but did not ever see him pay for any; that Ferrell was there practically every time he went there. Coble testified that somewhere in the neighborhood of a year or a little better of 1947, or the last of 1946, Ferrell came to him, and told him he was having it pretty tough; to see if he couldn't get a few groceries; that he understood some of the rest of them were getting a few things—he didn't say what. Coble asked him what he was referring to. Ferrell replied: "Well, I understand some of the other policemen are getting whiskey, groceries and cars. It looks like you could give me a few groceries." Coble discussed with Smith the giving of groceries to Ferrell before doing so. Smith told Coble to let him have groceries. Smith said of Ferrell: "He's catching a lot of people down there. We had better give him a few groceries, and kind of cool him off a little." Then Coble started to furnishing Ferrell groceries. Ferrell started off with about $25.00 or $30.00 a month for about a year; in one month got up to about $80.00. When it got up to $80.00, Smith said: "I thought he didn't want but $25 or $30.00 of groceries." Coble replied: "I can't stop him; you put him on there. If you want him stopped, you see him and stop him." Coble spoke to Ferrell about it. Ferrell replied: "Last night I overlooked two down there. If I had caught them, it would have cost you more than what these few groceries I got cost." Coble told that to Smith, who replied: "Don't say no more to him about it." Ferrell got groceries from Coble until they closed down in December, 1948. Smith's conversation was admitted against him alone.

Counts One, Six and Fifteen—On Christmas Eve, 1949, York parked his car in the back of Coble's store. Ferrell came out the back door. York gave Ferrell a bottle of whiskey and $50.00 in money, saying: "Here is a further present for you; George has always told me to look out for you fellows all I could." The money and whiskey were Smith's property. Ferrell thanked him, saying he would see him later; the place was hot, police officers were in the store; and he was going away as quick as he could.

EVIDENCE AGAINST J. H. ADAMS AND SMITH.

Counts One, Seven and Sixteen—Around 1 September, 1948, Coble gave Adams whiskey on a number of occasions. Sometimes Adams would come in Coble's store kidding about the numbers and say: "What kind of day did you have? Were you overhit, or did you make money?" Coble would reply he didn't know what he was talking about. Then Adams would say: "What about a bottle or two? I am kind of dry. I need

one." Coble would give him a bottle or two of whiskey—this took place over a period of five or six months. It was Smith's whiskey, and Smith knew what Coble was doing with reference to Adams. Coble charged this whiskey to the "Jeep Account." For about six months Coble gave Adams a bottle or two of Smith's whiskey per month.

Counts One, Eight and Seventeen—On Christmas Eve, 1949, after York had seen Ferrell back of Coble's store, he went into the store and saw Adams and police officer Tillman. It was about 3 or 4 p.m. Adams asked York to go in the back and take a drink with him. York, in taking the drink, saw the brand of whiskey was similar to the brand of a case of whiskey of Smith's York had furnished Coble's store the day before. Adams said to York that Tillman and himself had been given a bottle of whiskey there, and he needed more liquor Christmas; and asked York if he had some. York replied: "Yes, at home." York went to his home, and Tillman and Adams followed. Tillman remained outside in the car. Adams went in the house. He asked if there was a dictaphone in the room. York replied: "No." York gave him four bottles of whiskey and $100.00 in money, which belonged to Smith. Adams went to the car carrying the whiskey and money. Tillman testified he was a police officer of the City of Greensboro in 1949, and still was. On Christmas Eve, 1949, he was off duty, and he and Adams then went to Coble's store, and went in. He saw York there. A good crowd was there—whites and Negroes. When they left Adams said to Tillman: "Let's go by York's house, and get a bottle of whiskey." He drove to York's house. Adams went in, and came back with some whiskey—either two or three bottles in two packages. Tillman got a bottle of the whiskey. In November, 1950, York was a witness in Superior Court in Greensboro, and mentioned Adams. Adams told Tillman he wasn't going to admit any of it. Tillman told Adams he didn't see any use denying these meetings. Tillman was interrogated by the S. B. I. He told Adams he had told them what he knew. That seemed to make Adams mad. He said what would the Chief and his wife think, and left. As far back as 1945 Smith told York, and many times since, not to be afraid of Adams, as he was his man. This was admitted against Smith alone.

EVIDENCE AGAINST F. B. MONEY AND SMITH.

Counts One, Nine and Eighteen—At Smith's direction York gave Money whiskey about once a month, and at times left it at Coble's store for him. Money always expressed his appreciation, and would ask about Smith; how the business was going on, and if we were being bothered too much. Smith told York for years that Money was all right, and wouldn't bother the operations unless he had to. Coble testified Money got whiskey

on numerous occasions. He would get a bottle probably once or twice a month, and then at Christmas, two. It was Smith's whiskey, and went on the "Jeep Account." Coble gave this whiskey to Money in 1946 or 1947, up until 1948. Money told Coble that during 1947 or 1948 he could have arrested him several times for operating a lottery; he had been in his store several times when he was taking the "low" down over the telephone. In lottery slang the "low" means the total amount written by the writer less his 25%. In 1948 York saw Money with a crowd at Smith's house. There was an atmosphere of drinking. The conversation of Smith was admitted against him alone. The conversation of Money was admitted against him alone.

Counts One, Ten and Nineteen—In Christmas week, 1949, York was still engaged in lottery operations with Smith. Early in Christmas week, 1949, Money came to York's home, just out of the city limits of Greensboro, and asked him how everything was going along. York replied pretty good, and "I guess you want a little liquor." Money replied: "yes." York gave him two bottles of whiskey and $100.00 in money—Smith's property. Money asked York how business was, how I was getting along, and if anybody was bothering me much. York replied, things were not too bad. Money thanked him for the whiskey and money, saying he would be glad to do anything for me he could.

The defendant Smith offered no testimony.

EVIDENCE FOR THE FOUR POLICE OFFICERS, DEFENDANTS.

Paschal, Ferrell, Adams and Money denied *in toto* the charges against them in the indictment and also all statements the State offered evidence they had made. Each one testified that they did not know Smith, and had received no money, whiskey, groceries or anything of value from him directly or through any agents or co-conspirators. Paschal offered evidence to show how he financed the purchase of the automobile, which the State contends Smith paid for. They offered evidence that after York's testimony in his lottery case in reference to the police officers, that Coble, on or about 20 December, 1948, made an affidavit in the presence of Sgt. Evans, S. B. I. Agent Allen, Sgt. Sink and Deputy Sheriff Donovant, stating that he knew nothing of the police officers receiving any money, whiskey or groceries from Smith or his agents, or anyone else, directly or indirectly. Each one of the four defendants offered numerous witnesses that he was a man of good character. There was evidence that York had received a "time cut" on his road sentence, and that Coble was seeking one.

The evidence for the State has been set forth in more detail because of the motions for judgment of nonsuit.

The jury found for its verdict that each defendant was guilty as charged. The defendants thereupon moved that the jury be polled. The court polled the jury, and each juror for himself answered that each defendant is guilty on all counts as charged in the bill of indictment.

From the judgments imposed on each defendant, each defendant appeals, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Jordan & Wright, Hines & Boren and Don A. Walser for defendant Francis Duval Smith, alias George Smith.

T. Glenn Henderson and Norman A. Boren for defendants R. L. Ferrell, R. L. Paschal, F. B. Money, and J. H. Adams.

PARKER, J. At the close of the evidence for the State, the defendant Smith moved for judgment of nonsuit on counts 1 through 10, inclusive, in the bill of indictment; and as to each of said counts. The motion was refused as to all said counts, and the defendant Smith excepted. The defendant Smith introduced no evidence. The other four defendants did introduce evidence. After all the evidence in the case had been concluded, the defendant Smith again moved for judgment of nonsuit on counts 1 to ten, inclusive, and on each one of them. The motion was refused and the defendant Smith excepted. However, in his brief the "defendant Smith concedes that the State's evidence, when viewed in the light most favorable to the State, was sufficient to repel the motions for judgment as of nonsuit upon counts 2, 3, 4, 5, 7 and 9. Hence, the exceptions to the overruling of the demurrer to the evidence and motions for judgment as of nonsuit on these counts are abandoned. On the other hand, it is submitted that the evidence was insufficient to be submitted to the jury upon counts 1, 6, 8 and 10. We can perceive that there might be some difference of opinion as to counts 6, 8 and 10, although we believe the conviction on these counts should be set aside and reversed." Without repeating the evidence on counts 6, 8 and 10, set forth above, it was amply sufficient to overcome the defendant Smith's motion for judgment of nonsuit.

At the close of the State's evidence the defendant Paschal moved for judgment of nonsuit upon counts 1, 11, 12 and 13; overruled and Paschal excepts.

At the close of the State's evidence the defendant Ferrell moved for judgment of nonsuit upon counts 1, 14 and 15; overruled and Ferrell excepts.

At the close of the State's evidence the defendant Adams moved for judgment of nonsuit upon counts 1, 16 and 17; overruled and Adams excepts.

At the close of the State's evidence the defendant Money moved for judgment of nonsuit upon counts 1, 18 and 19; overruled and Money excepts.

At the close of all the evidence the defendants Paschal, Ferrell, Adams and Money renewed their motions for judgment of nonsuit; overruled and exceptions by all four defendants.

Paschal, Ferrell, Money and Adams filed with us a joint brief. Their brief states: "The defendant policemen concede that there was sufficient evidence to submit to the jury on the alleged overt acts of receiving bribes, as charged in counts 11 through 19, inclusive, of the bill of indictment, if the otherwise uncorroborated testimony of two accomplices is sufficient to make out a case for the jury. However, the defendant policemen stressfully urge and contend that there was a total failure of proof sufficient to carry the case to the jury on the charge that they entered into a conspiracy with Smith, and it is submitted that the motions for judgment as of nonsuit on the conspiracy count should have been granted." "It has been repeatedly held by this Court that the unsupported testimony of an accomplice, while it should be received with caution, if it produces convincing proof of the defendant's guilt is sufficient to sustain a conviction. *S. v. Ashburn,* 187 N.C. 717 (728) and cases there cited." *S. v. Gore,* 207 N.C. 618, 178 S.E. 209. To the same effect *S. v. Herring,* 201 N.C., 543, 160 S.E. 891; *S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594; *S. v. Rising,* 223 N.C. 747, 28 S.E. 2d 221. Upon the admission of the four police officers defendants in their brief, their motions for nonsuit are untenable on counts eleven through nineteen, inclusive. Regardless of such admission there was plenary evidence on those counts to carry the case to the jury.

That leaves for our consideration the refusal of the trial court to nonsuit the State on Count One in the indictment as to all the defendants, or one or more of them.

"On a motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom." *S. v. Shipman,* 202 N.C. 518, 163 S.E. 657. On such a motion "the defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when not in conflict with the State's evidence, it may be used to explain or make clear that which has been offered by the State." *S. v. Bryant,* 235 N.C. 420, 70 S.E. 2d 186. "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." *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730. A

fatal variance between *allegata et probata* can be taken advantage of by motion for judgment as of nonsuit. *S. v. Nunley,* 224 N.C. 96, 29 S.E. 2d 17.

Count One charges the five defendants with a conspiracy to commit a felony. All the defendants contend that Count One of the indictment charged that a conspiracy existed between Smith on the one hand and the four defendant police officers on the other, under which Smith agreed to give bribes to the police officers in return for an agreement on their part to protect Smith's lottery operations, and that the four police officers consented to receive, and did receive bribes for said purposes. That the evidence discloses, as the defendants contend, that none of the defendant policemen knew that any of the others were the recipients of bribes, nor is there any evidence that Smith directly communicated with any of the four police officer defendants regarding the bribes. That the evidence discloses, when viewed most favorably for the State, the bribery of the policemen was an isolated incident unrelated to the bribery of the other policemen. That while there is evidence that York and Coble gave bribes to the four police officer defendants at Smith's requests and as his agents that would only be evidence of a conspiracy by Smith, York and Coble to corrupt police officers, and does not support Count One; but is a fatal variance between *allegata* and proof. That there is no evidence from which it could be found that any systematic scheme or plan was either evolved or carried into effect with the defendant policemen to protect Smith's lottery operations.

It is not requisite to convict for the State to prove that the police officer defendants, or any one of them, knew that the others, or any of them, were the recipient of bribes. "It is not necessary, however, that a person to be criminally liable, be acquainted with the others engaged in the conspiracy; although to hold one liable as a participant, it must be shown that he did some act or made some agreement showing his intention to be a participant:" 11 Am. Jur., Conspiracy, Sec. 7. "It is not necessary to constitute the offense that the parties should have come together and agreed in express terms to unite for a common object. A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." *S. v. Connor,* 179 N.C. 752, 103 S.E. 79. However, there is evidence that Ferrell told Coble "I understand some of the other policemen are getting whiskey, groceries and cars. It looks like you could give me a few groceries." There is further evidence that Smith made the payments on a car for Paschal.

The defendants contend there is no evidence that Smith directly communicated with any of the police officer defendants regarding bribes. That is an oversight. There is evidence that Paschal told Coble, Smith had offered him a car if he would knock out opposition bankers; that he

had done the job, and he had not come across with the car. Coble reported this to Smith. A day or two later Paschal met Smith at Coble's store, and Paschal and Smith went out of the store for 20 or 30 minutes. When they came back Smith told Coble he had straightened it out; that he was going to buy the car, and make the payments, which he did.

The evidence discloses that York and Coble in dealing with the four police officer defendants were acting under Smith's direction and as his agents. Smith said he could not operate successfully without police protection, and to give money, whiskey, groceries and a car (the car was to Paschal alone) to these four defendants, and that they received what he directed to be given. That they never arrested Smith, York or Coble in their lottery operations. That Paschal knocked out opposition bankers. That Ferrell told Coble "last night I overlooked two down there, it would have cost you more than what these few groceries I got cost." That Adams would come in Coble's store kidding about the numbers, and say "what kind of day did you have? Were you overhit, or did you make money?" Then Adams would say "what about a bottle or two," and Coble would give him whiskey. Money told Coble during 1947 and 1948 he could have arrested him several times, when he was taking "the low" down over the telephone. Smith told York for years that Money was all right, and wouldn't bother the operations, unless he had to do so; that he need not be afraid of Adams, as he was his man; and made the same statements as to Paschal and Ferrell. What Smith told York was admitted against Smith only.

Considering all these facts and circumstances in the light most favorable to the State there was abundant evidence tending to show that all five defendants had entered into a criminal conspiracy with a common design and purpose to unite for the common object of Smith offering bribes to Paschal, Ferrell, Adams and Money, police officers of the City of Greensboro, and of the four said police officer defendants receiving said bribes with the express understanding that they would protect Smith in his lottery operations, as charged in Count One of the indictment. The evidence made out a case for the jury on that count as to all the defendants. The court was correct in refusing the motions for judgment of nonsuit made by all the defendants and each one of them on Count One in the indictment. "Direct proof of the charge" (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,* 204 N.C. 710, 169 S.E. 711. The late *Chief Justice Stacy* speaking for the Court in *S. v. Ritter,* 197 N.C. 113, 147 S.E. 733, says: "The gist of a criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the

agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means—and it is said that the crime is complete without any overt act having been done to carry out the agreement, citing authorities. . . . The crime of conspiracy consists of the conspiracy, and not of its execution . . . One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy."

Smith's assignment of error No. One. York on re-direct examination by the State before the State rested, testified: "Earl Black was an employee of George Smith's before the round-up in December 1948. I disremember the exact date that Earl Black left George's employment, but he was in Greensboro off and on for the course of as much as three years. He was supposed to be a witness against George and the others for the State, but he failed to testify against George . . . Black was brought up here, I believe, under subpoena." The evidence shows there was a big blowup in Smith's lottery operations in December, 1948, and over 30 people connected with his lotteries were arrested. A warrant was issued for Smith charging him with violating the lottery laws. He became a fugitive from justice, and was arrested in Fayetteville in June, 1949. Smith was tried in the Municipal Court of Greensboro on these charges and fined $10,000.00. Sgt. Evans, a witness for Smith's co-defendants, testified: "The original and basic source of information in connection with that investigation" (referring to the blowup in 1948) "was Earl Black. . . . I talked to Black a week or ten days. I got a tremendous amount of information from Black. He had been in the lottery business in Greensboro with George Smith." The solicitor asked York this question:

"Q. What statements, if any, did George Smith make to you with reference to Earl Black's appearance as a witness against Smith or failure to appear?" Objection by Smith, overruled by the court, and Smith excepted. "A. George said he was supposed to pay Earl Black $4,000.00 not to testify against him, that he had already paid him $1,000.00 and that Carl Vann had $3,000.00 holding it as soon as Earl Black went through with the deal, and didn't testify."

York testified immediately thereafter without objection, "as best I can recall, the $4,000.00 also included Black being a witness against Smith in New Hanover County in Wilmington."

The question had reference to Smith's case in the Greensboro Municipal Court, when he was fined $10,000.00. The warrants in this case had not been issued against any of the five defendants here.

The defendant Smith contends that the admission of this testimony was prejudicial and material error on the ground the general rule is that evidence of one offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other, and relies upon *S. v. Smith,* 204 N.C. 638, 169 S.E. 230; *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; and *S. v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853.

In *S. v. Fowler, supra,* relied upon by Smith, it is said: "To this general rule, however, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge or *scienter,* or to make out the *res gestae,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions" (citing numerous authorities).

The question is squarely presented as to whether this evidence comes within the general rule or the exception to it. The evidence discloses that Smith for years had operated vast lotteries in Greensboro. After he was fined $10,000.00 in 1949, he continued to operate. York testified at the trial "George is still the kingpin," from which it could be inferred that he even then was operating. Smith told York he could not operate profitably without protection. The point at issue in this action was did Smith, directly and through his agents and co-conspirators, give money, whiskey and groceries to his co-defendants, and if so, were they bribes. The evidence objected to showed Smith paid Black a $4,000.00 bribe for protection—*i.e.,* not to testify against him in Greensboro and in Wilmington on his trials for operating lotteries. The first count in the indictment charges said bribes being offered by Smith to and received by Paschal, Ferrell, Adams and Money with the express and implied understanding that their official action and their omission to perform official acts as police officers were to be influenced thereby. Counts 2 to 19, both inclusive, in the indictment, charge the bribe being offered by Smith, and received by the defendant named in the count with the intent and understanding that his official actions would be influenced thereby. The bill of indictment charges a violation of G.S., Sections 14-217 and 14-218. Section 14-217 has as an essential element of the offense of bribery of officials the receipt of anything of value with the express or implied understanding that his official acts are to be in any degree influenced thereby. This evidence was competent to show the *quo animo,* intent, design, guilty knowledge or *scienter* with which Smith, through York and Coble, gave money, whiskey and groceries to Paschal, Ferrell, Adams and Money. In other words, it was competent to show Smith's intent in this case, and not to prove the accusations substantively. It was sufficiently

connected with the charges in this case to render it competent for this purpose. It was evidence tending to show also why the State did not call Black as a witness. It was part of a series of transactions carried out by Smith in pursuance of his original design to buy protection, and the jury might well have inferred this common purpose from the evidence. In addition, the bribing of Black not to testify exhibits a chain of circumstances in respect of the matter on trial, and so connected with the offenses charged as to throw light on these questions. The following cases are in accord with this view: *S. v. Stancill,* 178 N.C. 683, 100 S.E. 241; *S. v. Dail,* 191 N.C. 231, 131 S.E. 573; *S. v. Batts,* 210 N.C. 659, 188 S.E. 99; *S. v. Flowers,* 211 N.C. 721, 192 S.E. 110; *S. v. Smoak,* 213 N.C. 79, 195 S.E. 72; *S. v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511; *S. v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516; *S. v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *S. v. Bryant,* 231 N.C. 106, 55 S.E. 2d 922; *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322. The cases of *S. v. Smith, supra, S. v. Choate, supra,* and *S. v. Fowler, supra,* are distinguishable. We hold the evidence competent, and the assignment of error is not sustained.

Smith's assignment of Error No. 3. R. A. Craig, a witness for the State, testified that in 1947 he was in Smith's house, and saw an account or record book. The witness was being examined by the solicitor for the State.

Q. Do you recall seeing any items that particularly aroused your interest?

Mr. Henderson: Objection. The record would be the best evidence.

Mr. Jordan: And whether it aroused his interest, your Honor, certainly wouldn't be material.

The Court: The objection is sustained as to the officers, and overruled as to the defendant Smith. Smith excepted. Q. What did you see? A. There was a notation on Jeep for $80.54. Q. Jeep, $80.54? A. Yes, sir. Q. Did you see more than one such entry? A. I believe I saw it twice. Mr. Jordan: The defendant Smith moves to strike that evidence. If it was a document, that would be the best evidence, and there's been no foundation laid for the introduction of secondary evidence. The Court: Objection overruled. The defendant Smith excepts.

Previously, Coble had testified: "I do not have any books on the Jeep Account; the records have been destroyed." The foundation had been laid for the introduction of secondary evidence, and the evidence is competent. *Potato Company v. Jeanette,* 174 N.C. 236, 93 S.E. 795; Stansbury N. C. Evidence, Sec. 192. In addition what he saw in this book in Smith's home was competent against Smith.

Smith's assignment of Error No. 2.

On the eighth day of the trial the court ordered the defendant Smith into custody, and increased his bond from $3,000.00 to $50,000.00. This

occurred about 12:30 p.m. on 20 February, 1952, after Smith's counsel had cross-examined Coble, but before the cross-examination of him by the police officers' counsel. York had already testified. The court called Smith's counsel to the bench (counsel on both sides had gone frequently to the bench to talk to the court of their own volition and called by the court during the trial) and quietly stated, not in the hearing of the jury, that he had decided to order Smith into custody. Counsel for Smith protested. The court stated he would direct the sheriff to take Smith into custody out of the presence of the jury. The conversation was "beyond the hearing of the jury." The jury left the courtroom; Smith remaining in the courtroom until the jury had left. The court instructed the sheriff not to walk beside Smith, but to remain a discreet distance away. Smith was then put in jail. After lunch Smith's counsel conferred with the judge in his chambers protesting his action, and saying it had seriously prejudiced Smith's case. The judge called the solicitor into his chambers. The solicitor did not know until then that Smith had been placed in custody. The court then fixed Smith's bond at $50,000.00. Before court reconvened after lunch, Smith returned with the sheriff from jail to the courtroom, and then the jury was brought from the jury room into the courtroom; Smith being seated in the chair he had occupied before. During the time Smith was in custody, on each and every occasion when he left or entered the courtroom, the jury was in the jury room and out of sight and hearing of the courtroom and the lobby between the courtroom and the public elevator. Nothing was said or done by the court or the sheriff in the presence or hearing of the jury to inform the jury that the defendant had been taken into custody and his appearance bond raised to $50,000.00. Smith was in the courtroom seated in his usual chair each time the jury entered the courtroom and he remained there until the jury left the courtroom at each recess. The jury was not kept together. On the afternoon of 14 February, 1952, Smith gave a $50,000.00 bond, and was released from custody. To this ordering of Smith into custody and increasing his bond, he excepts, and assigns as error No. 2.

"In a criminal prosecution the State is the plaintiff and may have custody of accused, this being essential for the protection of society. It is within the discretion of the trial court whether accused should be placed in custody; and the court's proper exercise of discretion is not error where the jury were unaware that accused had been placed in custody, or were not influenced by that fact." 23 C.J.S., Criminal Law, Sec. 977.

In *S. v. Smith,* 202 N.C. 581, 163 S.E. 554, the court ordered the defendant into custody during the trial. This Court said: "The conduct of the defendant called for drastic action. His continued absence impeded the trial. The judge states that he made 'every possible effort to

assure the defendant of able counsel and a fair trial, but the defendant did not seem to appreciate the effort or to respect the court.' It does not appear that the jury knew anything of the order or of the commitment of the defendant; the finding of the court is to the contrary. Under the circumstances the order was within the exercise of legitimate power and affords no sufficient ground for a new trial."

In *Hood v. U. S.*, C.C.A. Okl., 23 F. 2d 472, *certiorari* denied 48 S. Ct. 436, 277 U.S. 588, 72 L. Ed. 1002 (trial for a conspiracy to engage in transactions involving morphine) the Court said: "The demand for the exclusion of witnesses and the committal of defendant Bowdry to the custody of the marshal were matters addressed to the sound discretion of the trial court, and we do not find that the discretion was abused." See Bishop's New Crim. Proc., Sec. 952a.

The defendant Smith in his brief relies upon *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. McNeill,* 231 N.C. 666, 58 S.E. 2d 366; *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568; *S. v. Wagstaff,* 235 N.C. 69, 68 S.E. 2d 858. The facts in those cases are distinguishable. In the *Hart case* the defendant in the presence of the jury was ordered into custody by the court. In the *McNeill case* a defendant's witness immediately upon leaving the stand and in the presence of the jury was ordered into custody by the court. In the *Simpson case* immediately after recess for lunch, some of the jurors being still in the courtroom, the court ordered the defendant and two of his witnesses into custody, and they were placed in jail. When the court reconvened, the jury being in the box, the defendant and his two witnesses were brought into the courtroom in custody of the sheriff. In *Wagstaff's case* the 19 year old defendant was without counsel. The court ordered his father into custody in the presence of the jury, and removed from the courtroom—the defendant needing the counsel of his father, and his father being a probable witness for his son.

"In the absence of constitutional or statutory provisions to the contrary, the general rule is that the inherent power of the court to insure itself of the presence of the accused during the trial may, in its discretion, be exercised so as to order a person who has been at liberty on bail, into the custody of the sheriff during trial of the case . . . It is not necessary for the court, in exercising its discretionary power to remand during trial, to file any reasons for such action; and if such order is made, it must be assumed, in the absence of a contrary showing, that the court acted in good faith and upon sufficient grounds." 6 Am. Jur., Bail and Recognizance, Sec. 101.

Just before the court recessed for the day 13 February, 1952, the court instructed the jury: "Please remember the instructions of the court not to discuss this case with anybody, and please do not read the newspapers.

Don't let your wife tell you what is in them; just go right along, and form your own opinions. Keep your minds open, etc."

Before Smith was placed in custody it was already in evidence that a warrant had been issued in December, 1948, against Smith for operating a lottery by the Municipal Court of Greensboro; that in spite of efforts to arrest him, he was not picked up until June, 1949, in Fayetteville; that Smith had paid Black a bribe of $4,000.00—or at least $1,000.00 and placed $3,000.00 in escrow when he went through with his agreement—not to testify against him in 1949 and in Wilmington; that in 1950 York had pleaded guilty, and taken the "rap" for Smith, at his request. Smith was placed in custody not in the presence of the jury, and in going to and from jail, while he was in custody, there was nothing to indicate he was in custody. Considering all the facts and circumstances the judge did not abuse his discretion in placing Smith in custody and in increasing his bond to $50,000.00, which Smith gave next day—the court in good faith and upon sufficient grounds deeming his act essential for the protection of society. This assignment of error by Smith is not upheld.

The defendant Smith assigns as error No. 5 the refusal of the court to permit his counsel to make the concluding argument to the jury. Smith offered no evidence, but his four co-defendants testified for themselves, and introduced the evidence of a number of witnesses in their behalf. That gave the State the right to open and conclude the argument, and this assignment of error is untenable. *S. v. Robinson,* 124 N.C. 801, 32 S.E. 494; *S. v. Raper,* 203 N.C. 489, 166 S.E. 314; *Hamilton v. R. R.,* 200 N.C. 543, 158 S.E. 75.

ASSIGNMENTS OF ERRORS TO THE CHARGE.

Smith requested the court to give 17 prayers for instructions plus 4 additional prayers, covering seven pages in the Record; his four co-defendants requested none. Smith's assignment of error No. 6: "The trial judge erred in charging the jury on the law applicable to the testimony of accomplices, failing to give the requested instructions on this subject and on whether there was any corroborating evidence, and, if so, its legal significance." Paschal, Ferrell, Adams and Money assign as their Error No. 3: "Did the court err in charging the jury with reference to the testimony of the State's witnesses who were accomplices, and was there error in giving conflicting instructions on this aspect of the case?" Smith filed a brief with us, and his four co-defendants a separate joint brief. On these two assignments of error the argument is substantially the same in both briefs, and both briefs cite many times the same authorities. The State had five witnesses. All the defendants contend that of

these five witnesses only York and Coble were accomplices. The testimony of York and Coble was offered by the State as substantive evidence. If they corroborated each other, it was only incidentally. None of the defendants requested that the court instruct the jury that any of the testimony of York or Coble be considered as corroborative evidence, nor did the court do so.

The court refused to give Smith's prayer No. 3 verbatim, but gave it substantially in his charge.

All the defendants assign as error the court's refusal to give Smith's prayer 4: "In order to constitute corroborating evidence, the jury must be satisfied beyond a reasonable doubt that the facts relied upon as corroborating evidence existed or have been proven beyond a reasonable doubt, the burden being upon the State, and unless the jury so find they cannot consider the evidence as corroborating, and therefore would reject the same. In other words, evidence is not corroborative unless it does actually corroborate." And also the court's refusal to give Smith's prayer for additional instruction as follows: "The court charges the jury that the testimony of one accomplice cannot be used to corroborate that of another. Under the facts of this case the court charges you cannot consider the testimony of York to corroborate the testimony of Coble, or the testimony of Coble to corroborate the testimony of York. The court charges you that York and Coble are accomplices and you cannot consider the evidence of York to corroborate that of Coble, or Coble's testimony to corroborate that of York. Evidence of a number of accomplices needs the same amount of corroboration as that of one accomplice."

Prayer 4 is taken from the charge in *S. v. Ashburn, supra.* Ashburn excepted to this part of the charge, saying he made no such contention. The Court said: "If the defendant made no such contention, he should have called the court's attention to it, so that correction could be made at the time." The court did not lay this part of the charge down as a rule of law. Suffice it to say that the court in its charge in this case substantially followed the law laid down in the *Ashburn case,* relating to the testimony of an accomplice repeating many expressions there verbatim; and also following the law on the same subject expressed in *S. v. Williams,* 185 N.C. 643, 116 S.E. 570; *S. v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533. The exception to the refusal to give Prayer 4 is not sustained. The four additional prayers were taken apparently from 22 C.J.S., Crim. Law, p. 1408, where it is said: "The general rule is that the testimony of one accomplice cannot be accepted as sufficient corroboration of the testimony of another; and hence, there can be no conviction on the testimony of accomplices alone, no matter how many there may be, if their testimony is not corroborated by evidence apart from accomplice testimony." This statement of the law in C.J.S. is at variance with our decisions. *S. v.*

Gore, supra. The refusal of the court to give these four additional prayers was not error.

The court did not give Prayers 5 and 6 verbatim, but it did give them substantially in its charge, and in accordance with our decisions.

All the defendants assign as error that part of the court's charge between the letters G and H, and covering about two pages of the Record, pp. 283, 284 and 285, relating to the credibility of the testimony of accomplices in lieu of giving Smith's prayers for instruction on that subject, and particularly to this sentence: "The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury as a warrant to convict—although entirely supported." The two sentences in the charge immediately before this sentence, this sentence, and the three sentences immediately thereafter were Smith's prayer for instructions No. 2 given verbatim except supported for unsupported. Two of these last three sentences are: "The court instructs you that you may convict on the unsupported testimony of an accomplice, but that it is dangerous, etc. . . . Before the defendants can be convicted upon the unsupported testimony of an accomplice, etc." Reading the charge as a whole the use of the word "supported" instead of "unsupported" was a *lapsus linguae,* or as the philosophers say "heterophemy." It could not have misled the jury, and cannot be held material prejudicial error. *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460. The charge is to be construed contextually, and not by detaching a sentence or clause from its appropriate setting. *S. v. Utley,* 223 N.C. 39, 25 S.E. 2d 195.

That portion of the charge between the letters G and H is in conformity with *S. v. Williams, supra; S. v. Ashburn, supra;* and *S. v. Kelly, supra.* The assignments of error thereto are not sustained.

All the defendants assign as error that later on in the charge the court gave the law in respect to the credibility of witnesses generally, and this was in conflict with the charge previously given as to the testimony of accomplices and was misleading and inconsistent. The defendants offered the testimony of 36 witnesses besides testifying themselves. This part of the charge as to witnesses' credibility generally comes over six pages in the Record after that on the credibility of accomplices. At the close of the court's charge, counsel for Smith stated to the court: "In the solicitor's closing argument he made reference that the defendants' testimony should be scrutinized, which was correct, but he likewise said that only York's and Coble's testimony should be scrutinized. We think your Honor should tell the jury that the same test of scrutinizing the testimony of the defendants would not be applied to the testimony of York and Coble, since they are accomplices." The court immediately added this addition to its charge: "Gentlemen of the jury, the court has given you the rule with reference to the caution and scrutiny that you should con-

sider the evidence of accomplices. It has also given you the rule that you should apply to the consideration of the evidence of the defendants offered by them personally. I don't think that the court—I think I've gone into that fully enough so that you gentlemen will understand what the rule is and I will not at this time repeat it." Reading the charge as a whole there was no inconsistency, and these assignments of error are untenable. We have considered carefully all the other assignments of error under Smith's assignment of error No. 6 and under Paschal, Ferrell, Adams and Money's assignment of error No. 3, and they are not upheld.

Smith assigns as error No. 7 "The trial judge erred in refusing to give the jury the defendant Smith's written prayers for instructions on the question of agency as it related to the conspiracy count;" and assigns as error No. 8 "The trial judge failed to give the jury adequate and correct instructions on the conspiracy count." Paschal, Ferrell, Adams and Money assign as error No. 2 "The trial judge failed to give the jury adequate and correct instructions on the conspiracy count." On these assignments of error the argument in the brief of Smith and in the brief of his four co-defendants is substantially the same with many of the same authorities cited. All the defendants contend that the court's definition of "conspiracy" was fatally defective. The court summarized the first count in the indictment and said: "Conspiracy being an agreement to do an unlawful thing or an agreement to do a lawful thing in an unlawful manner or, more shortly, an unlawful agreement." In *S. v. Davenport,* 227 N.C. 475, p. 493 *et seq.,* 42 S.E. 2d 686, it is said: "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. Citing authorities." The court said further in its charge p. 286 of the Record: "The jury cannot find one defendant alone guilty, because it is necessary that at least two of the defendants combine in order to form a conspiracy." None of the defendants requested a fuller definition of conspiracy. While the court's definition is meager, it is sufficient. The defendants further contend that Count One charges that Smith conspired with his four co-defendants; that there is no evidence that he did so; that, if there was a conspiracy, he conspired through his agents; and there is a fatal variance between *allegata* and *probata.* This is set forth in Smith's prayers 8 and 9. There is plenary evidence that Smith conspired directly with all of his four co-defendants. Smith's assignments of errors Nos. 7 and 8 and the police officer defendants' assignment of error No. 2 are untenable, when the charge is read, and considered as a whole.

Smith assigns as error No. 9 "The trial judge did not comply with the requirements of G.S. 1-180 in that he failed to declare and explain to the jury the law arising on the evidence given in the case with respect to any

of the counts in the indictment." Paschal, Ferrell, Adams and Money assign as their error No. 4 the same as Smith assigns as his error No. 9, and further that the court failed to give equal stress to the contentions of the State and the defendants. The court in its charge stated it had taken longer to give a summary of the State's evidence than the defendants', but they were to attach no significance to that. He gave equal stress to the contentions of the State and the defendants. This was not error. *S. v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1. The court in its charge covered adequately the evidence and contentions of the State and the five defendants. On Count One the court charged as follows: "On count one of the bill of indictment, that is, the one that refers to the alleged conspiracy between Smith and the four policemen, the jury may return a verdict of guilty as to any two or more of the defendants or may return a verdict of not guilty as to one or all of the defendants. The jury cannot find one defendant alone guilty, because it is necessary that at least two of the defendants combine in order to form a conspiracy. So the verdict of the jury may be guilty as to any two or more or not guilty as to one or more or all, as the jury may find and are satisfied from the evidence beyond a reasonable doubt, the burden being upon the State. The defendant Smith cannot be convicted upon the first count unless one or more of the other defendants are likewise convicted."

On counts two to nineteen in the indictment, both inclusive, the court gave as its charge Smith's prayers for instructions on those counts verbatim with a few slight, immaterial variations—being 9 prayers. On counts two and eleven the court charged as follows: "The jury is instructed that the defendant Smith cannot be convicted on count two in the bill of indictment of offering a bribe of one hundred dollars directly or through his agents to R. L. Paschal unless the defendant R. L. Paschal is convicted on count 11 in the bill of indictment of receiving said bribe." An identical charge was given on counts three and twelve, four and thirteen, five and fourteen, six and fifteen, seven and sixteen, eight and seventeen, nine and eighteen, ten and nineteen, as those counts applied to Paschal, Ferrell, Adams and Money. The court then charged: "All of which is to say, gentlemen of the jury, that these counts are interwoven and that in effect that, before you can find Smith guilty of giving a bribe to Paschal, you've got to find that he did it, and find it beyond a reasonable doubt, and you've likewise got to find that Paschal received and find that beyond a reasonable doubt. You gentlemen will understand that in giving you those last instructions which I have just read to you that they are intended as instructions of the court but are not intended to be full. That is, gentlemen of the jury, when I said that Smith couldn't be convicted on a certain charge unless the officer affected in that particular charge was also convicted of receiving a bribe, I mean by that, gentlemen

of the jury, of receiving a bribe as I have earlier defined that for you, receiving a bribe for the purpose of influencing his official conduct as a member of the city police force, of the City of Greensboro." The court then charged presumption of innocence and added: "The State is required to overcome that presumption and convince you not beyond all or every or any possible doubt but beyond a reasonable doubt that the defendants or some of them are guilty before the defendants or any of them can be convicted." The four police officer defendants say in their brief "this placed the defendant Smith on the coattails of the defendant policemen, and while this may have been a correct statement of law, if his Honor had left it without further elaboration serious prejudicial error against the four defendant policemen occurred when his Honor (1) told the jury that a conviction might follow on the conspiracy count if any two of the defendants should be found guilty, and (2) instructed the jury with reference to all of the charges that the State was required to convince them 'that the defendants or some of them are guilty before the defendants or any of them can be convicted.'" The part above in (1) refers to Count One, and precedes the part of the charge as to Counts Two to Nineteen, both inclusive. The part in (2) follows after the charge on presumption of innocence. Reading the charge as a whole no error appears. If the four police officer defendants were prejudiced by being placed on Smith's coattails, it is not for them to complain, for their connection with Smith in his lottery operations was of their freewill and choice. This assignment of error is not sustained. Certainly Smith cannot complain of the charge on Counts Two to Nineteen, both inclusive. The four policemen defendants further assign as error that "on Counts 12, 16 and 18 the court neglected to mention these counts specifically in the partial recapitulation of the evidence." The court in its charge, while not referring to the numbers of the counts, did recapitulate the evidence on those counts; on count 12, p. 270 of the Record; on count 16, p. 274 of the Record; and on count 18, pp. 279 and 280 of the Record. A careful reading and study of the charge as a whole shows that while it is not as detailed as might be desired, and as we approve, yet it substantially complies with the requirements of G.S. 1-180. It was not prejudicial to the defendants, or any of them. Smith's assignment of error No. 9, and his co-defendants' assignment of error No. 4, are untenable.

The Record consists of 351 pages, the briefs of the State and of the defendants of 128 pages. After a meticulous consideration of all the exceptions brought forward in the appeals of Smith, Paschal, Ferrell, Adams and Money, as well as the entire Record, including the charge of the trial judge, we reach the conclusion that there was no prejudicial error in the trial to justify a new trial for the defendants, or any of them, and that the judgments below must be affirmed.

The evidence in this case of the guilt of all five defendants is overwhelming, and discloses a shocking state of affairs. In one of the most cultured and progressive cities of our State, George Smith operated for ten years or more vast lotteries, taking in for years as banker $4,000.00 a day, five days to the week, after the commissions received by his writers and pick-up men. Paschal, Ferrell, Adams and Money, sworn police officers of the city, conspired with Smith protecting him and annihilating opposition, so as to make Smith the "kingpin," and give him a monopoly. These policemen, derelict in their duty and faithless to their trust, cannot justly complain that they "had two strikes on them" when they were tried with Smith, because when they entered into the unlawful conspiracy with Smith they placed their liberty in his keeping. *S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508.

No error.

LAFAYETTE MILLER v. STATE OF NORTH CAROLINA.

(Filed 30 January, 1953.)

1. Criminal Law § 64½b—

In a proceeding under the Post-Conviction Hearing Act upon proper petition, the court correctly hears evidence, finds the facts, makes his conclusions of law, and enters judgment in accord therewith. G.S. 15-221.

2. Criminal Law §§ 64½d, 81h—

In a proceeding under the Post-Conviction Hearing Act, the findings of fact by the court are binding upon review if they are supported by evidence.

3. Same—

An exception in general terms "to each of the findings of fact . . ." with assignment of error that the court committed prejudicial error in finding the facts as he did, *is held* insufficient to present for review the sufficiency of the evidence to support the findings. However, in this case the findings are reviewed as though appropriate exceptions and assignments of error had been entered, since the life of petitioner is at stake.

4. Constitutional Law § 33: Jury § 1: Grand Jury § 1—

The evidence in this case *held* to support the court's findings that petitioner, acting through his attorneys, waived his right to challenge the competency of the petit jurors by purposely refraining from asserting such right in the original criminal action, and also that no Negroes were intentionally excluded from the grand and petit juries on account of their race or color.

5. Same—

Where there is nothing of record to indicate the race of persons whose names appeared on the jury list, testimony of witnesses identifying a few

of them as Negroes has no probative force as to the number or proportion of Negroes thereon when it appears that the witnesses had no knowledge as to the race of the remainder.

6. Same—

A Negro citizen charged with crime has the constitutional right that members of his race be not intentionally excluded either from the grand or petit juries solely because of their race or color. Fourteenth Amendment to the Federal Constitution; Article I, Section 17, of the State Constitution.

7. Same—

A Negro accused of crime has no right to demand that the grand or petit jury shall be composed in whole or in part of citizens of his own race nor has he the right to proportional representation of his race thereon, but only that Negroes not be intentionally excluded therefrom because of their race or color.

8. Same—

The requirements that persons whose names are placed on the jury list be adult residents of the State, be of good moral character and have sufficient intelligence to serve as members of the grand and petit juries, are relevant qualifications which do not offend either the State or Federal Constitutions, there being no discrimination against any class of citizens solely because of race. G.S. 9-1.

9. Same—

A Negro objecting to a grand or petit jury because of alleged discrimination against Negroes in its selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race or color.

10. Same—

A Negro accused of crime is entitled to a fair opportunity to have the question of whether members of his race have been intentionally excluded from the grand or petit juries because of race determined by adequate and timely procedure.

11. Constitutional Law § 40—

The accused in a criminal action may waive a constitutional right relating to a matter of mere practice or procedure, including the constitutional right of a Negro that members of his race be not intentionally excluded from the grand or petit juries. A waiver of such right by defendant's attorneys is binding on him.

12. Same: Indictment § 12—

A motion to quash the indictment is the proper procedure to raise the contention that members of defendant's race were discriminated against in the selection of the grand jury, and such motion may be made as a matter of right only up to the time of arraignment and plea, with discretionary power of the presiding judge to permit the motion thereafter as a matter of grace until the petit jury is sworn and impaneled, with no authority to hear the motion thereafter, and failure to follow this procedure waives the right to object on such grounds.

13. Constitutional Law § 33: Jury § 4½—

Objection of a Negro defendant that members of his race were intentionally excluded from the petit jury because of their race or color must be raised by challenge to the array or motion to quash the panel or venire before entering upon the trial, and the considered conclusion of his duly appointed attorneys not to raise the question and the entering of a plea of not guilty without following such procedure, *is held* a waiver for all time of defendant's right to raise the objection.

14. Criminal Law § 64½a—

The Post-Conviction Hearing Act is a procedure to grant a defendant appropriate post-trial remedy for substantial deprivations of his constitutional rights in the trial at which he was convicted when there has been no prior adjudication of such constitutional rights by any court of competent jurisdiction because he was prevented from claiming such rights by factors beyond his control, G.S. 15-217, G.S. 15-221, but the Act is not designed to add to the law's delays by giving the accused the right after conviction to raise constitutional questions which he could and should have raised in the original trial by appropriate procedure.

15. Same—

Where defendant's counsel appointed by the court concludes after due consideration that it is to their client's best interest not to raise by appropriate procedure the questions of whether members of defendant's race were excluded from the grand and petit juries, and therefore waive the right to raise the question, *held* such defendant has not been denied his constitutional right to raise the question and he is not entitled to present the question in a proceeding under the Post-Conviction Hearing Act, since a litigant does not suffer a denial of a constitutional right when he intentionally and voluntarily relinquishes it.

PARKER, J., took no part in the consideration or decision of this case.

PROCEEDING under the North Carolina Post-Conviction Hearing Act heard by *Clawson L. Williams, J.,* at the May Term, 1952, of the Superior Court of BEAUFORT County, and reviewed by the North Carolina Supreme Court upon a duly granted writ of *certiorari.*

The North Carolina Post-Conviction Hearing Act originated in Chapter 1083 of the 1951 Session Laws. It has since been codified as Article 22 of Chapter 15 of the General Statutes. See: 1951 Cumulative Supplement.

The petitioner, Lafayette Miller, a Negro, was indicted by a grand jury at the 14 January, 1952, Term of the Superior Court of Beaufort County for the murder of Harvey C. Boyd, a white man. He was tried by a petit jury on this charge at the same term. The petit jury found the petitioner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. In consequence, Judge Williams, who presided at the trial, pronounced judgment of death against the petitioner in conformity with G.S. 14-17.

The appeal of the petitioner was dismissed and the judgment of death imposed on him was affirmed by the North Carolina Supreme Court on 9 April, 1952, upon grounds set out in the opinion reported in *S. v. Miller,* 235 N.C. 394, 70 S.E. 2d 2. As the result of this action, Friday, 25 April, 1952, was automatically fixed by G.S. 15-194 as the time for carrying out the judgment of death.

One day before that date, *i.e.,* on 24 April, 1952, the petitioner, who is imprisoned in the Central Prison, commenced this proceeding against the State of North Carolina under the provisions of the North Carolina Post-Conviction Hearing Act and obtained a judicial order in it staying the execution of the judgment of death until the proceeding could be judicially determined. The petition filed by the petitioner in this proceeding invokes in general terms the provisions of the Post-Conviction Hearing Act embodied in G.S. 15-217, which specify that "any person imprisoned . . . in Central Prison . . . who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this article." The petition asserts that the petitioner's constitutional rights were violated in the original criminal action in these specific respects: "That he was indicted and tried by a grand jury and a petit jury in and for Beaufort County from which juries members of petitioner's race, to wit, Negroes, have been arbitrarily, systematically and discriminatorily excluded over the years, wholly and solely on account of their race and/or color." Within the thirty days specified by G.S. 15-220, *i.e.,* on 2 May, 1952, the State of North Carolina, acting through the solicitor of the judicial district embracing Beaufort County, answered the petition. The answer denies all the crucial averments of the petition; alleges in detail that there was no discrimination against Negroes in the selecting, drawing, and summoning of the grand and petit jurors who indicted and convicted the petitioner; and pleads in detail that the petitioner, acting through competent counsel, waived any right to charge any such discrimination by his conduct at the trial of the original criminal action.

The proceeding was tried at the May Term, 1952, of the Superior Court of Beaufort County by Judge Williams, who heard the evidence offered by the parties and passed upon the issues of fact arising in the proceeding without the aid of a jury in accordance with the provisions of the Post-Conviction Hearing Act codified as G.S. 15-221. The evidence is incorporated in the transcript of the record in this proceeding.

The essential facts are either judicially known or may be gleaned from the record proper in *S. v. Miller, supra;* the application of the petitioner

for the writ of *certiorari* for the review of this proceeding; the answer of the State to that application; and the transcript of the record in this proceeding. These facts and the inferences supported by them are stated in chronological order in the numbered paragraphs which immediately follow.

1. Beaufort County is an agricultural, lumbering, and maritime county, having a landed area of 531,840 acres. The census of 1940 divides its total population of 36,431 into these two racial groups: 22,632 whites, and 13,799 Negroes.

2. Negroes served on occasion upon juries in Beaufort County prior to 1935.

3. Ever since the "Scottsboro Cases" were decided by the United States Supreme Court in 1935, the county attorneys of Beaufort County have been careful to advise the Board of Commissioners of Beaufort County that discrimination in the selection of jurors on the grounds of race or color is forbidden by law; that it is the legal duty of the Board to select for jury service without regard to their race or color persons qualified by the law of North Carolina to act as grand and petit jurors in Beaufort County; and that citizens of North Carolina over the age of twenty-one years residing in Beaufort County are qualified by the law of North Carolina for jury service in Beaufort County if they "are of good moral character and have sufficient intelligence to serve as members of grand and petit juries." (See: G.S. 9-1; *Hinton v. Hinton,* 196 N.C. 341, 145 S.E. 615.)

4. Ever since 1935, the Board of Commissioners of Beaufort County has earnestly endeavored to select for jury service in the county without regard to their race or color persons possessing the qualifications prescribed by the State law for grand and petit jurors. As a consequence, "there have . . . been . . . very few terms of court" in Beaufort County since 1935 "when there have not been colored people on the grand jury, or the petit jury, or both." In 1937, the North Carolina Supreme Court upheld the decision of the Superior Court of Beaufort County in *S. v. Bell,* 212 N.C. 20, 192 S.E. 852, adjudging that "no discrimination was made between persons belonging to the white or negro race" in the selection of the jury panel involved in that case. There has been an "observable increase" in the number of Negroes called for jury service in Beaufort County since *S. v. Bell, supra,* was decided.

5. The jury list and jury box of Beaufort County have been completely revised during each odd numbered year as required by the statute incorporated in G.S. 9-1. The Beaufort County jury panel and the Beaufort County special venire under scrutiny in this proceeding were drawn from the jury box for the biennium beginning in July, 1951.

6. The jury box of Beaufort County for the biennium beginning in July, 1951, was the result of the official acts described in this paragraph. The Clerk of the Board of Commissioners of Beaufort County laid before the Board at its regular meeting on the first Monday in June, 1951, data from the tax returns of Beaufort County for the preceding year, showing the names of the 10,400 white and the 4,536 Negro taxpayers of Beaufort County. In so doing, the Clerk acted in substantial compliance with the mandatory provisions of G.S. 9-1. (See: *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99.) The action of the Clerk was well calculated to place before the Board the names of virtually all persons possessing any qualifications for jury service in Beaufort County because the tax returns were required by law to disclose the names of all male residents over twenty-one and under fifty years of age, the names of all residents owning dogs, the names of all residents owning other tangible personal property having a value exceeding three hundred dollars, and the names of all persons owning real property in the county. The Board of Commissioners of Beaufort County selected from the data laid before it by its Clerk the names of those citizens of the State over twenty-one years of age residing in Beaufort County whom it decided to be of good moral character and sufficient intelligence to serve as members of grand and petit juries, and the Clerk of the Board took the names thus selected by the Board and made out a new jury list for the county consisting of those names only. In so doing, the Board and its Clerk acted in strict accord with the procedure established by G.S. 9-1. Subsequent to these events, to wit, at its regular meeting on the first Monday in July, 1951, the Board of Commissioners of Beaufort County caused the names on the new jury list to be copied on small scrolls of paper of equal size, and put into the division of the county jury box marked No. 1 after such jury box had been emptied of its previous contents. In so doing, the Board acted in complete compliance with G.S. 9-2. Neither the jury list nor the scrolls indicated in any way the race or color of the persons whose names they bore. The county jury box contained two divisions marked No. 1 and No. 2, respectively, and was equipped with two separate locks as required by G.S. 9-2. After the scrolls containing the names of those selected for jury service during the biennium beginning in July, 1951, had been placed in it, the jury box was locked. Subsequent to that event the key to one of the locks was kept by the Sheriff of Beaufort County, the key to the other lock was kept by the Chairman of the Board of Commissioners of Beaufort County, and the jury box was kept in the custody of the Clerk of the Board, all in obedience to G.S. 9-2.

7. The Board of Commissioners of Beaufort County consisted of Carl Alligood, Irvin Hodges, A. D. Swindell, Mark Taylor, and Max F. Thompson at the times specified in the preceding paragraph. Irvin

Hodges was Chairman of the Board. These Commissioners were elected to their offices by popular vote. One of them resided in each of the five geographical subdivisions of the county. Their administration of county government gave them many and varied contacts with substantial portions of both of the racial groups represented in the population of Beaufort County. As a result of these circumstances, the Commissioners possessed in the aggregate a dependable and extensive personal knowledge of the qualifications of both white and Negro residents of Beaufort County for service as members of grand and petit juries. Moreover, they made fair and honest efforts to determine by appropriate inquiries of well informed persons the qualifications for jury service of all resident taxpayers of the county not personally known to them whose names appeared in the data laid before them by their Clerk, irrespective of the race or color of such taxpayers. When it made its selection of persons to perform jury service in the county during the biennium beginning in July, 1951, the Board of Commissioners of Beaufort County selected without any regard whatever for their race or color citizens of the State over twenty-one years of age residing in Beaufort County whom it knew or found by fair inquiry to be possessed of good moral character and sufficient intelligence to serve as members of grand and petit juries. The Board did not intentionally exclude any Negroes from jury service because of their race or color. The attitude of each Commissioner, and the final result of the corporate labors of all of them are accurately epitomized in certain testimony given by Chairman Irvin Hodges, a witness for the petitioner, on the hearing of this proceeding in the Superior Court. When this testimony is rearranged in proper order for the sake of clarity, it comes to this: "I made . . . inquiry regarding those persons . . . I did not know, both white and colored, as to their qualifications. . . . I made no effort to discriminate because of race or color. I made inquiry only on qualifications of jurors. . . . There was no rejection of names, white or colored, for any reason . . . other than. . . . (lack of) qualifications . . . Some whites did not go in the box, and some coloreds did not go in . . . I determined the eligibility of Negroes . . . the same way I did for the whites. . . . I have no idea as to how many Negro names are in the jury box, but I know there are right many . . . If we think that a Negro is just as capable to perform jury service as a white person, his name goes into the box. There are not as many Negroes in the box as white. I think that the number of Negro names to white names in the box is pretty close to a pro rata part. By pro rata part, I mean according to the total number of taxpayers, white and colored." It appeared at the trial that it was impossible to determine by an examination of the court records, the jury list, or the jury box of Beaufort County how many white persons and how many Negroes were selected

for jury service during the biennium beginning in July, 1951, for the very simple reason that the court records, the jury list, and the scrolls in the jury box did not indicate the race or color of those selected.

8. The petitioner, a Negro man aged about twenty years, was arrested on the night of 21 November, 1951. He was forthwith formally charged by warrant with an offense punishable by death, namely, the first degree murder of Harvey C. Boyd, a white man aged twenty-one years. His case was set for trial at the regular term of the Superior Court of Beaufort County scheduled to convene on Monday, 14 January, 1952.

9. Several weeks before that date Judge Chester Morris, the judge then holding the courts of the judicial district embracing Beaufort County, appointed Hallet S. Ward and James B. McMullan, highly reputable members of the Beaufort County bar, to defend the petitioner. Judge Morris took this action under G.S. 15-4.1 because of the petitioner's financial incapacity to retain counsel of his own choosing. Ward and McMullan are competent lawyers. Indeed, Ward is one of the outstanding trial lawyers of North Carolina. He was admitted to the North Carolina Bar in 1893 after graduating in law at the University of North Carolina, and from that time to the present day has actively practiced his profession in the courts of Beaufort and neighboring counties. He has resided and maintained his law office at the county seat of Beaufort County since 1905, and in consequence has had personal knowledge of the constitution of grand and petit juries in Beaufort County during all the times set out above. Notwithstanding his long career at the bar, Hallet Ward's eye is not dim, nor his natural force substantially abated. He is rightly noted for his sound judgment as a counsellor, his ability and zeal as an advocate, and his undiluted intellectual honesty. James B. McMullan is an alert and well trained young lawyer who has practiced at the Beaufort County bar about two and a half years.

10. Ward and McMullan consulted with the petitioner shortly after they were assigned to defend him, and then made the factual and legal investigations necessary to enable them to present at the trial any available matter in defense or mitigation of the charge against their client. In so doing, they ascertained that there were two versions of the homicide under investigation, one based on evidence at the disposal of the State, and the other resting upon the unsupported assertions of the petitioner.

11. The State's version was as follows: Neither Harvey C. Boyd nor his wife, Opal Boyd, had any personal acquaintance with the petitioner. On the night of 21 November, 1951, the petitioner armed himself with a shotgun, and went to the home of Harvey C. Boyd in a rural section of Beaufort County with intent to kill him. The petitioner concealed himself in the darkness outside the home until Harvey C. Boyd and his wife, Opal Boyd, entered their bedroom preparatory to retiring. The peti-

tioner then crept to a window of the bedroom, and shot and killed Harvey C. Boyd, who was ignorant of both the presence and purpose of his assailant. Immediately after the slaying, the petitioner imprisoned the deceased's wife, Opal Boyd, in the back compartment or trunk of the deceased's automobile, and drove such automobile away. As he was driving the deceased's automobile along a public highway at a considerable distance from the place of the homicide, the petitioner was stopped by two State highway patrolmen. The patrolmen heard the screams of a woman emanating from the rear compartment or trunk of the halted automobile. They opened the compartment or trunk, found Opal Boyd confined in it, released her, and arrested the petitioner, who afterwards voluntarily stated that he shot Harvey C. Boyd in order to obtain his automobile.

12. The petitioner's version was that he became personally acquainted with Mrs. Opal Boyd when he was employed to mow grass in the yard at the Boyd home; that Mrs. Boyd told him that she and her husband were "not getting along good," and that she wanted him to kill her husband; that he promised her that he would do so on a specified night; that he armed himself with a shotgun and went to the Boyd home on the appointed night for the purpose of killing Boyd; that on his arrival there, he went to an open window, and observed Boyd and his wife inside the house; that Mrs. Boyd saw him, came into the yard, and told him to shoot Boyd; that he advised Mrs. Boyd that he had never "done nothing like that" and suggested that she "do it"; that Mrs. Boyd replied that she could not "shoot a gun"; that he "fixed the gun," handed it to her, and told her to shoot Boyd; and that Mrs. Boyd took the gun and shot Boyd.

13. Ward and McMullan knew that under G.S. 14-17 "a murder . . . perpetrated by means of . . . lying in wait, . . . or by any other kind of willful, deliberate and premeditated killing, or . . . committed in the perpetration or attempt to perpetrate any . . . robbery" is murder in the first degree. As the result of their investigation, they came to these deliberate and honest conclusions: (1) That under either version of the homicide, the petitioner was guilty of murder in the first degree; (2) that it was virtually certain that the petitioner would be found guilty of murder in the first degree by any petit jury impaneled to pass upon the question of his guilt or innocence; and (3) that the petitioner could not possibly be saved from capital punishment for the homicide unless the trial jurors could be persuaded to exercise the discretionary power vested in them by G.S. 14-17 and recommend that his punishment should be imprisonment for life in the State's prison rather than death. Ward and McMullan based their subsequent defense of the petitioner upon these considered and sincere convictions.

14. Ward and McMullan pondered the question whether they ought to challenge the validity of any indictment returned against the petitioner by a Beaufort County grand jury on the theory that qualified Negroes had been intentionally excluded from the grand jury on account of their race or color. They reached the deliberate and honest determination that they would not be justified in interposing any such challenge for two reasons somewhat alternative in character. Their primary reason was that they firmly believed that qualified Negroes had not in fact been purposely excluded from the jury list and the jury box of Beaufort County on account of their race or color, and that in consequence the racial exclusion theory was devoid of merit. Their secondary reason was based on different considerations. They knew that the grand jury hears no evidence save that submitted to it by the prosecution; that the grand jury does not pass upon the guilt or innocence of the accused, but, on the contrary, merely decides whether or not the evidence of the prosecution, standing alone, reasonably justifies putting him on trial before a petit jury; and that the grand jury decides this question adversely to the accused whenever as many as twelve of its eighteen members so vote. They were satisfied, moreover, that a new grand jury, wholly unexceptionable in character, would be impaneled in Beaufort County at an early date if the court, perchance, should take what they deemed to be an inconceivable course and quash an indictment against the petitioner on the theory that racial exclusion had been purposely practiced in the selection of the grand jurors returning such indictment; that such new grand jury would indict the petitioner anew immediately after hearing the testimony of the prosecution, no matter what its racial composition might be; and that in consequence the quashing of an indictment against the petitioner on the racial exclusion theory would cause a mere temporary delay in his trial without effecting any real benefit to him.

15. At least twenty days before the regular term of the Superior Court of Beaufort County scheduled to begin on Monday, 14 January, 1952, the Board of Commissioners of Beaufort County caused a child not more than ten years of age to draw from the county jury box out of the division marked No. 1 fifty-seven scrolls to the end that a jury panel might be provided for such term in obedience to G.S. 9-3. It appears inferentially that three of the scrolls were destroyed under G.S. 9-7 because the persons whose names were inscribed on them had either died or removed from the county. The fifty-four persons whose names appeared on the remaining scrolls were summoned to appear at the term in question for service as grand and petit jurors.

16. The Superior Court of Beaufort County convened on Monday, 14 January, 1952, with Judge Williams presiding. Under his direction, the names of the fifty-four persons constituting the jury panel for the

term were written on scrolls, which were put into a hat. Eighteen of the scrolls were drawn out of the hat by a child under ten years of age. The eighteen persons whose names were inscribed on the scrolls thus drawn from the hat were sworn and impaneled as grand jurors, and served as such during the term as prescribed by G.S. 9-24. All of the eighteen grand jurors belonged to the white race. The remaining thirty-six persons on the panel had no connection whatever with the trial of the petitioner. The only evidence at the hearing of this proceeding relating to the race of these persons appears in this somewhat conjectural statement of the petitioner's witness Bryan Marslender: "I do not think there were any Negroes on the regular jury panel for that term of court from which the grand jury was drawn. I don't recall seeing any."

17. After hearing the State's evidence, the grand jury returned into open court as a true bill an indictment charging the petitioner with the first degree murder of Harvey C. Boyd. Counsel for the petitioner did not undertake to challenge the validity of the indictment by a motion to quash or otherwise on the theory that Negroes had been intentionally excluded from the grand jury on account of their race or color. Indeed, they deliberately refrained from doing so for the reasons detailed in paragraph 14 of this statement.

18. On his arraignment, the petitioner pleaded "not guilty," and moved the presiding judge that a special venire be summoned from Martin County, another county in the same judicial district, to serve as petit jurors in the criminal action against him. The judge allowed the motion under G.S. 1-86, and directed that the special venire should be drawn from the jury box of Martin County by a child under ten years of age in the presence of the petitioner and his counsel, counsel for the prosecution, and specified officers of Martin County. The special venire was drawn from the jury box of Martin County in strict obedience to the directions of the judge.

19. No qualified Negroes had been excluded from the jury box of Martin County on account of their race or color. Indeed, counsel for the petitioner stated on the hearing of this proceeding that they "do not attack the Martin County jury in this hearing."

20. The special venire from Martin County appeared in the Superior Court of Beaufort County at the appointed time. It consisted of eighty-three white persons and twenty-four Negroes. Counsel for the petitioner did not challenge the array or move to quash the venire from Martin County on the theory that Negroes had been intentionally excluded from the venire on account of their race or color. Indeed, they deliberately refrained from so doing because they firmly believed that no such racial exclusion had occurred and because they were convinced that they could

not reasonably expect to secure a jury panel more favorable to the petitioner than that drawn from the jury box of Martin County.

21. Eleven of the requisite twelve petit jurors were obtained from the special venire summoned from Martin County before it was exhausted. Eight of them were white persons, and three of them were Negroes.

22. The presiding judge ordered that an additional special venire of thirty persons be summoned from Beaufort County, where the trial was being held, to the end that the trial jury might be completed. In pursuing this course, the judge acted "by consent" of counsel for the prosecution and the defense and under G.S. 1-86. Pursuant to this same statute and G.S. 9-30, the presiding judge required the Clerk of the Board of Commissioners of Beaufort County to bring the county jury box into open court, and caused thirty scrolls to be drawn from the jury box out of the division marked No. 1 by a child under ten years of age in the presence of the petitioner and his counsel. The thirty persons drawn from the jury box in this manner were summoned as the additional special venire from Beaufort County. The transcript of the record makes it plain that two of these special veniremen, to wit, the ones selected as the twelfth and the alternative jurors, were white persons and that one of them, namely Estalla Bland, was a Negro. It does not disclose the race of the other twenty-seven unless that disclosure is made by these somewhat uncertain words of the petitioner's witness Bryan Marslender: "In my minutes I have the names of 30 persons drawn in the special venire from Beaufort County. One of the jurors drawn from that panel served on the trial jury which tried the petitioner Lafayette Miller, but I do not remember the names. On the panel of 30 drawn for that special venire was the name of Estalla Bland. I have checked the records and find that Estalla Bland is a colored person, living at Pantego."

23. The attorneys for the petitioner did not challenge the array or move to quash the additional special venire from Beaufort County on the theory that Negroes had been intentionally excluded from such venire on account of their race or color. Indeed, they deliberately refrained from so doing because they firmly believed that no such racial exclusion had occurred.

24. The twelfth petit juror and an alternate juror were obtained from the additional special venire from Beaufort County. Both of them were members of the white race. Since the alternate juror did not participate in the decision of the case, the petit jurors who actually tried the original criminal action consisted of nine white persons and three Negroes.

25. When the original criminal action was tried on its merits at the January Term, 1952, of the Superior Court of Beaufort County, the State offered testimony sufficient to show that the petitioner killed Harvey

C. Boyd under the circumstances delineated in paragraph 11 of this statement. The petitioner, who insisted on taking the witness stand despite the advice of his attorneys to the contrary, gave the version of the slaying depicted in paragraph 12 of this statement.

26. The petit jury found the petitioner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. Judge Williams pronounced judgment of death against him. The petitioner's attorneys excepted to the judgment, and gave notice of appeal from it to the North Carolina Supreme Court. They did not perfect the appeal by serving a statement of case on appeal upon the solicitor for reasons stated in the next paragraph.

27. The attorneys for the petitioner were convinced that the trial which resulted in the conviction and sentence of their client was wholly free of legal error, and that in consequence it would be utterly useless to perfect the appeal to the North Carolina Supreme Court. This consideration induced them to seek executive clemency. Hallet S. Ward made this illuminating statement on the hearing of the proceeding: "I don't know whether I did the right thing or not, but I did an honest thing. I had no exception on that record that I was willing to stand in the Supreme Court, and insist upon, and I have got enough self-respect . . . to want to be able to give a sensible and respectful reason for any position that I take before any court, and I determined, and Mr. McMullan agreed with me, for we conferred upon it several times, that our service to this prisoner consisted of appeal to the Governor to commute the sentence."

28. For the reasons stated above, Ward and McMullan made application to the Governor of North Carolina for commutation of the petitioner's sentence to life imprisonment, and were informed by the Governor that the executive department would not consider the application while an appeal by the petitioner was still pending in the courts. In order to remove this bar to the consideration of the application for executive clemency, Ward and McMullan filed a motion dated 29 February, 1952, in the North Carolina Supreme Court, asserting that they were "unable to assign error to any part of the record or evidence in the cause," and praying for permission "to withdraw the appeal in the cause" on that ground.

29. While this motion was awaiting a hearing, the Attorney-General of North Carolina moved to docket and dismiss the appeal under Rule 17 of the Rules of Practice of the North Carolina Supreme Court, and for an affirmance of the judgment of death. On 9 April, 1952, the North Carolina Supreme Court allowed the motion of the Attorney-General after its own examination of the record proper in the original criminal action revealed that no error appeared on the face of the record. See: *S. v. Miller, supra.*

30. Subsequent to that event, the Governor of North Carolina informed Ward and McMullan that he had investigated the case; that he had had the petitioner examined by a psychiatrist; and that he had found nothing that would justify him in extending executive clemency to the petitioner.

31. After the application for executive clemency had been denied by the Governor, to wit, on 24 April, 1952, Herman L. Taylor, a member of the Wake County bar, and W. Frank Brower, a member of the Durham County bar, brought this proceeding in behalf of the petitioner against the State of North Carolina, and in that way made their initial appearances in the courts as counsel for the petitioner. In instituting and prosecuting this proceeding, Taylor and Brower act without the concurrence of the petitioner's original attorneys, Ward and McMullan.

32. When this proceeding was heard by Judge Williams at the May Term, 1952, the petitioner called these persons to the witness stand: Bryan Marslender, Clerk of the Superior Court of Beaufort County; W. B. Carter, Chairman of the Board of Elections of Beaufort County; D. E. Redditt, the Tax Collector of Beaufort County; William Rumley, the Sheriff of Beaufort County; Jack Harris, a Deputy Sheriff of Beaufort County; C. C. Duke, the Clerk of the Board of Commissioners of Beaufort County; Irvin Hodges, Carl Alligood, A. D. Swindell, and Mark Taylor, the four surviving members of the Board of Commissioners of Beaufort County; and John I. Morgan, a white citizen of Beaufort County. The State's witnesses at such hearing were Lonnie Dennis, a Negro citizen of Beaufort County; Hallet S. Ward, James B. McMullan, J. D. Grimes, and M. C. Paul, members of the Beaufort County bar; Elbert Peel, the County Attorney of Martin County; L. B. Wynn, the Clerk of the Superior Court of Martin County; and J. S. Getsinger, the Clerk of the Board of Commissioners of Martin County. The petitioner noted four exceptions to the admission of testimony given by Hallet S. Ward. These exceptions have since been abandoned by the petitioner under the Rules of Practice of the North Carolina Supreme Court.

33. There was no discordancy whatever between the testimony of the petitioner's witnesses and that of the State's witnesses at the hearing in this proceeding. The harmonious evidence of the witnesses in this proceeding, the record proper in *S. v. Miller, supra,* the application of the petitioner for the writ of *certiorari* for the review of this proceeding, and the answer of the State to that application reveal the truth of all the matters and things set out in paragraphs 2 to 28, both inclusive, of this statement.

After hearing the evidence in this proceeding, Judge Williams made voluminous findings of fact, conforming, in essential respects, to the matters stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, and 31. He made these conclusions of

law in considerable detail thereon: (1) That the petitioner, acting through his original attorneys, waived his alleged constitutional right to challenge the competency of the grand jurors who indicted him by purposely refraining from asserting it in the original criminal action; (2) that the petitioner, acting through his original attorneys, waived his alleged constitutional right to challenge the competency of the petit jurors who convicted him by purposely refraining from asserting it in the original criminal action; and (3) that no Negroes were intentionally excluded from the grand and petit juries which indicted and convicted the petitioner on account of their race or color. Judge Williams entered judgment declaring that the petitioner is not entitled to any relief in this proceeding, and vacating the judicial order staying the execution of the judgment of death. He stipulated, however, that the vacation of the judicial order staying the execution of the judgment of death should not take effect until the North Carolina Supreme Court had been afforded an opportunity to review his judgment upon *certiorari* under G.S. 15-222.

The petitioner applied to us for a writ of *certiorari* to review the judgment in the proceeding within 60 days from its entry, and we granted his application. He asserts, in substance, that Judge Williams erred "in finding the facts as he did"; in making his conclusions of law thereon; and in entering his judgment.

Taylor & Mitchell and W. Frank Brower for the petitioner.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

ERVIN, J. This is the first proceeding under the North Carolina Post-Conviction Hearing Act to come before the North Carolina Supreme Court.

The trial of the proceeding in the Superior Court was accordant with the procedure established by the act. G.S. 15-221. After hearing the testimony, the presiding judge made findings of fact in commendable detail, declared his conclusions of law upon them, and entered final judgment adverse to the petitioner.

The findings of fact of the judge are binding upon the petitioner on this review if they are supported by evidence. *S. v. Brown, supra; S. v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613; *S. v. Henderson,* 216 N.C. 99, 3 S.E. 2d 357; *S. v. Bell, supra; S. v. Walls,* 211 N.C. 487, 191 S.E. 232; *S. v. Cooper,* 205 N.C. 657, 172 S.E. 199; *S. v. Daniels,* 134 N.C. 641, 46 S.E. 743.

The petitioner undertakes to challenge the sufficiency of the evidence to support the findings of fact of the judge by excepting in general terms "to each of the findings of fact . . . set out by the court," and by assert-

ing without specification in his first assignment of error that "the court committed prejudicial error in finding the facts as he did." This exception and this assignment of error fall short of the requirement that "when it is claimed that the findings of fact made by the trial judge are not supported by the evidence, the exceptions and the assignments of error in relation thereto must specifically and distinctly point out the alleged errors." *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351. Since the petitioner's life hangs in the balance, we have nevertheless examined and weighed the evidence in this proceeding with the same meticulous and painstaking care we would have employed had he noted appropriate exceptions and assignments of error to all of the findings of fact adverse to him.

The evidence supports the findings of fact. Yea, it necessitates them. It appears, in substance, in paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 30, and 31 of the statement of facts, which contains a complete history of the original criminal action resulting in the petitioner's conviction and this proceeding as such history is revealed by the record proper in *S. v. Miller, supra,* the application of the petitioner for the writ of *certiorari* for the review of this proceeding, the answer of the State to that application, and the transcript of the record in this proceeding.

We digress at this point to make some incidental observations. In reaching the conclusion that the evidence compels the findings of fact made by the presiding judge, we have not disregarded the arithmetical arguments advanced by the petitioner on the basis of the testimony of his witnesses D. E. Redditt, the Tax Collector of Beaufort County, and Bryan Marslender, the Clerk of the Superior Court of Beaufort County. The petitioner's assertion that "only 15 Negroes . . . sat as grand jurors" in Beaufort County during the five years next preceding the trial of this proceeding rests solely upon a bit of evidence given by Redditt on his third and final appearance on the witness stand. On a proper analysis this testimony is destitute of probative value. Redditt had nothing to do with the selecting, drawing, or summoning of persons for jury service in Beaufort County. He had, moreover, no connection with the administration of justice in Beaufort County, or with the keeping of any records relating to that endeavor. He did not, in fact, possess any knowledge whatever of the racial composition of Beaufort County grand juries, and his own evidence on his prior appearances on the witness stand positively negatives any implication that he did. Redditt merely testified on his last visit to the stand that he had made an examination in some unexplained way of 23 unauthenticated writings purporting to be grand jury lists of Beaufort County covering in part the five years next preceding the trial of this proceeding, and that he had "identified 15" of the 414

persons whose names appeared in such writings "to be Negroes." Manifestly this testimony leaves to speculation the racial identities of the other 399 persons listed.

The transcript of the record reveals that 64 weeks of court were held in Beaufort County in the five years preceding the hearing in this proceeding, and that 2,211 persons were drawn for jury service during 43 of these weeks. It does not expressly appear how many persons were drawn for such service during the other 21 weeks because the number drawn for the first week of the May Term, 1949, was not proved at the trial, and the exhibit showing the numbers drawn for the remaining 20 weeks was omitted from the transcript of the record when its evidential contents were settled by stipulation between counsel for the petitioner and the solicitor of the judicial district embracing Beaufort County. Since it was customary to draw no fewer than 36 persons for service as petit jurors during each week of civil court and no fewer than 54 persons for service as grand and petit jurors during each week of criminal court as authorized by G.S. 9-3, it can be inferred with complete assurance that at least 900 persons were drawn for jury service in Beaufort County during the 13 weeks of civil court and the 8 weeks of criminal court included in the 21 weeks set forth above. This being true, at least 3,111 persons were drawn for service as grand and petit jurors in Beaufort County during the 64 weeks of court held in the five years next preceding the trial of this proceeding.

The petitioner undertook to have Marslender classify the 3,111 persons as to race by merely inspecting their bare names as they were recorded on minute dockets, which contained no indication of the race of any of them. Marslender stated that he did "not know too many colored people in Beaufort County personally," and that his mere perusal of the bare names on the minute dockets enabled him to identify only 28 of the 3,111 persons in question as Negroes. He testified further, however, that he did "not mean to testify" these 28 persons comprised "all the Negroes on these panels"; that he was able to classify only 815 of the 3,111 persons in question as members of the white race; and that he was totally unable to testify as to the racial identities of the remaining 2,268 persons whose names appeared on the minute dockets. These things being true, the intimation that only 28 Negroes were called for jury service in Beaufort County during the five years prior to the hearing in this proceeding finds no support in Marslender's evidence. Indeed, such intimation flies in the face of Marslender's positive statement: "I know there have been but a very few terms of court when there haven't been colored people on the grand jury, or the petit jury, or both." The 36 members of the regular panel and the 27 special veniremen mentioned in paragraphs 16 and 22 of the statement of facts are included in the 815 persons classified by

Marslender as members of the white race. We close these incidental observations by noting that Lonnie Dennis, the only Negro witness, testified he did not know any Negroes qualified to serve on a jury who had been excluded from so doing by officials of Beaufort County.

Apart from the North Carolina Post-Conviction Hearing Act, the law bearing on the questions arising on this review is well settled. It is set forth in the numbered paragraphs which follow:

1. A state denies to a Negro citizen charged with crime the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution whenever its legislators, or its courts, or its administrative officers intentionally exclude Negro citizens from service upon the grand jury that indicts him or the petit jury which tries him solely because of their race or color. *Shepherd v. Florida,* 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740; *Moore v. New York,* 333 U.S. 565, 68 S. Ct. 705, 92 L. Ed. 881; *Brunson v. North Carolina,* 332 U.S. 851, 68 S. Ct. 634, 92 L. Ed. 1132; *Patton v. Mississippi,* 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76, 1 A.L.R. 2d 1286; *Hill v. Texas,* 316 U.S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; *Smith v. Texas,* 311 U.S. 128, 61 S. Ct., 164, 85 L. Ed. 84; *Pierre v. Louisiana,* 306 U.S. 354, 59 S. Ct. 536, 83 L. Ed. 757; *Hale v. Kentucky,* 303 U.S. 613, 58 S. Ct. 753, 82 L. Ed. 1050; *Hollins v. Oklahoma,* 295 U.S. 394, 55 S. Ct. 784, 79 L. Ed. 1500; *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; *Rogers v. Alabama,* 192 U.S. 226, 24 S. Ct. 257, 48 L. Ed. 417; *Neal v. Delaware,* 103 U.S. 370, 26 L. Ed. 567; *Ex Parte Virginia,* 100 U.S. 339, 25 L. Ed. 676; *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664; *S. v. Peoples,* 131 N.C. 784, 42 S.E. 814. A similar conclusion is reached in North Carolina under the law of the land clause embodied in Article I, Section 17, of the State Constitution. *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537.

2. The Fourteenth Amendment to the Constitution of the United States does not confer upon a Negro citizen charged with crime in a state court the right to demand that the grand or petit jury, which considers his case, shall be composed, either in whole or in part, of citizens of his own race. All he can demand is that he be indicted or tried by a jury from which Negroes have not been intentionally excluded because of their race or color. In consequence, there is no constitutional warrant for the proposition that a jury which indicts or tries a Negro must be composed of persons of each race in proportion to their respective numbers as citizens of the political unit from which the jury is summoned. *Cassell v. Texas,* 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839; *Martin v. Texas,* 200 U.S. 316, 26 S. Ct. 338, 50 L. Ed. 497; *Carter v. Texas,* 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Gibson v. Mississippi,* 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; *Shibuya Jugiro v. Brush,* 140 U.S. 291, 11 S. Ct. 770,

35 L. Ed. 510; *Bush v. Kentucky,* 107 U.S. 110, 1 S. Ct. 625, 27 L. Ed. 354; *Virginia v. Rives,* 100 U.S. 313, 25 L. Ed. 667; *S. v. Brown, supra; S. v. Speller,* 231 N.C. 549, 57 S.E. 2d 759, and 230 N.C. 345, 53 S.E. 2d 294; *S. v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77; *S. v. Sloan,* 97 N.C. 499, 2 S.E. 666.

3. A state may prescribe such relevant qualifications as it deems proper for jurors without offending the Fourteenth Amendment to the United States Constitution as long as it takes care that no discrimination in respect to jury service is made against any class of citizens solely because of their race. Hence, a state statute may restrict eligibility for jury service in a county to adult citizens and residents who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries, and confer upon county commissioners the discretionary power to select for jury service in the county without regard to their race or color those adult citizens and residents who in their judgment possess these qualifications. *Fay v. New York,* 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043; *Franklin v. South Carolina,* 218 U.S. 161, 30 S. Ct. 640, 54 L. Ed. 980; *Williams v. Mississippi,* 170 U.S. 213, 18 S. Ct. 583, 42 L. Ed. 1012; *Murray v. Louisiana,* 163 U.S. 101, 16 S. Ct. 990, 41 L. Ed. 87; *Gibson v. Mississippi, supra; Shibuya Jugiro v. Brush, supra; Wood v. Brush,* 140 U.S. 278, 11 S. Ct. 738, 35 L. Ed. 505. The North Carolina statute does not contravene the Fourteenth Amendment. It prescribes relevant qualifications for jurymen, and does not discriminate against any persons because of race or color. G.S. 9-1.

4. A Negro objecting to a grand or petit jury because of alleged discrimination against Negroes in its selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race or color. *Fay v. New York, supra; Akins v. Texas,* 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692; *Martin v. Texas, supra; Brownfield v. South Carolina,* 189 U.S. 426, 23 S. Ct. 513, 47 L. Ed. 882; *Tarrance v. Florida,* 188 U.S. 519, 23 S. Ct. 402, 47 L. Ed. 572; *Williams v. Mississippi, supra; Smith v. Mississippi,* 162 U.S. 597, 16 S. Ct. 900, 40 L. Ed. 1082.

5. The Fourteenth Amendment to the United States Constitution requires a state to extend to a Negro charged with crime in its court a fair opportunity to have it determined by adequate and timely procedure whether Negroes legally qualified to serve as jurors have been intentionally excluded on account of their race or color from the grand jury returning an indictment against him or from the lists of those drawn or summoned to serve as petit jurors on his trial. *Rogers v. Alabama, supra; Carter v. Texas, supra.* North Carolina criminal procedure, which is set forth below in numbered paragraphs 7 and 8, grants to a Negro defendant a fair and full opportunity to assert and establish an objection of this

nature at the trial of the original criminal action against him, and thus satisfies this requirement of the Fourteenth Amendment. *Carter v. Texas, supra.*

6. The accused in a criminal action may waive a constitutional right relating to a mere matter of practice or procedure. *S. v. Hartsfield,* 188 N.C. 357, 124 S.E. 629; *Jennings v. Illinois,* 342 U.S. 104, 72 S. Ct. 123, 96 L. Ed. 119; *Yakus v. United States,* 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834; *Parker v. United States,* 184 F. 2d 488; *People v. Harris,* 302 Ill. 590, 135 N.E. 75; 16 C.J.S., Constitutional Law, section 91; 22 C.J.S., Criminal Law, section 91. Hence, the constitutional right of a Negro defendant to be indicted or tried by a jury from which members of his race have not been intentionally excluded may be waived by him. *S. v. Kirksey, supra; Washington v. State,* 95 Fla. 289, 116 So. 470; *Merriweather v. Commonwealth,* 118 Ky. 870, 82 S.W. 592, 4 Ann. Cas. 1039; *Haggard v. Commonwealth,* 79 Ky. 366; *Keith v. State,* 53 Ohio App. 58, 4 N.E. 2d 220; *Watts v. State,* 75 Tex. Crim. Rep. 330, 171 S.W. 202. It is inherent in the judicial process that courts must deal with litigants as though they were acting in the persons of their attorneys. For this reason, the law confers upon the attorney for the defense in a criminal case the power to take such steps in matters of practice and procedure as he deems appropriate to protect the interests of the accused, and decrees that the accused is bound by his action as to those matters. *Abney v. State,* 47 Ga. App. 40, 169 S.E. 539; *State v. Froah,* 220 Iowa 840, 263 N.W. 525; *State v. Dangelo,* 182 Iowa 1253, 166 N.W. 587; *Dewberry v. Commonwealth,* 241 Ky. 726, 44 S.W. 2d 1076; *Sayre v. Commonwealth,* 194 Ky. 338, 238 S.W. 737, 24 A.L.R. 1017; *Bonar v. Commonwealth,* 180 Ky. 338, 202 S.W. 676; *State v. Turlok,* 76 Mont. 549, 248 P. 169; *State v. Keller,* 57 N.D. 645, 223 N.W. 698, 64 A.L.R. 434; *Jacobs v. State,* 85 Tex. Crim. Rep. 505, 213 S.W. 628. It necessarily follows that the attorney for the defense in a criminal action may waive a constitutional right of his client relating to a matter of practice or procedure. *S. v. Hartsfield, supra; James v. Commonwealth,* 197 Ky. 338, 247 S.W. 945. The right of a Negro defendant to object to a grand or petit jury upon the ground of discrimination against members of his race in the selection of such jury is waived by failing to pursue the proper remedy. *S. v. Kirksey, supra.* See, also, in this connection the cases collected in the annotation in 52 A.L.R. 919. This statement of the Circuit Court of Appeals for the Eighth Circuit is pertinent: "Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has been rendered adverse to them, to obtain a retrial according to procedure which they have voluntarily discarded and waived. *Johnson v. Zerbst,* (304 U.S.

458), Syl. 2, page 458, 58 S. Ct. page 1019. Full opportunity having been afforded the appellants to apply to have the jury panel quashed and to have Negroes summoned on a new jury panel, they could not deliberately withhold their application for such procedure and then be heard after conviction to assert on *habeas corpus* that their conviction was void. Such is not the function of the writ of *habeas corpus.* In the situation presented there was no denial of judicial remedy; therefore there was no denial of equal protection nor of due process of law. The decision of their counsel learned in the law, an attorney of judgment, experience and discretion, that their interests would not be furthered by filing the application, was binding upon the appellants and no inference can be drawn in view of the testimony on the trial that there was even a mistake of judgment chargeable to the attorney." *Carruthers v. Reed,* 102 F. 2d 933, *certiorari* denied in 307 U.S. 643, 59 S. Ct. 1047, 83 L. Ed. 1523.

7. The North Carolina statute codified as G.S. 9-26 provides that "all exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by a motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." Under the statute, a motion to quash an indictment against a Negro is the proper remedy in a criminal case where Negroes were intentionally excluded from the grand jury returning the indictment solely on the ground of race or color. *S. v. Peoples, supra; S. v. Haywood,* 94 N.C. 847. The statute and related common law practice unite to create these three rules: (1) An accused may make the motion to quash the indictment as a matter of right up to the time when he is arraigned and enters his plea; (2) the presiding judge has the discretionary power to permit the accused to make the motion to quash the indictment as a matter of grace after his plea is entered and until the petit jury is sworn and impaneled to try the case on its merits; and (3) the presiding judge has no power to entertain a motion to quash the indictment at all after the petit jury is sworn and impaneled to try the case on its merits. *S. v. Banner,* 149 N.C. 519, 63 S.E. 84; *S. v. Gardner,* 104 N.C. 739, 10 S.E. 146. A Negro defendant waives any objection to the grand jury which indicts him on the ground that Negroes were intentionally excluded from such grand jury because of their race or color unless he takes the objection by a motion to quash the indictment before entering a plea to the merits. *S. v. Banner, supra.* When a Negro defendant moves to quash an indictment on the racial exclusion theory either as a matter of right or as a matter of grace, he may offer evidence to sustain his motion.

8. The objection of a Negro charged with crime that qualified Negroes were excluded solely because of their race or color from the list of persons drawn or summoned to serve as petit jurors at his trial must be taken by

a challenge to the array or a motion to quash the panel or venire before entering upon the trial. *S. v. Parker,* 132 N.C. 1014, 43 S.E. 830. If not so taken, the objection is waived. *S. v. Kirksey, supra.*

The evidence showed, and the presiding judge found, in essence, that Hallet S. Ward and James B. McMullan, the petitioner's court appointed attorneys in the original criminal action, were competent lawyers; that they determined after deliberate consideration not to challenge the grand jury that indicted the petitioner or the petit jury that tried him on the theory that members of his race, to wit, Negroes, were intentionally excluded from the jury on account of their race or color; that they knowingly and deliberately adopted this course of procedure because they deemed the racial exclusion theory to be without merit in fact, and because this course appeared to them at the time to be to the best interest of the petitioner; and that in consequence of these things the petitioner pleaded not guilty to the indictment against him and went to trial on the merits in the original criminal action without making any objection to either the grand or the petit jury.

The presiding judge concluded as a matter of law on the basis of this evidence and these findings of fact that the petitioner, acting through his attorneys in the original criminal action, effectually waived for all time his constitutional right to object to the grand and petit juries which indicted and convicted him upon the ground that qualified Negroes were intentionally excluded from such juries solely because of their race or color by pleading not guilty and going to trial on the merits without making any objections to such juries. This legal conclusion, standing alone, is sufficient to sustain the judgment in this proceeding, if it be valid. It is too evident to admit of dispute that this legal conclusion finds full support in the principles of law enunciated in numbered paragraphs 6, 7, and 8 set forth above, and is sound unless those principles of law have been abrogated as to the petitioner by the North Carolina Post-Conviction Hearing Act. The petitioner insists that those legal principles are made inapplicable to him by this statute because "there has been no prior adjudication" as to the constitutional rights he claims in this proceeding "by any court of competent jurisdiction."

The answer to the problem posed by this contention necessarily lies in the provisions of the Post-Conviction Hearing Act. In construing this somewhat novel statute, we observe a strict judicial decorum and refrain from expressing an opinion upon any matters beyond those necessary to a determination of the proceeding now before us.

The Post-Conviction Hearing Act provides in express terms that "any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work on the roads and highways of the State under the supervision of

the State Highway and Public Works Commission, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction," may apply by petition to the Superior Court for "an appropriate order with respect to the judgment or sentence in the former proceedings under which the petitioner was convicted." G.S. 15-217, 15-221.

The North Carolina Post-Conviction Hearing Act is modeled on the Illinois Post-Conviction Hearing Act, which is set forth in full in *People v. Dale,* 406 Ill. 238, 92 N.E. 2d 761. It is not designed to add to the law's delays by giving an accused two days in court where one is sufficient for the doing of substantial justice under fundamental law. It is not devised to confer upon an accused, who is defended by counsel of his own selection or competent counsel appointed by the court, a legal privilege, at his own election, to have his rights arising under the common law and the statutes adjudicated at a time of the State's choosing in the original criminal action, and his rights arising under the constitutions of his State and Nation adjudicated at a subsequent time of his own choosing in another proceeding. It is enacted to provide an adequate and available post-trial remedy for persons imprisoned under judicial decrees who suffered substantial and unadjudicated deprivations of their constitutional rights in the original criminal actions resulting in their convictions because they were prevented from claiming such constitutional rights in the original criminal actions by factors beyond their control.

To this end, the North Carolina Post-Conviction Hearing Act establishes a new judicial proceeding by which the Superior Court may probe beneath the adjudication in the original criminal action in which an imprisoned petitioner was convicted and sentenced, and grant him appropriate relief in respect to his conviction and sentence in case it determines that two specified conditions concur. These conditions are as follows: (1) That there was a substantial denial of the constitutional rights of the petitioner in the original criminal action in which he was convicted and (2) that there has been no prior adjudication as to such constitutional rights by any court of competent jurisdiction.

When the instant proceeding is laid alongside the Post-Conviction Hearing Act as thus interpreted, it becomes plain that there was no *substantial denial* of the constitutional rights now claimed by the petitioner in the original criminal action which resulted in his conviction.

The petitioner was defended by competent counsel in the original criminal action. He was not prevented from laying claim to his alleged constitutional rights in that action by any factors beyond his control. On the contrary, he had a fair and full opportunity to assert his present

claims in the original proceeding before a court, which was empowered by law to consider them and determine their validity. Acting through his counsel, he deliberately and knowingly refrained from presenting his present claims to the court for adjudication in that proceeding because he deemed them to be without merit in fact and believed their non-assertion to be to his best interest. A litigant does not suffer a *denial* of a supposed right when he intentionally and voluntarily relinquishes it.

It follows that the presiding judge rightly ruled that the petitioner waived the claims which he now undertakes to assert. This conclusion is in accord with decisions of the United States Supreme Court and the Supreme Court of Illinois in a proceeding under the Illinois Post-Conviction Hearing Act. *Jennings v. Illinois, supra; People v. Jennings,* 411 Ill. 21, 102 N.E. 2d 824.

The petitioner's plight would be the same even if he had not waived his claims. The evidence and the findings show that his constitutional rights were not violated in the proceeding culminating in his conviction.

The judicial order staying the execution of the judgment of death automatically expires on the day of the filing of this opinion. See: G.S. 15-194.

A criminal prosecution is likely to have a tragic ending for the accused if defense attorneys are compelled to make legal bricks without factual straw.

The judgment is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

THE CAROLINA-VIRGINIA COASTAL HIGHWAY, PLAINTIFF, v. COASTAL TURNPIKE AUTHORITY; WM. F. FREEMAN ENGINEERS, INC.; DELEUW, CATHER & COMPANY; AND HARRY McMULLAN, AS ATTORNEY-GENERAL OF NORTH CAROLINA, DEFENDANTS.

(Filed 30 January, 1953.)

1. Constitutional Law § 8c—

The lawmaking power is the exclusive function of the legislative department, and the General Assembly may not delegate such power to any other department or body except municipal corporations. Constitution of North Carolina, Articles VII, VIII, IX.

2. Same—

While the General Assembly may delegate to administrative boards or governmental agencies the authority to find facts determinative of whether

or not a law should apply or another agency of government should come into existence, provided the Legislature prescribes adequate standards to guide the administrative board or governmental agency, the General Assembly may not delegate the power to apply or withhold the application of a law in the absolute and unguided discretion of an administrative board or governmental agency or confer upon it the power to make law or determine questions of public policy.

3. Municipal Corporations § 1—

While a municipal corporation is ordinarily an agency of the State for self-government of a particular territory, in its broader sense it includes any corporation formed for purely governmental purposes which is an agency of the State.

4. Same: Constitutional Law § 8b—

The creation of a municipal corporation or the enlargement or diminution of its powers, or its dissolution, is a political function which rests solely in the Legislature, and while the General Assembly may delegate by general law the power to a court or other agency to ascertain the existence of facts upon which such questions are to be determined in accordance with standards set up in the act, it may not delegate the authority to determine questions of public policy or the exercise of any unguided discretion in regard thereto.

5. Same—

The provisions of G.S. 136-89.1 *et seq.*, delegating to the Municipal Board of Control the power to determine not only whether the requirements of the act for the creation of a municipal corporation for the purpose of constructing and operating toll roads had been complied with, but also the power to determine whether the proposed toll road is in the public interest and therefore whether or not the corporation should be created, *is held* unconstitutional as an attempted delegation of the naked and arbitrary power to determine a question of public policy without standards of legislative guidance of any kind. Constitution of North Carolina, Article II, section 1.

6. Statutes § 2—

Chap. 993, Session Laws of 1951, amending the provisions of Chap. 1024, Session Laws of 1949, by limiting the territory for the creation of a corporation for the construction and operation of toll bridges to five counties of the State transforms the statute into a "local act" relating to ferries or bridges within the meaning of Article II, section 29, of the State Constitution, and is void.

7. Taxation § 19½—

A corporation created under the provisions of G.S. 136-89.1 *et seq.* for the purpose of constructing and operating toll roads and bridges is not a municipal corporation within the meaning of Article V, section 5, of the Constitution of North Carolina, and its property may not be exempt from taxation, since the exclusive direction and control of such corporation and its power to fix charges and collect toll fees is vested in a self-perpetuating body created at its inception without governmental control of any kind, and therefore it is not a governmental agency but a private corporation.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Hatch, Special Judge,* at Chambers in Raleigh, 17 October, 1952. From WAKE.

Civil action under the Declaratory Judgment Act (G.S. 1-253 *et seq.*), to determine whether the plaintiff is a municipal corporation with power to issue tax-exempt bonds and construct and operate as a tax-exempt project the toll road and toll bridge referred to in the complaint, involving questions respecting the constitutional validity of Chapter 1024, Session Laws of 1949, as amended by Chapter 993, Session Laws of 1951, now codified as G.S. 136-89.1 to 136-89.11.

These in substance are the pertinent allegations of the complaint:

1. That the plaintiff is a municipal corporation organized under Chapter 1024, Session Laws of 1949, entitled "An act to authorize the organization of municipal corporations for the purpose of constructing and operating toll roads."

2. That by virtue of an order of the Municipal Board of Control (a three-member administrative agency of the State, G.S. 160-195 *et seq.*) dated 3 June, 1949, the plaintiff municipal corporation was organized for the purpose of constructing and operating a toll road in the counties of Dare and Currituck, running from a point north of Nags Head where State Highway No. 158 intersects the road leading to Duck, and following the Duck road about three miles, thence curving toward the Atlantic Ocean and following the coast line, maintaining a distance of from 300 to 600 feet west of the high water mark of the Atlantic Ocean, to the North Carolina-Virginia State boundary line.

3. After the plaintiff was organized as a municipal corporation, Chapter 1024, Session Laws of 1949 was amended by Chapter 993, Session Laws of 1951 (G.S. 136-89.1 to 136-89.11); that pursuant to the amendatory act, the Municipal Board of Control, on petition of the plaintiff, entered an order 5 August, 1952, amending the original charter of the plaintiff by conferring on it power and authority to build and operate a toll bridge in Dare County to span Croatan Sound, so as to connect Roanoke Island with Manns Harbor.

(Copies of all petitions, notices, orders, and other papers in connection with the purported organization of the plaintiff as a municipal corporation and the amendment of its charter are attached to the complaint as exhibits. These documents appear to be adequate in form to meet the procedural requirements of the statute. This being so, they are omitted herefrom as not being pertinent to decision.)

4. That in furtherance of its plan to construct the proposed toll road and toll bridge, the plaintiff has entered into contracts with the defendants Wm. F. Freeman Engineers, Inc., and DeLeuw, Cather & Company

for the performance of engineering services in connection with the planning, design, and supervision of the construction of the proposed road and bridge. The plaintiff also has entered into a contract with the defendant Coastal Turnpike Authority whereby the plaintiff has agreed to construct the proposed road to the Virginia State line, and Coastal Turnpike Authority has agreed to construct an extension of the road north of and beyond the Virginia State line to a point at or near Virginia Beach. And plaintiff is about to finance the costs of its road and bridge projects by the issuance of tax-exempt revenue bonds.

5. That a controversy has arisen between the plaintiff and the defendants as to the right of the plaintiff to enter into these contracts, based upon questions respecting (1) the constitutional validity of the statutes under which the plaintiff was organized, and (2) the regularity of the procedure followed in organizing the plaintiff municipal corporation. The defendants have refused to perform their contracts until these controversial questions are resolved.

The defendants by answers admit all factual allegations set out in the complaint, but challenge the constitutional validity of the acts under which the plaintiff is organized, and also deny that the plaintiff has complied with the statutory procedure prescribed for the creation of such corporation. This brings into focus the controlling provisions of the Acts.

Chapter 1024, Session Laws of 1949, under which the plaintiff was originally organized, provides in part:

"Section 1. Any number of persons not less than ten (10) are hereby authorized and empowered to file a petition with the Municipal Board of Control created by G.S. 160-195, for the organization and creation of a Municipal Corporation for the purpose of acquiring rights of way, owning and operating a toll road or highway in the State.

"Sec. 2. The petition shall be presented to the secretary of the Municipal Board of Control and shall set forth the name by which the municipal corporation is to be known and shall describe in a general way the location of the proposed highway or toll road which is to be constructed or acquired, and by giving the names of the owners of the lands over which the said toll road or highway is to be constructed. The said petition shall describe in general terms the nature of the highway to be constructed and the width of the right of way which is desired to be acquired, which shall not exceed a width of one hundred (100) feet.

"The secretary of said board shall thereupon make an order prescribing the time and place for the hearing of said petition before the Municipal Board of Control. Notice of hearing shall be published once a week for four weeks in a newspaper published in or having a circulation in the county or counties where such toll road or highway is to be constructed,

giving notice of the proposal to organize a municipal corporation for such purpose. Such notice is to be signed by the secretary of said board.

"Sec. 3. Any person in any manner interested in the laying out and construction of the said toll road or highway may appear at the hearing of such petition, *and the matter shall be tried as an issue of fact by the Municipal Board of Control,* and no formal answer to the petition need be filed. The board may adjourn the hearing from time to time in its discretion. *The Municipal Board of Control shall determine whether or not the laying out, construction and operation of the toll road is in the public interest* and whether all the requirements of this Act have been substantially complied with *and, if the Municipal Board of Control shall so find, it shall enter an order creating a municipal corporation and fixing* the name of the same, giving it the name proposed in the petition unless, for good cause, it finds that some other name should be provided. (Italics added.)

"Upon the approval of the Municipal Board of Control and the recording of the papers, as above provided, the organization shall become a municipal corporation with such powers and functions as are prescribed in this Act.

"Sec. 4. Within ninety (90) days after the organization of such municipal corporation, *the petitioners for the same shall meet at the courthouse in the county in which the said toll road or highway or some part thereof is located and elect a board of not less than three (3) nor more than seven (7) commissioners which shall act as the governing board of said municipal corporation.* Notice of the time and place of such meeting may be given by any three (3) of the petitioners, *and such board of commissioners, when elected, shall serve for a term of six (6) years from the date of their election or until their successors are duly elected and qualified. The successors to such board of commissioners shall be elected by the commissioners before their term of office expires, and any vacancy in the membership thereof shall be filled by the remaining members of the said commission.* (Italics added.)

"Sec. 5. The board of commissioners of said municipal corporation shall elect a president and secretary thereof and adopt a common seal, said officers to serve for a term of six years or until their successors are duly elected and qualified. Any vacancies occurring in such offices shall be filled by the appointment of the board of commissioners for the unexpired term of the one creating such vacancy."

Sec. 7. Confers power of eminent domain on corporation.

"Sec. 8. That said corporation, when created, shall be operated entirely for the benefit of the public and no person shall receive any profits whatever from the operation thereof, except that the officers and em-

ployees of said corporation shall be paid by the governing board thereof reasonable compensation for services rendered."

Sec. 9. Confers power to issue revenue bonds to finance costs of project.

"Sec. 10. *That all of said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessment,* direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation. *All the property of the said corporation shall be exempt from all taxation.* (Italics added.)

"Sec. 11. In the event the State Highway and Public Works Commission shall at any time hereafter determine to acquire any toll road or highway which may be constructed by a municipal corporation organized under the provisions of this Act, for the purpose of operating the same as a part of the State highway system, *the State Highway and Public Works Commission shall have a right to acquire the same* and to enter into an agreement with the municipal corporation created under the provisions of this Act for the acquisition of such road or highway, and all rights of such municipal corporation therein, *upon the condition that the State Highway and Public Works Commission shall pay or assume all of the outstanding obligations of such municipal corporation, including any outstanding bonds, incurred or issued in the acquisition of rights of way and construction of such improvements,* and, upon such contract being entered into, all of the right, title and interest of such municipal corporation created hereunder to such toll road or highway shall cease and determine and the same shall become a part of the State highway system, and such road or highway may be operated as a toll road or otherwise, as the State Highway and Public Works Commission may determine." (Italics added.)

The amendatory act, Chapter 993, Session Laws of 1951, provides, among other things:

Sec. 1. Prescribes procedure for amending and extending provisions of charter of any corporation organized under the original act, with direction that "Amendment in this manner may be had to accomplish a change in the location of the proposed highway or toll road, an extension or addition thereto, *the construction of a feeder road or bridge having a direct relationship to the original objective of the formation of the municipal corporation,* or any other accomplishment deemed expedient or necessary by the commissioners of the municipal corporation. (Italics added.)

"Sec. 2. . . .

"The said municipal corporation, when organized, shall have the following powers:

"1. (a) To adopt by-laws for the regulation of its affairs and the conduct of its business;

"(b) To adopt a corporate seal and alter the same at pleasure;

"(c) To maintain an office at such place or places within the State as it may designate;

"(d) To sue and be sued in its own name;

"(e) *To construct, maintain, repair and operate the toll road, toll bridge or turnpike at such location within the North Carolina Counties of Currituck, Dare, Tyrrell, Hyde, and Carteret as shall be adopted by the municipal corporation;* (Italics added.)

"(g) *To fix and revise, from time to time, and charge and collect tolls for transit over the turnpike constructed by it, without obtaining the consent or approval of any department, division, commission, board, bureau, or agency of the State, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions, or things which are specifically required by this Act;* (Italics added.)

"(h) *To establish rules and regulations for the use of the turnpike;* (Italics added.)

"2½. Upon the completion of any project authorized under the terms of this Act, the municipal corporation shall file with the Chairman of the North Carolina State Highway and Public Works Commission a report prepared by a certified public accountant, showing all items which were included in the original cost of the project, the schedule of salaries, wages, and operating expenses budgeted for the project, and shall at periodic intervals thereafter, at least once in every year, file an operating statement for the project as prepared by the auditors or accountants of the municipal corporation.

"3. *Revenues. The municipal corporation is hereby authorized to fix, revise, charge and collect tolls for the use of the turnpike and the different parts or sections thereof, . . . Such tolls shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the State.* (Italics added.)

"4. The authority of the municipal corporation to construct a toll road or turnpike shall not be limited to the construction of a roadway or highway but shall include the authority to construct a toll road across any body of water, navigable or nonnavigable, *within the Counties of Currituck, Dare, Tyrrell, Hyde and Carteret,* and the State of North Carolina expressly consents to the construction of such toll road or bridge over and across waters within its jurisdiction when the charter of said municipal corporation provides for such construction. (Italics added.)

"Sec. 3. All laws and clauses of laws in conflict with this Act are hereby repealed."

The court below entered judgment on the pleadings adjudging that the challenged statute, both as originally enacted and as amended, is valid and constitutional; that the plaintiff municipal corporation has been duly created and its charter duly amended in compliance with the procedural requirements of the laws of the State of North Carolina; and that the contracts entered into between the plaintiff and each of the defendants, Coastal Turnpike Authority, Wm. F. Freeman Engineers, Inc., and DeLeuw, Cather & Company, are in all respects valid and binding and fully enforceable against the parties thereto.

The defendants excepted and appealed.

McMullan & McMullan and Reed, Hoyt & Washburn for plaintiff, appellee.

John A. Wilkinson for defendants, appellants.

JOHNSON, J. Our examination of the challenged statute impels the conclusion that it is repugnant to three sections of the State Constitution. For immediate purposes of decision, it would suffice to rest decision on one section only. However, against the eventuality that this would serve only to extend the litigation and lead to further adverse decisions following piecemeal amendatory legislation, we deem it appropriate to discuss the statute in the light of each section of the Constitution which it impinges. We treat them *seriatim*. The questions posed are these:

1. Whether the statute in attempting to authorize the Municipal Board of Control to "enter an order creating a municipal corporation" is invalid as being an attempt to delegate legislative power and authority contrary to the provisions of Article II, Section 1, of the Constitution?

2. Whether the amendatory act limiting the territorial scope of the statute to five of the 100 counties of the State, brings the statute into conflict with Article II, Section 29, of the Constitution, which forbids the General Assembly "to pass any local, private, or special act . . . authorizing the laying out, opening, . . . (or) maintaining . . . of highways. . . . ; (or) relating to ferries or bridges . . . ?"

3. Whether (assuming that the plaintiff may be clothed with corporate existence), in view of the provisions of the plaintiff's charter immunizing it from governmental control, the plaintiff is entitled to tax exemption as a municipal corporation within the purview of Article V, Section 5, of the Constitution?

It will add to clarity of understanding if we keep in mind these facts: (a) The Municipal Board of Control issued the plaintiff's so-called charter under the original act of 1949, before the passage of the amenda-

tory act of 1951; (b) the original act is state-wide in scope, and contains no express power authorizing the construction and operation of toll bridges—its express grant of powers relates only to toll roads; (c) the amendatory act limits the operation of the statute to five counties, and extends the express grant of powers to include toll bridges; (d) after the passage of the amendatory act, the plaintiff's charter was amended in form to confer on it the right to build a toll bridge over Croatan Sound; (e) Croatan Sound is not a link in the proposed toll road—the southern terminus of the proposed toll road is north of Nags Head, whereas Croatan Sound is several miles south of Nags Head and lies between Roanoke Island and the mainland at Manns Harbor.

1. *The question of delegation of legislative power.*—It is a settled principle of fundamental law, inherent in our constitutional separation of government into three departments and the assignment of the lawmaking function exclusively to the legislative department, that (except when authorized by the Constitution, as is the case in reference to certain lawmaking powers conferred upon municipal corporations usually relating to matters of local self-government, Const., Articles VII, VIII, and IX; *Provision Company v. Daves,* 190 N.C. 7, 128 S.E. 593), the Legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body. 11 Am. Jur., Constitutional Law, Sec. 214. See also *Motsinger v. Perryman,* 218 N.C. 15, 20, 9 S.E. 2d 511; *S. v. Curtis,* 230 N.C. 169, 52 S.E. 2d 364, and cases there cited.

However, it is not necessary for the Legislature to ascertain the facts of, or to deal with, each case. Since legislation must often be adapted to complex conditions involving numerous details with which the Legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply. *Provision Company v. Daves, supra.* Without this power, the Legislature would often be placed in the awkward situation of possessing a power over a given subject without being able to exercise it.

Here we pause to note the distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances. 11 Am. Jur., Constitutional Law, Sec. 234. See also *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896.

As to this, it may be conceded that the line of demarkation between those essentially legislative functions which must be exercised by the

Legislature itself, and those of an administrative nature, or involving mere details, which may be conferred upon another body or administrative agency, is sometimes vague and difficult to define or discern. *Provision Company v. Davis, supra.*

Nevertheless, the legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. This principle is implicit in the general rule prohibiting the delegation of legislative power, and is affirmed by numerous authoritative decisions of this Court. *Motsinger v. Perryman, supra; Provision Company v. Daves, supra; S. v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; *S. v. Curtis, supra.* See also Annotation, 79 L. Ed. 474, 487.

In short, while the Legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion, 11 Am. Jur., Constitutional Law, Sec. 234.

In the case at hand we are at grips with the question whether the statute, which invests in the Municipal Board of Control discretionary power to create a municipal corporation for the purpose of constructing and operating a toll road and a toll bridge, fails to lay down adequate standards for guidance, and is for that reason subject to attack as an unwarranted delegation of legislative power.

The term "municipal" relates not only to a town or city as an incorporated territorial entity, but it also pertains to local self-government in general and, in a broader sense, to the internal government of the State. In the latter, broader sense, a corporation formed for purely governmental purposes is a municipal corporation. *Wells v. Housing Authority,* 213 N.C. 744, bot. p. 750, 197 S.E. 693; *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281; *Webb v. Port Commission,* 205 N.C. 663, 172 S.E. 377; *Brumley v. Baxter,* 225 N.C. 691, 36 S.E. 2d 281. See also Const., Article VII, Sec. 7.

But whether a municipal corporation be a unit of local self-government in the sense of being an incorporated territorial area having inhabitants, or a mere governmental agency of the State, clothed with the requisite attributes of government necessary to make it a municipal corporation, in either event such corporation is but a creature, an instrumentality, an agent of the State. 37 Am. Jur., Municipal Corporations, Sec. 4. See also *Lee v. Poston,* 233 N.C. 546, 64 S.E. 2d 835.

This being so, the power to create or establish municipal corporations, to enlarge or diminish their powers, or to dissolve or abolish them altogether, is a political function which rests solely in the legislative branch of the government. 37 Am. Jur., Municipal Corporations, Sec. 7; *Starmount Co. v. Hamilton Lakes,* 205 N.C. 514, 171 S.E. 909; *Webb v. Port Commission, supra; Cox v. City of Kinston,* 217 N.C. 391, 8 S.E. 2d 252; *Greensboro-High Point Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803.

Ordinarily "no delegation of legislative functions is involved in general laws providing for the incorporation of municipal corporations, fixing the conditions on which they may be created, and leaving to some officer or official body the duty of determining whether such conditions exist, . . ." 37 Am. Jur., Municipal Corporations, Sec. 8; *Lyon v. Payette,* 38 Idaho 705, 224 P. 793; *Boone County v. Verona,* 190 Ky. 430, 227 S.W. 804; *Carrithers v. Shelbyville,* 126 Ky. 769, 104 S.W. 744.

"It is generally held that the legislature, in enacting general statutes governing the incorporation of municipal corporations, which describe the conditions precedent to incorporation, may confer upon a court or other agency the power and duty to ascertain the existence of the facts set forth in the statute upon which it will become effective and to see that all legal forms have been complied with. When such facts are found to exist and the required legal forms have been complied with, the law directs the creation of the municipal corporation. If the legislature vests no power in the courts or other body or individual other than to determine the existence of the facts set forth in the law itself, contingent upon the existence of which the law comes into operation, it does not constitute a delegation of legislative power." 37 Am. Jur., Municipal Corporations, Sec. 8. See also McQuillin, Municipal Corporations, 3rd Ed., Vol. 1, Sec. 3.05.

However, by the decided weight of authority, the rule is that "if the statute requires or authorizes the court or other agency to pass upon questions of public policy involved, or to exercise any discretion as to whether the municipal corporation should be created, or to render any other assistance than the determination of facts, there is an attempted delegation of legislative power and the statute is invalid." 37 Am. Jur., Municipal Corporations, Sec. 8; *In re North Milwaukee,* 93 Wis. 616, 67 N.W. 1033.

We come now to test the statute at hand by the foregoing principles. As to the provisions of the statute prescribing (1) the minimum number of persons required to join in the petition to the Municipal Board of Control, (2) the requirements of the petition as to description of the proposed project, listing of the names of the persons across whose lands the toll road is to be constructed, etc., and (3) the requirements providing

for a time and place for hearing, and publication of notice of the hearing, it may be conceded that these and similar procedural requirements present only questions of fact which may properly be inquired into and determined by the Municipal Board of Control, without further rules or standards for guidance, and we see in them no unauthorized delegation of legislative power.

But there is more to the statute than that. It provides that at the hearing on the petition, at which "the matter shall be tried as an issue of fact . . . the Municipal Board of Control shall determine whether or not the laying out, construction and operation of the toll road is in the public interest and whether all the requirements of this Act have been substantially complied with and, if the Municipal Board of Control shall so find, it shall enter an order creating a municipal corporation and fixing the name of the same, . . ." Thus the Legislature attempts to delegate to an administrative agency the crucial question whether a toll road or toll bridge in any given instance will be "in the public interest." Necessarily this involves questions of vital public policy requiring the exercise of discriminating legislative statecraft—particularly so in view of the existence of our state-wide system of highways (G.S. 136-1 to 136-101) and the recently created "North Carolina Turnpike Authority" with power and authority to lay out, construct and operate turnpikes and toll roads on a state-wide basis. Chapter 894, Session Laws of 1951, now codified as G.S. 136-89.12 *et seq.*

Manifestly, the power to determine whether the construction and operation of a toll road or toll bridge in any given instance will be "in the public interest" is purely a legislative question to be resolved only in the exercise or under the direction of legislative powers of guidance and control. Yet, the statute attempts to confer on the Municipal Board of Control the naked, arbitrary power to make this determination, without standards of legislative guidance of any kind, thereby attempting to clothe the members of this administrative agency with apparent power in their unguided discretion to give or withhold the benefits of the law in any given case or cases.

It necessarily follows from what we have said that the statute is violative of Article II, Section 1, of the State Constitution which inhibits the Legislature from delegating its supreme legislative power to any other department or body.

2. *The question whether the amendatory act brings the statute into conflict with Article II, Section 29, of the State Constitution.*—This section of the Constitution provides in pertinent part that the "General Assembly shall not pass any local, private, or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges;

. . . nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, . . . The General Assembly shall have power to pass general laws regulating matters set out in this section."

As bearing on the question whether the amendatory act (Chapter 993, Session Laws of 1951) transforms the statute into a "local act" within the meaning of the Constitution, it is significant that the act authorizes the construction and operation of toll roads and toll bridges only within five counties of the State.

In *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313, in which Article II, Section 29, of the Constitution was construed and applied, the Court said: " 'a local act' is one operating only in a limited territory or specified locality."

In *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521, an act which excepted from its provisions 64 of the 100 counties in the State was held to be a local or special act and invalid under Article II, Section 29, of the Constitution.

It is manifest that the act in question, as amended, is an act "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys," and is also an act "relating to ferries or bridges."

It necessarily follows that the statute is repugnant to Article II, Section 29, of the State Constitution and is therefore void.

The cases relied on by the defendants are distinguishable.

3. *The question of tax exemption.*—Conceding, without deciding, that the plaintiff may be clothed with corporate existence, nevertheless we are constrained to the view that it is not a municipal corporation within the purview of Article V, Section 5, of the Constitution of North Carolina, which provides: "Property belonging to the State or to municipal corporations shall be exempt from taxation."

In order to come within the constitutional orbit of tax exemption, a corporation must be an instrumentality, an agent, a department, or an arm of the State in the sense of being at least a subordinate branch of the State government or of a local subdivision thereof and subject to governmental visitation and control, so that ordinarily the interests and franchises pertaining to the corporation are either the exclusive property of the government itself or are under the exclusive control of some agency or political subdivision thereof. See 37 Am. Jur., Municipal Corporations, Sections 4 and 6; 18 C.J.S., Corporations, Sec. 18; 13 Am. Jur., Corporations, Section 17; McQuillin, Municipal Corporations, 3rd Ed., Vol. 1, Sections 2.01 through 2.27. See also *Drainage Commissioners v. Webb,* 160 N.C. 594, 76 S.E. 552; *Southern Assembly v. Palmer,* 166 N.C. 75, 82 S.E. 18.

In the case at hand it is noted that the plaintiff is set up as a corporate entity, controlled by a "governing board" appointed by the ten original petitioners and incorporators, without the intervention of any agency or official of the government. Both the challenged statute and the charter issued thereunder by the Municipal Board of Control direct that the governing board so selected shall serve for a period of six years, or until their successors are duly elected and qualified, with further provision that the successors to the governing board shall be chosen by the board members themselves. It is further provided that any vacancy occurring at any time in the membership of the governing board shall be filled by the remaining members.

Thus, the exclusive direction and control of the corporation is vested in a self-perpetuating body, created in its inception without governmental intervention of any kind.

Moreover, the statute expressly directs that the corporation may "fix, . . . charge, and collect" such toll fees as it deems proper "without obtaining the consent or approval of any department, division, commission, board, bureau, or agency of the State, and without any other proceedings . . ." (G.S. 136-89.6(g)).

The statute further provides that when such tolls shall be so fixed they "shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the State." (G.S. 136-89.6.)

Manifestly, a corporation so set up beyond the ambit of governmental visitation and control may not be classified as a tax exempt municipal corporation within the meaning of the Constitution. Its status as fixed by the controlling provisions of the statute is that of a private corporation. (18 C.J.S., Corporations, Sec. 18.) And this is so notwithstanding the recitals in the statute to the effect: (1) that the corporation "shall be operated entirely for the benefit of the public," (2) that certain financial reports shall be filed with the State Highway and Public Works Commission, and (3) that the Highway Commission shall have the option to purchase the property of the corporation on the open-end basis set out in the statute. These recitals are neutralized and stripped of effectiveness by the provisions which expressly immunize the corporation from any kind of governmental visitation or control.

The decisions in *Webb v. Port Commission, supra,* and in *Wells v. Housing Authority, supra,* relied on by the defendants, are distinguishable. In the *Webb case,* admittedly a borderline case as disclosed by the dissenting opinion by *Brogden, J.,* concurred in by *Stacy, C. J.,* the power to appoint the members of the governing board of the corporation was vested in the commissioners of Morehead City. Thus, in that case the corporation was under the direct control of the governing officials of a local subdivision of the State government. Similarly, in the *Wells case,*

the members of the governing board of the local housing authority were appointed by the board of commissioners of the City of Wilmington, and in that manner the housing authority was kept within the orbit of governmental control on the local level. In the instant case there is no such control. The governing board functions as in the case of any private corporation.

The other authorities cited and relied on by the plaintiff have been carefully examined. They are either factually distinguishable or not considered authoritative with us.

It follows from what we have said that the judgment below is

Reversed.

PARKER, J., took no part in the consideration or decision of this case.

W. H. McKINNEY AND WIFE, LUCY H. McKINNEY, v. THE CITY OF HIGH POINT.

(Filed 30 January, 1953.)

1. **Pleadings § 15—**

A demurrer tests the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but not inferences or conclusions of law.

2. **Same—**

A pleading will be liberally construed upon demurrer with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. G.S. 1-151.

3. **Municipal Corporations § 37—**

The power of a municipality to enact zoning regulations is based upon the power to protect and promote the public health, safety and general welfare.

4. **Municipal Corporations §§ 6, 37—**

The erection by a municipality of a water storage tank in connection with its waterworks system is done by it in its governmental capacity and the city's zoning ordinances do not apply thereto.

5. **Municipal Corporations § 37—City may not be held liable for negligence solely on ground that water tank was maintained in section zoned for residences.**

The complaint alleged that the defendant municipality erected a water storage tank in a section of the city zoned exclusively for residences, and that the construction of the tank was unlawful and in violation of municipal ordinance, and sought to recover damages to plaintiffs' contiguous property on the ground of negligence. Defendant city demurred. *Held:*

The demurrer did not admit the legal conclusion that the construction of the tank was unlawful, and in the absence of any allegation of negligence in the design, construction, maintenance or operation of the tank, the complaint failed to state a cause of action for negligence, and as to such cause of action the demurrer should have been sustained.

6. Same—

Since a municipality has the right in the exercise of its governmental function to erect a water storage tank in a section zoned for residences exclusively it may not be held liable, in the absence of statutory provision, for resulting damage to contiguous property upon the theory of a trespass when the tank is properly built and operated.

7. Same: Eminent Domain § 3—

Where a municipality, in the exercise of a governmental function, erects a water storage tank in a section zoned for residences exclusively, it may be held liable in damages for the depreciation in value of contiguous property incident to the maintenance of such tank, since to that extent it amounts to a "taking" of property for which compensation must be paid. Constitution of North Carolina, Article I, Sec. 17; Fifth Amendment to the Constitution of the United States.

8. Same—Speculative damage incident to taking of property may not be recovered.

Plaintiffs' complaint alleged that defendant municipality erected a water storage tank across the street from property owned by plaintiffs in a section of the city zoned for residences exclusively, and that the maintenance of the tank materially depreciated the value of their property. *Held:* The complaint states a cause of action in favor of plaintiffs to recover compensation as for the taking of property, but allegations to the effect that the maintenance of the tank created a constant hazard to plaintiffs' property from airplanes, windstorms, tornadoes, cyclones and electrical storms and danger from the leaking or bursting of the tank, relate to matters too contingent, uncertain and speculative to be considered as elements of damage.

9. Municipal Corporations § 37: Nuisances § 3a—

The maintenance of a water storage tank by a municipality in a section zoned for residences exclusively cannot give rise to a cause of action for a nuisance in behalf of the owners of contiguous property, since such tank is not a nuisance *per se* and the municipality has the right to maintain it at the place in question in the exercise of a legitimate and necessary governmental function, notwithstanding its zoning regulations.

10. Pleadings § 19c—

If a complaint is good in any respect or to any extent, it cannot be overthrown by demurrer.

APPEAL by defendant from *Patton, Special Judge,* June Term, 1952, of GUILFORD (High Point Division). From a judgment overruling its demurrer to the amended complaint the defendant appeals. Modified and affirmed.

Civil action to recover damages to plaintiffs' property alleged to have been caused by the erection of an elevated water tank on property across the street from plaintiffs' property, in violation of the defendant's zoning laws, as to the use of the property, and the height of the structure, allegedly constituting a nuisance and a taking of plaintiffs' property for a public use, and was actionable negligence, resulting in diminution of the plaintiffs' property.

The plaintiffs in their amended complaint allege in substance:

(1) That the plaintiffs are residents of the City of High Point, Guilford County, North Carolina; and that the defendant is a municipal corporation, created, organized and existing under the laws of the State of North Carolina.

(2) That the plaintiff, W. H. McKinney, owned prior to the erection of the water tank, and still owns, several lots located at the southeast corner of Salem Street and Bridges Street in the City of High Point, having a frontage of 123½ feet on Salem Street and a frontage of 97½ feet on Howard Street. That the plaintiff Lucy H. McKinney has an inchoate dower right in said property. There is a seven-room house on said property in which the plaintiffs have resided for many years, making improvements thereto from time to time.

(3) Paragraph 4 of the amended complaint reads as follows: "That the section in which plaintiffs' property is located was for many years, and is now, zoned as "Residence 'A' District," as defined in "The Code of the City of High Point, North Carolina, 1950," Chapter 24, Sections 24.7, 24.26 and 24.45 (formerly Chapter O, Art. II of the 1945 Code Ordinances of the City of High Point); that said ordinance specifies the type and height of buildings and structures that can be constructed or erected in said Residence "A" District, and specifically excludes all other types of buildings or structures; that the construction or erection of a public utility is not enumerated among the list of buildings and structures that can be constructed or erected in said Residence "A" District; that elsewhere in said Code the erection of a municipal utility in any district is provided for, but only after referral to, and report by, the Board of Adjustments, and according to the method prescribed therein; that the matter of the erection of the water tank described below was not referred to the Board of Adjustments, nor was the procedure outlined in the said ordinance followed, and same was wrongfully and unlawfully erected in its present location; that said water tank further greatly exceeds the height requirements of said ordinance; that said ordinance was in full force and effect prior to the erection of said hereinafter described water tank, was in force and effect when same was erected, and is still in force and effect; that said ordinance is made a part hereof as fully as if set forth verbatim herein."

(4) In the spring of 1950 the defendant notified the citizens of High Point that it intended to build a large water tank in the northeast section of the city; that it had under consideration several sites for the location of said tank, including the present location thereof. That public meetings were held by the city council to afford citizens in the areas to be affected an opportunity to oppose the construction of said tank in their neighborhood. The plaintiffs and other citizens in their neighborhood appeared at said meetings, and opposed the erection of a proposed tank in their vicinity.

(5) The defendant on 1 August, 1950, purchased property on the east side of Howard Street between Farlow and Bridges Streets for the location of a 1,000,000 gallon capacity storage tank, and on 15 August, 1950, authorized and let the contract for the erection of said tank. The building and the erection of the tank was completed in August, 1951. The tank is approximately 184 feet high and is supported by nine large steel columns imbedded in concrete. It is surrounded by a high wire fence, and towers high above any other buildings in the section where it is located. The maximum height of a public building permitted by ordinance is 60 feet.

(6) The rear of plaintiffs' property is located across Howard Street from the water tank, and stands in the shadow of the tank. The neighborhood is well settled with homes; a large, modern church has recently been built in said community. That until the erection of the tank this district was used as a Residence "A" District.

(7) Paragraph 9 of the amended complaint reads as follows: "That the erection and maintenance of said water tank and its enclosure in said location by the defendant has materially damaged the said property of the plaintiffs; that it has tended to cheapen said property by placing nearby a structure out of keeping and harmony with the other buildings and structures located in said section, and particularly the property of the plaintiffs; that the erection of said tank, in violation of said ordinance, has tended to industrialize a purely residential section, and has tended to defeat the very purpose for which said section or district was zoned by the defendant; that said tank constitutes a constant hazard to plaintiffs' property from airplanes, windstorms, tornadoes, cyclones and electrical storms; that there is a constant hazard to plaintiffs' property from the danger of said tank leaking or bursting; that it is painted a bright silver color so that the reflection of the rays of the sun upon it causes a continuous and blinding glare, and said tank constitutes a nuisance; that it further constitutes a wrongful and unlawful taking or appropriation of plaintiffs' property; that the plaintiffs have been damaged by the unlawful, careless, negligent and arbitrary acts of the defendant in the erection of the water tank and its enclosure herein described in

close proximity to plaintiffs' property; by reason of the wrongful, unlawful and negligent erection of said water tank and its enclosure the plaintiffs have been damaged in the sum of $7,500.00."

(8) Pursuant to the city's charter the plaintiffs gave notice in writing on 19 September, 1951, to the city council of the defendant of their claim for damages on account of the erection of the tank stating the date and place of infliction of their alleged damage, the manner or character of the damage and the amount of the damages claimed. The defendant has ignored said claim. Pursuant to the defendant's charter the plaintiffs have waited more than thirty days from the time of presentation of their claim to commence action.

The court allowed the plaintiffs to file an amended complaint, and the defendant agreed that its demurrer should be heard upon the amended complaint instead of upon the original complaint.

The defendant sets forth five grounds in its demurrer:

1. The complaint does not state facts sufficient to constitute a cause of action. 2. That the water tank erected by the defendant City of High Point in the portion of the City in which the land of the plaintiffs is located, as referred to in the complaint, was designed and erected within the governmental function of the City of High Point for the sole purpose of supplying adequate water and water pressure to the citizens and businesses located in the said city and for fighting fires in the said city, particularly in the section in which the land of the plaintiffs is located. 3. That at no place in the complaint is it alleged that there has been any physical invasion or taking of the property or property rights of the plaintiffs and that any claim of the plaintiffs for damage is merely fanciful or imaginary and that such injury, if any, is therefore *damnum absque injuria* for which no recovery can be obtained. 4. That all allegations of the complaint are speculative and the conclusions imaginary. 5. The allegations are contrary to known and scientific facts and do not support the conclusions reached.

James B. Lovelace and Frazier & Frazier for plaintiffs, appellees.

Grover H. Jones and Brooks, McLendon, Brim & Holderness for defendant, appellant.

PARKER, J. On the demurrer we take the case as made by the amended complaint. The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but it does not admit any legal inferences or conclusions of law asserted by the pleader. We are required on a demurrer to construe the complaint liberally with a view to substantial justice between the parties, and every

reasonable intendment is to be made in favor of the pleader. G.S. 1-151; *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690; *Cathey v. Construction Company,* 218 N.C. 525, 11 S.E. 2d 571; Joyner v. Woodard, 201 N.C. 315, 160 S.E. 288.

Numerous courts, including the United States Supreme Court, have sustained zoning ordinances and laws for the purpose of regulating and restricting the character, location and use of buildings in cities, entirely on the substantial grounds that they are reasonably necessary for the purpose of protecting and promoting the public health, safety and general welfare.

"The stabilization, conservation and protection of uses and values of land and buildings . . . constitute fundamental purposes of zoning, reasonably related to the public welfare. 'Not the least of its (zoning) purposes is to stabilize property uses.'" McQuillin Mun. Corp. 3rd, Vol. 8, Zoning, Sec. 25.25, "Zoning ordinances involve a reciprocity of benefit as well as of restraint. . . . The theory of zoning is one of balancing public against private interests." *Ibid.,* Sec. 25.40.

Vast property rights are affected by zoning regulations. Metzembaum states in his "The Law of Zoning," p. 136 (1930) that a pamphlet to be issued in 1930 by the United States Government will show almost forty million people in the United States living within zoned municipalities. Many millions have been added since. He further states that in 1919 England made zoning mandatory upon every city which, on 1 January, 1923, would have twenty thousand or more people. It is interesting to note that zoning of certain areas, protection of streets against encroachments and building height limitations were not unknown to the Roman Law. Thomas Adams "Outline of Town and City Planning" (1935), Ch. 1, p. 53. "Use zoning is almost coeval with the English Colonization of the United States. In the first year of the first royal governor of the province of Massachusetts Bay Colony, in the reign of William and Mary, a law was passed forbidding certain noxious or 'nuisance' industries from carrying on any business in any district not specifically designated for such use by the selectmen of the town jointly with two or more justices of the peace . . . This law applied to Boston, Salem and Charleston, and to any other market town in the province. . . . 'This act, which is still law, is undoubtedly,' says Thomas Adams 'the first example of "use zoning" in America.'" McQuillin Mun. Corp., 3rd Ed., Vol. 8, Article Zoning, Sec. 25.03, Note 15.

On 1 August, 1950, defendant authorized the purchase of property for the location of an elevated water tank in a section it had zoned as a "Residence 'A' District"; on 15 August, 1950, it let the contract for its construction; and the work was completed in August, 1951. In the Code of the city the erection of a municipal utility in any district of the city is

provided for, but only after referral to, and report by the Board of Adjustments, and according to the method set forth in the Code. The city did not follow this procedure. The question arises whether the zoning regulations of the defendant applied to the erection, maintenance and operation of an elevated water tank such as this is, which was deemed necessary by the defendant having authority over a given field of public administration. Counsel in their briefs have cited us no authority on this question. After a diligent search in our Reports we are unable to find a case that has decided it. It appears to be a question of first impression with us. The plaintiffs allege in their amended complaint that the erection of the tank by the defendant was wrongful and unlawful. That allegation is a conclusion of law which is not admitted by the demurrer. *Cathey v. Construction Company, supra.*

The defendant contends that the construction and maintenance of this tank was a governmental function on its part, and that the rule of nonliability in such cases applies. The plaintiffs contend that the construction and maintenance of the tank was a corporate function, and that the defendant is liable for any negligence of its agents in performing duties of a corporate character in the management of its property.

Mr. Justice Denny, speaking for the Court in a lucid opinion in *Rhodes v. Asheville,* 230 N.C. 134, at pages 137 and 138, 52 S.E. 2d 371, says: "Since this Court handed down the decision in 1903, in the case of *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1029, the construction, maintenance and operation of a water and light plant by a municipality, has been held to be a necessary governmental expense. Even so, it has been uniformly held that, except as to certain exempted services, such as furnishing water to extinguish fires, *Klassette v. Drug Co.,* 227 N.C. 353, 42 S.E. 2d 411; *Mabe v. Winston-Salem,* 190 N.C. 486, 130 S.E. 169; *Mack v. Charlotte,* 181 N.C. 383, 107 S.E. 244; G.S. 160-255, a municipality in operating a water or light plant or other business function does so in its corporate or proprietary capacity. *Fisher v. New Bern,* 140 N.C. 506, 53 S.E. 342; *Harrington v. Wadesboro,* 153 N.C. 437, 69 S.E. 261; *Terrell v. Washington,* 158 N.C. 281, 73 S.E. 888; *Woodie v. Wilkesboro,* 159 N.C. 353, 74 S.E. 924. . . . We have cited the above decisions to show that a municipality may in certain instances, be liable in tort even though it may be engaged in a governmental function; and likewise may be held liable when engaged in a proprietary function which is considered such a *public necessity* that its activity is held to be for *a public purpose* and a necessary governmental expense."

The following cases fall on the governmental side of municipal power: *Price v. Trustees,* 172 N.C. 84, 89 S.E. 1066, L.R.A., 1917 A, 992; *Parks-Belk Company v. City of Concord,* 194 N.C. 134, 138 S.E. 599; *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423.

Now in respect to the question raised above. "Municipalities are sometimes regarded as subject to the prohibitions or restrictions of their own zoning ordinances, in so far as the property is being used in the performance of a proprietary or corporate function, as distinguished from a governmental function, the use of property for which is ordinarily held not to be within the prohibitions or restrictions of a zoning ordinance." 58 Am. Jur., Zoning, Sec. 120. "The need of a public building in a certain location ought to be determined by the federal, state, or municipal authority, and its determination on the question of necessary or desirable location cannot be interfered with by a local zoning ordinance." Bassett "Zoning" (1940), Public Bldgs., p. 31.

In *Sunny Slope Water Company v. Pasadena* (1934), 1 Cal. 2d 87, 33 P. 2d 672, it was held that a city engaged in the distribution and sale of water was not bound by its zoning ordinances in a highly restricted residential area as regarding its right to operate wells and water pumps in the area. The distinction between governmental and proprietary functions was not raised.

In *Decatur Park Dist. v. Becker* (1938), 368 Ill. 442, 14 N.E. 2d 490, it was decided that a park district organized by the Legislature to establish parks and playgrounds was entitled to condemn certain lands for such purposes under its power of eminent domain, notwithstanding the fact that a city zoning ordinance classified such land as "A" residence property.

In *State v. Board of County Commissioners*, 79 N.E. 2d 698 (Com. Pl. Ohio 1947), affirmed 83 Ohio App. 388, 78 N.E. 2d 694 (Ct. of App. Ohio, 1948), it is said "both principle and authority support the view that restrictions in zoning ordinances of municipalities are ineffective to prevent the use of land by a county for the public purpose for which it has been appropriated." See also *Tim v. Long Branch* (N.J.), 53 A. 2d 164, 171 A.L.R. 320, and Annotation, and *Carroll v. Board of Adjustment of Jersey City* (1951), 15 N.J. Super. 363, 83 A. 2d 448.

A different conclusion was reached in the following three cases: *Taber v. Benton Harbor* (1937), 280 Mich. 522, 274 N.W. 324, holds that a municipality was held bound by its own zoning ordinance concerning the height of buildings and could not erect a water tank tower in violation thereof, where such an act was proprietary in nature. In *O'Brien v. Greenburgh* (1933), 239 App. Div. 555, 268 N.Y.S. 173 (affirmed without opinion in (1935) 266 N.Y. 582), 195 N.E. 210, a municipality was enjoined from erecting a garbage disposal plant in a restricted district in which a zoning ordinance adopted by the town provided that no disposal plant would be permitted, except upon consent of a certain percentage of the property owners. The Court said that such an act is a corporate act as distinguished from a governmental function and in the former capacity

the town is bound equally with all other persons by the terms of its own ordinance. In *Jefferson County v. City of Birmingham* (1951), 256 Ala. 436, 55 So. 2d 196, it was held that the proposed operation of a sewage disposal plant by the county would be a proprietary function and not a governmental function, and therefore the city under its zoning power could prohibit the construction and operation of a sewage disposal plant in a "B" residential district.

The General Assembly of North Carolina at its 1951 session enacted Pub. L. Ch. 1203, codified in G.S. as Sec. 160-181.1, which made zoning regulations applicable to the erection and construction of buildings by the State and its political subdivisions. The act became of full force and effect after its ratification 14 April, 1951. This water tank was in construction when this act was passed.

This Court has said in *Mack v. Charlotte,* 181 N.C. 383, 107 S.E. 244: "The principle upon which a municipality engaged in supplying water to the individual citizen, under contract for profit or pay, must be considered and dealt with as a private owner, applies to the ordinary burdens and liabilities incident to their private business relations, and not to its work for the public generally, such as procuring its water supply and extending it, providing for fire protection and sanitation purposes and the like, for therein the municipality is to be regarded as a governmental agency and, as such, possessing and capable of exercising the powers and privileges conferred upon it by law. *Felmet v. Canton,* 177 N.C. 52. The question was directly presented and same ruling made in *Howland v. Asheville,* 174 N.C. 749; *Harrington v. Greenville,* 159 N.C. 632; *McIlhenney v. Wilmington,* 127 N.C. 146; *Moffitt v. Asheville,* 103 N.C. 237, are in recognition of the same general principle." See also *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258.

G.S. 130-111 authorizes municipalities to condemn lands for water supply as are necessary for the successful operation and protection of their plants.

"Water-works are public utilities. The power to own or otherwise provide a system of water-works, conferred upon cities, has relation to public purposes, and for the public, and appertains to the corporation in its political or governmental capacity. They are supported at public expense, and are subject to the exclusive control of the city in its governmental capacity, for the convenience, health and general welfare of the city. The city determines the amount of water mains, where to be laid, and the number and location of fire-hydrants. Over these the individual has no control. In the exercise of this political power the city has discretion, with which the courts have no right to interfere." *Asher v. Hutchinson Water, Light & Power Co.,* 66 Kan. 496, 500, 71 Pac. 813, 61 L.R.A. 52.

The complaint does not state the purpose for which the defendant purchased land, and erected the water tank. It is a fair inference that it was erected for the purposes of public health, sanitation, fire protection and selling water for gain to its inhabitants and businesses within the city. Under our former decisions we conclude, and so hold, that the erection of this water tank was done by the defendant in its governmental capacity and that its zoning ordinances did not apply.

The plaintiffs contend that in their amended complaint they have alleged a cause of action for negligence. The plaintiffs have not alleged any negligence in the design, construction, maintenance or operation of this tank; nor that it was constructed, maintained and operated in any way different from similar tanks by other municipalities. The plaintiffs have alleged that the erection of the tank was unlawful and in violation of its zoning ordinance. This is a conclusion of law, which the demurrer does not admit. *Cathey v. Construction Company, supra.* The amended complaint alleges no cause of action for negligence, and as to such cause of action, the demurrer should have been sustained, and it is so ordered. *Parks-Belk Company v. Concord, supra; Rhodes v. Asheville, supra; Broome v. Charlotte,* 208 N.C. 729, 182 S.E. 325.

The defendant having a right to erect and maintain the water tank for the public benefit, in its governmental capacity, is not liable civilly to individuals for injuries resulting therefrom, when properly built and operated, upon the theory of a trespass, in the absence of a statute giving such right. *James v. Charlotte,* 183 N.C. 630, 112 S.E. 423. This does not prevent the right of a recovery of damages for a taking or appropriating, in whole or in part, of property for a public use without due compensation. *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827, and cases cited. It is said in *Dayton v. Asheville,* "Public necessity may justify the taking, but cannot justify the taking without compensation. *Platt Brothers v. Waterbury,* 72 Conn. 531. See, also, *Boise Valley Construction Company v. Kroeger,* 28 L.R.A. (N.S.), 968, and note, which contains a valuable collection of the authorities on the subject." To hold otherwise would be in violation of the State and the United States Constitutions. "No person ought to be . . . disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty or property, but by the law of the land." N. C. Const., Art. I, Sec. 17. "Nor shall private property be taken for public use without just compensation." U. S. Const., Amend. 5. *Rhodes v. Durham.* 165 N.C. 679, 81 S.E. 938; *Ivester v. Winston-Salem,* 215 N.C. 1, 1 S.E. 2d 88.

"The violation of a statutory provision containing a mandate to do an act for the benefit of another, or the prohibition against the doing of an act which may be to his injury, is generally regarded as giving rise to a liability and creating a private right of action, whenever the other ele-

ments essential to a recovery are present. In the application of such a rule, there is support for the right of real-estate owners to claim and recover damages for any injuries they may sustain by reason of depreciation in the value of their property caused by a violation of zoning laws." 58 Am. Jur., Zoning, Sec. 191.

In *Sapiro v. Frisbie* (1928), 93 Cal. App. 299, 270 P. 280, it was held that property owners in a residence district were entitled to recover damages from persons erecting an undertaking establishment in the district in violation of a zoning ordinance enacted pursuant to the Stockton City Charter. The Court said: "The right of the plaintiffs to claim and recover damages for any injuries which they may have sustained . . . by reason of any depreciation in the value of their real property caused by the acts with the commission of which the complaint charges the defendants, seems to us to be a proposition which is not subject to serious controversy." *Stone v. Texas Company,* 180 N.C. 546, 105 S.E. 425, 12 A.L.R. 1297; *Leathers v. Blackwell Durham Tobacco Company,* 144 N.C. 330, 57 S.E. 11, 9 L.R.A. (N.S.) 349, are cases holding there is a right of action predicated upon a violation of statutory duty. See also 50 Am. Jur., Statutes, Sec. 584.

The amended complaint does not state how far the tank is located from the plaintiffs' property in feet, but says their property is located just across Howard Street from it. The amended complaint alleges that the construction and maintenance of this tank in a zoned Residence "A" District has cheapened, and materially damaged their property; that the maximum height of a public or semi-public building permitted by the defendant's ordinance is 60 feet and this tank is 184 feet high; that their home stands in the shadow of it; that it is painted a bright silver color so that the reflection of the rays of the sun upon it causes a continuous and blinding glare; that the construction, maintenance and operation of the tank has defeated the purpose for which the section was zoned. These allegations allege a taking of plaintiffs' property for which compensation must be paid for any loss the plaintiffs may have suffered under the fundamental law of the State and Nation.

In *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396, the proposed water tank was to be erected on lands adjoining the home site of the interveners in a development subject to covenants restricting the use of the land to private dwelling purposes alone. It was held that this was a taking of vested interests in property for which the owners are entitled to compensation for any loss sustained.

The allegations in the amended complaint that said tank constitutes a constant hazard to plaintiffs' property from airplanes, windstorms, tornadoes, cyclones and electrical storms; that there is a constant hazard to plaintiffs' property from the danger of said tank leaking or bursting seem

to be too uncertain, contingent and speculative to be considered as an element of damages, and are not susceptible of the exactness of proof required to fix a liability. The law in respect to such damages is set forth in *Johnson v. R. R.*, 184 N.C. 101, 113 S.E. 606; *Bowen v. King*, 146 N.C. 385, 59 S.E. 1044; *Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619.

The complaint sets forth a cause of action for the taking of plaintiffs' property, and we so hold.

The plaintiffs contend that they have alleged a cause of action for a nuisance. "An elevated water tank is not a nuisance *per se*." *Raleigh v. Edwards, supra.* "Its situation, environment and manner of operation determine its status." *Pake v. Morris*, 230 N.C. 424, 53 S.E. 2d 300, citing in support of the statement *Webb v. Chemical Co.*, 170 N.C. 662, 87 S.E. 633; *Redd v. Cotton Mills*, 136 N.C. 342, 48 S.E. 761. The plaintiffs have not alleged in their complaint that the defendant was in any way negligent in the design, construction, maintenance or operation of the tank; nor have they alleged that it is in any way different from elevated water tanks constructed, maintained or operated by other municipalities. The defendant acting in its governmental capacity constructed this tank. It is a legitimate and proper and necessary governmental function of the defendant. "A legitimate and proper business enterprise located in a town, which enterprise is not in itself a nuisance, is subject to no liability to adjacent property owners, or others in the vicinity, for the ordinary, careful and reasonable operation of the business. It is the negligent and unreasonable operation and maintenance that produces the nuisance, and the nuisance thus created imposes liability." *King v. Ward*, 207 N.C. 782, 178 S.E. 577. *Mr. Justice Barnhill* succinctly and clearly says for the Court in *Clinton v. Ross*, 226 N.C. 682, at p. 690, 40 S.E. 2d 593: "A tobacco sales warehouse is a lawful enterprise and the medium through which the farmers of the State market one of its largest income-producing crops. . . . In no sense is it a public or private nuisance. The court below found that the warehouse of the defendant is operated in the same manner as are other warehouses of like kind throughout the tobacco belt. When so conducted there is nothing inherent in the manner of operation which constitutes a menace to the general welfare, health, morals or safety of the community."

The amended complaint does not state a cause of action for a nuisance, and as to such allegations the demurrer should have been sustained, and we so hold.

If a complaint is good in any respect or to any extent, it cannot be overthrown by a demurrer. *Byers v. Byers*, 223 N.C. 85, 25 S.E. 2d 466.

Except as herein modified, the judgment of the court is affirmed.

Modified and affirmed.

G. H. PARKER, A TAXPAYER, AND ALL OTHER TAXPAYERS IN THE ANSON COUNTY ADMINISTRATIVE SCHOOL UNIT WHO MAY DESIRE TO BECOME PARTIES PLAINTIFF HERETO, v. THE COUNTY OF ANSON, NORTH CAROLINA, AND THE BOARD OF EDUCATION OF THE COUNTY OF ANSON, NORTH CAROLINA.

(Filed 30 January, 1953.)

1. Schools § 10b—Resolutions of county administrative units and board of education held sufficient.

The county in question had two local school administrative units and a county administrative unit which embraced all of the county not included in the two local units. The three units filed identical resolutions with the board of commissioners, each of which detailed all the proposed projects for the entire county. *Held:* The resolutions complied with G.S. 115-83 regardless of whether it is required that the county board of education propose the necessary projects for all the administrative units of the county, or whether each unit must file a petition setting forth its own particular needs.

2. Statutes § 13—

The provision of the County Finance Act (G.S. 153-96) and the provision of the Election Law Act (G.S. 163-150) relating to form of ballots, were both brought forward and re-enacted in the General Statutes, and since there is no material conflict between them, both are in full force and effect and must be construed *in pari materia* as relating to the same subject matter.

3. Elections § 10: Schools § 10b—

A ballot for a school bond election which states the question submitted for approval or disapproval followed by a brief statement of the purposes for which the proceeds of the proposed bonds are to be used and that a tax would be levied to pay the principal and interest on the bonds in event of approval, followed by the word "Yes" and the word "No" and a square opposite each with instructions as to how the ballot should be marked; *is held* to comply with G.S. 163-95 and G.S. 163-150, and the fact that the number of proposed projects necessarily results in a ballot somewhat longer than usual is not objectionable.

4. Taxation § 2—

Where a county has assumed all bonds and other indebtedness of all its school districts, the limitation on its debt is to be ascertained on the basis of the assessed valuation of property for the entire county and not that of the school administrative units in which the projects lie. G.S. 153-83, G.S. 153-87.

5. Schools § 10b—

Where a county has assumed the indebtedness of all its school administrative units, all the electors of the county have a right to vote in a school bond election for improvements in any school administrative unit in the county. G.S. 153-77, G.S. 153-91, G.S. 153-93.

6. Same—

The fact that in a school bond election for projects presented by the school authorities and approved by the board of county commissioners, the board of county commissioners also submits without warrant of law a proposal initiated by it in regard to the schools *is held* not to so complicate the election as to render it void.

7. Same—

While the board of county commissioners is authorized to determine what expenditures shall be made for school building purposes in the county, G.S. 115-83, this right arises only when proposals for such expenditures are submitted to it by the board of education, and the board of county commissioners has no authority to initiate such project or submit same in a school bond election.

8. Schools § 10h—

While plans for the expenditure of the proceeds of bonds authorized by a school bond election are subject to change within proper limitations, such a change must be initiated by the county board of education.

9. Same—County commissioners may not change basic purpose for which school bonds were approved.

Proposals for school improvements, including the building of a high school in a certain section of the county, were duly approved in a school bond election. On the same ballot the board of county commissioners, without warrant of law, submitted a proposal not to build the high school if another high school in the county could be made sufficient and available for all of the high school students of the county. *Held:* The total amount of the bonds approved by the electors should be used for the purposes authorized in the absence of some compelling ground for modification initiated by the county board of education, and the board of county commissioners may not diminish the amount of the bond issue by the estimated cost of the proposed high school, since such change would involve a complete change of purpose in respect to the county high schools rather than a change in manner and method. G.S. 153-87.

10. Schools § 3a—

The county board of education and not the board of county commissioners is vested with authority to decide the number and location of high schools necessary within the county and to consolidate high schools within the county.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Pless, J.,* in Chambers, 13 October 1952, ANSON.

Civil action to invalidate a school bond election and to enjoin the sale of school capital outlay bonds in the sum of $1,250,000 authorized thereby.

There are three school administrative units in Anson County: the Wadesboro, the Morven, and the County Administrative Units. The County Unit embraces all of the County not included in the other two.

There was a conference of the governing authorities of the three units at which they surveyed and agreed on the school plant facilities which were necessary to enable the County to maintain the schools as a part of the State school system for a full nine months' term. They agreed on seven specific projects together with one for the acquisition of the necessary land and one for the necessary equipment for the proposed enlarged reconstructed and new buildings—nine in all.

Thereafter the County Board of Education, the Trustees of the Wadesboro Unit and the Trustees of the Morven Unit adopted identical resolutions which recite the consultation of the several units and the resulting agreement, and set forth the nine proposed projects for which capital in the sum of $1,250,000 is required and requesting the Board of Commissioners of the County to provide the money necessary to finance such school plant facilities. These resolutions were duly filed with the Board of Commissioners of the County. The required financial statements were also presented to said Board.

A hearing was had 5 May 1952 at which the Board of Commissioners duly adopted a bond order authorizing the issuance of school bonds in the sum of $1,250,000 to finance the specific projects proposed by the several school administrative units and calling an election thereon to be held 28 June 1952.

The bond order in Section 2 thereof lists the seven specific and the two general projects recommended by the administrative units as the projects to be financed by the proceeds of the proposed bond issue, and Section 3 thereof is as follows:

"Section 3. The Board of Commissioners has ascertained and hereby determines that it is necessary to provide such additional school plant facilities described in this bond order so that said County may maintain public schools in said County, as an administrative agency of the public school system of the State of North Carolina, for the nine months' school term, and that it will be necessary to expend for such school plant facilities the sum hereinbefore appropriated thereto, in addition to other moneys available therefor."

At the same meeting the Board of Commissioners adopted another resolution, unsupported by any petition from any one of the school administrative units, calling an election at the same time on the question "whether the qualified voters of the County desire that the County Board of Education shall erect, at an estimated additional cost of from approximately $300,000 to $400,000, the new high school building with gymnasium and the teacherage in the northwestern section of the County which is described in said bond order in the event that the existing high school in Wadesboro is to be made available to and adequate for all white high school children in the County."

The election was duly held 28 June at which the two propositions were submitted to the qualified voters of the County for their approval or disapproval.

The first proposition submitted listed each specific project contained in the resolutions of the several school administrative units and in the bond order and read in part as follows:

"Shall the qualified voters of the County of Anson approve the bond order entitled 'Bond Order authorizing the issuance of $1,250,000 School Bonds of the County of Anson,' which was adopted by the Board of Commissioners on May 19, 1952, and which (a) authorizes bonds of the County of Anson of the maximum aggregate principal amount of $1,250,000 to finance the cost of the . . . (2) erection of a new high school building with gymnasium at a suitable location in the northwestern section of the County, and . . . (b) also authorizes the levy of an annual tax sufficient to pay the principal of and interest on the bonds authorized thereby; and approve the indebtedness to be incurred by the issuance of said bonds?"

Proposition No. 2 was as follows:

"If the existing high school building in Wadesboro is made available to and adequate for all white school children in Anson County and fully staffed and equipped to serve as a central high school for the white high school children of the county, and would meet with the approval of the State Board of Education, should the County Board of Education erect, at an estimated additional expense of between approximately $300,000 and $400,000, a new high school building with gymnasium for white children, and teacherage, in the northwestern section of the County?"

At the bottom of each ballot there appeared the word "Yes" followed by a square and "No" followed by a square. Instructions were printed thereon directing the voters how to mark each ballot so as to indicate their approval or disapproval of the propositions submitted.

Proposition No. 1 was approved by a majority of 76, and Proposition No. 2 was disapproved by a majority of 266.

The result of the election was duly declared 7 July 1952, and as a result thereof the Board of Commissioners now propose to issue only $950,000 in bonds and to abandon Project No. 2 for the erection of a new high school and gymnasium in the northwestern section of the County.

Anson County has assumed all bond and other indebtedness of all school districts in the County.

On 6 August 1952 plaintiff instituted this action to invalidate said election and enjoin the issuance of the bonds authorized thereby and in any event to restrain the enforcement of Proposition No. 2 and the resultant abandonment of the project for the erection of a new high school with gymnasium in the northwestern section of the County.

After hearing the cause on the pleadings, exhibits, and affidavit filed, the court below found the facts in some detail and, upon the facts found, entered judgment denying plaintiff's prayer for a restraining order and dismissing the action.

Plaintiff excepted and appealed.

Banks D. Thomas and J. C. Sedberry for plaintiff appellant.

Taylor, Kitchin & Taylor for defendant appellees.

BARNHILL, J. This Court in recent decisions has fully discussed the law controlling elections on school capital outlay bonds, the right of the proper officials to divert or transfer the proceeds of such bonds to other projects, the authority of the local school administrative unit on the one hand, and of the board of county commissioners on the other, in respect to school administration; the provision of funds for the erection, enlargement, remodeling, and repair of school buildings, and like questions which are either directly or indirectly at issue on this appeal. *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263; *Feezor v. Siceloff,* 232 N.C. 563, 61 S.E. 2d 714; *Gore v. Columbus County,* 232 N.C. 636, 61 S.E. 2d 890; *Mauldin v. McAden,* 234 N.C. 501, 67 S.E. 2d 647; *Atkins v. McAden,* 229 N.C. 752, 51 S.E. 2d 484; *Johnson v. Marrow,* 228 N.C. 58, 44 S.E. 2d 468; *Board of Education v. Lewis,* 231 N.C. 661, 58 S.E. 2d 725; *Kreeger v. Drummond,* 235 N.C. 8, 68 S.E. 2d 800; *Edwards v. Board of Education,* 235 N.C. 345, 70 S.E. 2d 170; *Reeves v. Board of Education,* 204 N.C. 74, 167 S.E. 454. Any further general discussion at this time would serve no useful purpose. We shall, therefore, confine our discussion to the specific material questions posed for decision.

The exceptive assignments of error in the record are directed primarily to (1) findings of fact and conclusions of law made by the court below, and (2) the failure and refusal of the court to find certain facts and conclusions tendered and proposed by plaintiff. The material assignments present for decision these questions:

1. Was the bond order supported by resolutions filed by the proper school authorities of the county?

2. Did the ballots on Proposition No. 1 used in the election comply with the requirements of law or were they so confusing in phraseology and form as to invalidate the election?

3. Does the proposed bond issue exceed the net school indebtedness permitted by law, G.S. 153-87?

4. Did all the electors of the County, including those residing within the bounds of the municipal school administrative units, have a right to vote in said election?

5. Was the submission of Proposition No. 2 authorized, and, if not, did the submission thereof together with Proposition No. 1 so confuse the question of the bond issue as to render the election void?

6. Does the Board of Commissioners have authority to abandon the project for a new high school and auxiliary buildings in the northwestern section of the county and substitute in lieu thereof a central high school in Wadesboro?

1. RESOLUTIONS OF SCHOOL ADMINISTRATIVE UNITS. The three school administrative units filed with the Board of Commissioners identical resolutions. They disclose that the governing authorities of the three units had, in conference, agreed that the school plant facilities set forth in the several resolutions are needed for the maintenance of the public schools in the County and should be provided. Each resolution details the several proposed projects within the county and within each municipal school administrative unit. They comply with the requirements of G.S. 115-83. Each presented the proposed school plant facilities of the administrative unit in behalf of which it was filed. If it was necessary for the County Board of Education to propose the necessary projects for all three units, this was done. If, on the other hand, it is required that each unit file a petition setting forth its particular needs, then such petitions were filed, and the inclusion therein of projects not within the particular unit may be treated as mere surplusage. In any event the filing of the three petitions and the contents thereof disclose a commendable spirit of co-operation existing between the three units.

2. BALLOTS. The County Finance Act, now G.S. Ch. 153, Art. 9, was adopted in 1927, Ch. 81, P.L. 1927. It provides for the issuance of bonds for the erection and purchase of schoolhouses, G.S. 153-77 (a), and prescribes the form of ballot to be used in an election held to obtain approval by the electorate of a bond issue to finance the same. G.S. 153-96. The latter section is in part as follows:

"The form of the question as stated on the ballot shall be in substantially the words: 'For the order authorizing $ ..... bonds (briefly stating the purpose) and a tax therefor' and 'Against the order authorizing $..... bonds (briefly stating the purpose) and a tax therefor.'"

The Election Laws Act of 1929, Ch. 164, P.L. 1929, now G.S. Ch. 163, Art. 20, likewise makes provision for elections which shall apply "to all counties . . . and school districts . . ." G.S. 163-148, and "shall apply to and control all elections for the issuance of bonds . . . And the form of ballot in such elections shall be a statement of the question, with provisions to be answered 'Yes' or 'No,' or 'For' or 'Against' as the case may be," G.S. 163-150.

Whether the adoption of the latter statute in effect repealed the bond provisions of the County Finance Act, particularly in respect to the form

of the ballots to be used, is immaterial here. Both statutes were brought forward and re-enacted in the Act of 1943 which is known as our General Statutes. They are now in full force and effect. And as they relate to the same subject matter, they must be construed *in pari materia*. *S. v. Hill*, 236 N.C. 704, and cases cited.

Unfortunately, many successive Acts of the Legislature relating to the same subject matter are brought forward in the General Statutes without any attempt to eliminate provisions which were repealed by later provisions or re-enactments of the same statute or by other independent Acts relating to the same subject matter so that, in many respects, the General Statutes Act is a compilation rather than a codification of our statute law. The inevitable effect is to create conflicts and inconsistencies which must be resolved by the Court as occasion arises. But we find no material conflict here.

The ballot used in the bond election, in the beginning, states the question submitted for the approval or disapproval of the voters. This is followed by a brief statement of the purposes for which the proceeds of the proposed bonds are to be used. Each project is listed separately and is as brief as an intelligent statement thereof will permit. It incorporates the statement that a tax will be levied to pay the principal of and interest on the bonds in the event the bond issue is approved. This is followed by "squares opposite the affirmative and negative forms" and instructions as to how the ballot should be marked. We can find nothing here inconsistent with the provisions of the statutes prescribing the form of the ballot to be used, either as contained in the County Finance Act or the Election Laws statute. Instead, it would seem to be clear that the ballot is "substantially" in the form prescribed.

It is true the number of projects to be financed by the proposed bond issue, which were wisely incorporated in the ballot for the information of the voters, makes it somewhat longer than the usual ballot. Yet this creates no "confusion" such as would mislead intelligent voters. Nor is the use of the words "yes" and "no" rather than "for" and "against" of any material significance.

3. DEBT LIMITATION. The County of Anson has assumed all bonds and other indebtedness of all school districts in Anson County including city administrative units and districts formerly known as special charter districts. The court below so found and its findings are supported by the record. This being true, the County was authorized to issue bonds in an amount equal to eight per cent of "the assessed valuation of property as last fixed for county taxation." G.S. 153-83, 87. The proposed bond issue amounts to a fraction more than six per cent of such valuation. It follows that it is not in excess of the amount permitted by law.

4. ELECTORS ENTITLED TO VOTE. It is the duty of the county to provide the funds required to furnish the necessary school plant facilities whether such facilities are located within or without the bounds of a local municipal school administrative unit, G.S. 115-83, and to levy a county-wide tax for the payment thereof, G.S. 153-77. An election to obtain the approval of a proposed school facilities bond issue is county-wide in scope. G.S. 153-91, 93. *Reeves v. Board of Education, supra.* Those who may be subjected to the payment of the tax levied to pay the bonds and who are otherwise qualified to vote have a right to participate in a school bond election.

5. PROPOSITION No. 2. The submission of this proposition and the subsequent decision to abandon the construction of a new high school in the northwestern section of the County represents the unilateral action of the Board of Commissioners of the County. There is nothing in the record to indicate that the Board of Education in any wise approved its action in respect thereto. The question of the validity of such action relates primarily to the abandonment of one of the projects proposed by the County school authorities and approved by the Board of Commissioners. It will be so treated, although what is here said applies with equal force to the two municipal school administrative units in the County.

While the statute, G.S. 153-93, permits the submission of more than one question or proposal in one and the same election, this contemplates questions authorized by law. The second proposal submitted by the Board of Commissioners was without statutory sanction. Certainly it constitutes no mandate. Instead, it was wholly advisory in nature and the Board was without authority to include it in the proposal for a school bond election submitted to the voters for their approval. Even so, we do not perceive that its action in so doing so complicated the election or so confused the voters as to render the election void. Certainly there is nothing in the record which tends to support the contention that the election should be invalidated on that ground.

6. ABANDONMENT OF PROJECT FOR NEW HIGH SCHOOL IN NORTHWESTERN SECTION OF COUNTY. The appellee Board of Commissioners, in justification of its action in attempting to abandon the project for a new high school and to establish a central high school at Wadesboro, leans heavily on the language used in the statute, G.S. 115-83, and in a number of our decisions above cited to the effect that it is the duty of the Board of Commissioners to determine what expenditures shall be made for the erection, repair, and equipment of school buildings in the County. G.S. 115-83; *Johnson v. Marrow, supra; Atkins v. McAden, supra.* But this provision of the statute as construed by us may not be lifted out of its context so as to universalize its meaning and vest in the Commissioners an unqualified, unlimited right to determine, of their own motion, at any

time, and under any and all conditions, what expenditures are necessary to provide the county with the necessary school buildings and equipment. *Poindexter v. Motor Lines,* 235 N.C. 286, 69 S.E. 2d 495, and cases cited. The procedure necessary to vest the Board with the power to exercise the right, and the conditions under which such power is invoked, is prescribed by the statute, G.S. Ch. 115, Art. 10. It is definitely limited in scope. *Waldrop v. Hodges, supra; Gore v. Columbus County, supra.*

Speaking to the subject in *Atkins v. McAden, supra, Denny, J.,* says: "This control over the expenditure of funds for the erection, repair and equipment of school buildings by the board of county commissioners, will not be construed so as to interfere with the exclusive control of the schools vested in the county board of education or the trustees of an administrative unit." See also *School Commissioners v. Aldermen,* 158 N.C. 191, 73 S.E. 905.

The authority to operate the schools is vested in the Board of Education of the County. It determines, in the first instance, what buildings require enlargement or remodeling and whether new buildings are needed. It decides the location for school buildings and selects the sites for new ones. *Atkins v. McAden, supra.* It surveys annually the needs of the county school system in respect to school plant facilities and equipment and by resolution presents its plan to the Board of Commissioners. Then, and only then, it becomes the duty of the Board of Commissioners to determine what expenditures, if any, proposed for such purposes by the Board of Education, are necessary. When it determines that funds are necessary for any one or all of the proposed projects, then it must furnish the funds necessary to provide the facilities incorporated in the approved projects.

The right of the Board of Commissioners to determine what expenditures shall be made arises when a proposal for the expenditure of funds for school facilities is made by the Board of Education. Having determined that question and having provided the funds it deems necessary, its jurisdiction ends and the authority to execute the plan of enlargement or improvement reverts to the Board of Education. It selects and purchases new sites, approves the plans for the erection of new buildings or the remodeling or enlarging of old buildings. It lets the contracts, supervises the construction, and expends the funds.

We do not mean to say, however, that a plan once adopted must be adhered to under any and all conditions. The Board of Education and the Board of Commissioners have limited authority to alter the plan or to abandon particular projects.

Any change in plan must be initiated by the Board of Education. Then the Board of Commissioners, acting in good faith, may, in proper cases, after finding the facts required by statute, determine whether the reallo-

cation of funds or the change in plans is or is not necessary and approve or disapprove the expenditure of the funds theretofore furnished by it for the execution of the amended plan.

Here the Board of Education and the Wadesboro school administrative unit submitted plans which contemplated the erection of a new high school in the northwestern section of the County within the jurisdiction of the County Board and the enlargement of the high school within the jurisdiction of the Wadesboro school administrative unit. These plans were approved by the Board of Commissioners, and it found as a fact that it is necessary to provide the funds therefor. Both projects were incorporated in the bond resolution. Signs were erected on the site selected for the new high school before the election so that the electors might be fully advised as to its proposed location. The project for a new high school was submitted to and approved by the voters. Fair play demands that defendants keep faith with the electors and use the proceeds for the purposes for which the bonds were authorized, *Waldrop v. Hodges, supra,* unless some sound and compelling reason is made to appear why the original plan should be modified or one of the projects included therein should be abandoned. The procedure for determining the extent to which and the manner in which such change may be effected is charted in the decisions herein first cited.

Furthermore, the proposed action of the Board of Commissioners constitutes a clear invasion of the prerogatives of the Board of Education. The latter Board, not the Board of Commissioners, is vested with authority to decide whether there shall be one central high school or two high schools located in different sections of the County; to effect consolidations and to decide all like questions connected with the efficient operation of the schools of the County. *Kreeger v. Drummond, supra,* and cases cited.

It would seem that the avowed intention of the Board of Commissioners involves a complete change of purpose in respect to high schools, *Waldrop v. Hodges, supra; Rider v. Lenoir County,* 236 N.C. 620; G.S. 153-107, rather than a change in the manner and method of accomplishing that purpose, *Feezor v. Siceloff, supra.* It contemplates one central high school rather than two located in different administrative units of the County. This would involve the complete abandonment of any provision for a high school in one school administrative unit and the conversion of another in a different unit to serve all the white high school children of the County. This in turn entails the transfer of high school pupils and possible consolidations. What action, if any, the proper authorities may take in respect thereto is not disclosed. *Kreeger v. Drummond, supra.* Final decision on this phase of the case must, therefore, await future developments.

Our conclusions on the several questions presented for decision are supported by the decisions herein first cited.

It follows that the court below erred in concluding that the Board of Commissioners of Anson County may now abandon the project for a new high school and auxiliary buildings in the northwestern section of the County; reduce the amount of the authorized bonds to be issued and sold; and thus refuse to furnish the funds for a project it has already approved as a necessary part of the County school system. The cause will be remanded to the end that such orders and decrees may be entered as may be necessary to effectuate the purposes for which said bonds were authorized in compliance with this opinion.

Error and remanded.

PARKER, J., took no part in the consideration or decision of this case.

SEABOARD AIR LINE RAILROAD COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY AND WILMINGTON RAILWAY BRIDGE COMPANY.

(Filed 30 January, 1953.)

1. Injunctions § 6a—

A temporary restraining order will lie for the purpose of preventing the commission or continuance of some act which during the litigation would produce injury to the plaintiff or which would tend to render judgment in his favor ineffectual, to the end that the *status quo* be preserved pending the action. G.S. 1-485.

2. Injunctions § 6b—

A preliminary mandatory injunction may issue when it is made to appear with reasonable certainty that complainant is entitled to the equitable relief sought and that the issuance of the writ is reasonably necessary to restore to complainant that which was wrongfully taken from him or to restore a status formerly existing between the parties.

3. Same—Issuance of preliminary mandatory injunction which in effect determined action on its merits held error.

Plaintiff railroad company sought the right to construct a spur from the main line of a track operated by it and defendant railroad company jointly, though owned by a third corporation, plaintiff contending that the third corporation was a passive trustee holding legal title for the joint benefit of plaintiff and defendant, and that defendant corporation, having control of such third corporation, was in effect an active trustee and should not be permitted to exclude plaintiff from an opportunity to share in the profitable use of the facilities jointly owned by them. *Held:* Plaintiff is not entitled to a preliminary mandatory injunction restraining defendant from interfering with the construction and use of such spur track by

plaintiff, since the effect of such order is not to restore a prior status or to prevent defendant from having the advantage of a change in status brought about by a wrongful act, but to establish a right in plaintiff prior to the determination of the action on its merits before defendant had had time to answer.

4. Appeal and Error § 1—

A matter not presented in or decided by the lower court is not before the Supreme Court on appeal.

APPEAL by defendant Atlantic Coast Line Railroad Company from *Carr, J.*, in Chambers, 22 October, 1952. From NEW HANOVER. Error.

This was a suit to enjoin defendants from interfering with plaintiff's making physical connection of a proposed spur with defendant Bridge Company's main line track, over which the plaintiff and the defendant Atlantic Coast Line Railroad Company under agreement operate trains.

The suit was instituted and complaint filed 10 October, 1952. Based upon the complaint an order to show cause was issued and hearing thereon had 22 October, 1952, at which time judgment was rendered restraining the defendants in accord with the prayer in the complaint. The defendant Atlantic Coast Line Railroad Company appealed.

For the sake of brevity the Seaboard Air Line Railroad Company will be referred to herein as the Seaboard, the Atlantic Coast Line Railroad Company as the Coast Line, and the Wilmington Railway Bridge Company as the Bridge Company.

The material facts as set forth in the complaint are these:

The Bridge Company, a corporation created by the Constitutional Convention of 1866, holds the legal title to but does not operate the railroad tracks and bridges extending from Navassa on the west bank of Cape Fear River to Hilton on the east bank of Northeast Cape Fear River, including the bridges over the rivers, and also including spur tracks from the main line along the west bank of Northeast Cape Fear River known as Almont Spur. The distance from Navassa to Hilton is approximately two and one-half miles. The entire capital stock of the Bridge Company, $40,000, is owned one-half by the Seaboard and one-half by the Coast Line. Both the Seaboard and the Coast Line use the railroad tracks and bridges of the Bridge Company for the operation of their trams into and out of Wilmington, and by agreement account for proportionate use on wheelage basis. The Bridge Company owns no rolling stock, tools or supplies of any kind. The cost of maintenance and repairs, insurance and taxes, is apportioned between the two operating railroad companies. The bonded debt of the Bridge Company has been paid off, each railroad company paying one-half.

The Bridge Company has a board of six directors. Four of these are named by the Coast Line and two by the Seaboard. This disparity was

occasioned by the fact that the original incorporators of the Bridge Company were the Wilmington, Charlotte & Rutherfordton Railroad Company (now Seaboard), the Wilmington & Manchester Railroad Company (now Coast Line), and Wilmington & Weldon Railroad Company (Coast Line), and the charter provided that each of the three should be entitled to choose two directors. The Wilmington & Weldon, now part of Coast Line, does not operate over the Bridge Company's track, but the Bridge Company was authorized by Act of 1867 to connect with all three of its incorporators. By subsequent agreement between the Seaboard and Coast Line it was agreed that Coast Line should take over the operation and maintenance of the Bridge Company's tracks for a period of five years, and that Seaboard should have the right at the end of any 5-year period, upon notice, to take over such operation. The present 5-year period will expire in 1956.

The officers of the Bridge Company consist of a President, Vice-President, Secretary and Treasurer, Assistant Secretary, and Assistant Treasurer. There are no other employees. All these officers are named by the Coast Line except the Secretary and Treasurer, who is the Vice-President of Seaboard. The President and Vice-President of the Bridge Company are the President and Vice-President of Coast Line.

The Atlantic & Yadkin branch of Coast Line, operating between Fayetteville and Wilmington, makes connection with the main line track of the Bridge Company at about half way between the rivers at a point designated as Yadkin Junction. The Wilmington-Florence line of Coast Line and the Wilmington-Charlotte line of Seaboard, coming from the west, connect with Bridge Company's tracks at Navassa for entrance over its tracks into Wilmington. Operations over Bridge Company's tracks by the trains of the two railroads as well as that entering at Yadkin Junction are controlled by a telephone block system operated through Coast Line's offices in Wilmington. The junction of the Atlantic & Yadkin at Yadkin Junction and the branching off of the Almont spurs were by consent of Seaboard and Coast Line. As illustrating the status of these parties, in 1922 by resolution of the Bridge Company its directors and officers were directed to advise the Interstate Commerce Commission "that as the property of this company is owned by and operated as a joint facility by and for the benefit of its owner lines, the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railway Company . . . and as all the operating expenses, revenues and fixed charges are taken care of and included in the accounts of the said owner and tenant companies" the provisions of the Federal Transportation Act of 1920 would not be applicable.

On 25 July, 1952, the Carolina Power & Light Company, hereinafter referred to as the Power Company, wrote the Seaboard and Coast Line

advising that it proposed to construct a large steam electric station on the east side of Cape Fear River north of the Bridge Company's main line, that it would receive large shipments of material for construction, and after completion would require 400,000 tons of coal annually, and that it desired to be served by both said railroad companies. The Power Company enclosed a plot plan showing approach by Seaboard by spur track branching from the Bridge Company's main line, and by Coast Line from its Atlantic & Yadkin branch, the plant site being equidistant from these points.

Thereupon the Seaboard advised the Coast Line and Bridge Company that it was prepared to build a line from the Power Company's plant to connect with the main line of Bridge Company's track at a point approximately half a mile east of Navassa, and proposed that the connection be made jointly with Coast Line or entirely by Seaboard. The Coast Line advised the Power Company and Seaboard that it was "advised that the Wilmington Railway and Bridge Company would not approve an application of Seaboard (or Coast Line either) to construct such connection with that trackage."

Plaintiff alleges that in an agreement between Seaboard and Coast Line in 1924 it was provided that the car count should apply to each car "running between Navassa and Yadkin and intermediate points," and that the proposed branch out to serve the Power Company would be from such an intermediate point; that there are no operating difficulties in the construction and use of the proposed connection, and the telephone block system would not be interfered with to the disadvantage of Coast Line or the Bridge Company.

Plaintiff alleges that in consequence of the refusal of defendant to permit the construction of an outlet to enable Seaboard to serve the Power Company the Coast Line would have a monopoly of the large freight movement to the Power Company, and would effectively prevent Seaboard from having a share therein as desired by the Power Company.

The plaintiff alleges that as result of the ownership by Seaboard and Coast Line of the entire capital stock of the Bridge Company, and the joint operation of its property by these companies, the Bridge Company as holder of the legal title for the benefit of the operating companies is an inactive trustee, and that Coast Line operating the line for the benefit of both occupies the position of an active trustee charged with fiduciary obligation which should prevent it from deriving benefit from its position.

The allegations of the complaint were supported by several affidavits and a number of exhibits, and the defendant Coast Line filed the affidavit of its General Manager, in which it was pointed out that due to the limited time and the length of the complaint and exhibits and the fact that the books and records of the Bridge Company were in possession of

the plaintiff, the defendant Coast Line had had insufficient time to gather all the evidence and exhibits which it will be necessary to present, or to prepare a detailed answer to the complaint; that the Bridge Company was and is a duly incorporated and organized corporation, controlled by its duly elected board of directors, holding annual meetings, and has in all respects retained its corporate existence; that the present officers were unanimously elected by the directors, two of them had been chosen by Seaboard; that Seaboard in 1951 waived its right to operate and maintain the tracks of the Bridge Company. The affiant denies that any fiduciary relationship exists between the parties, and that Seaboard and Coast Line are merely shareholders in an existing corporation; that since the present status of the parties became effective only one turnout has been constructed, in 1914, and that was by agreement of both Seaboard and Coast Line, and that for approximately 40 years the status has remained unchanged; that the Coast Line prefers to serve the power plant from its own track and does not consent to the proposed breakout from the main line of the Bridge Company; that if plaintiff be permitted to construct the turnout as prayed the Coast Line would be compelled to supervise by its employees all trains operated by Seaboard over Seaboard's spur track. This affiant also called attention to the arbitration clause in the agreement of 1909, and to the fact that Seaboard has not followed that procedure.

The plaintiff's prayer for relief set out in the complaint is that the defendant be enjoined "from interfering with the construction by the Seaboard of the turnout in the main line of the Bridge Company at, or approximately at, the point indicated," or from proceeding with arbitration under the agreement of 1909; and that an order be entered requiring the Coast Line to permit the necessary telephone connection and the use and operation thereof by the Seaboard in the operation by Seaboard of service to the power plant; and that pending the final determination of this suit the court make and issue forthwith a temporary restraining and mandatory order for these purposes.

After considering the complaint, affidavits and exhibits the court entered order that pending the final determination of the action the defendants and their agents and servants be restrained and enjoined (a) from interfering with the construction by plaintiff of the turnout in main line of the Bridge Company at the point indicated, (b) from interfering with the installation by plaintiff of a telephone at that point connected to the block system now maintained, (c) from interfering with the operation by plaintiff over the trackage of the Bridge Company to reach and use the turnout described, and (d) from interfering with the maintenance by plaintiff of said turnout on the right of way of the Bridge Company. It was further ordered that defendants permit the plaintiff to operate

over the trackage of the Bridge Company in order to reach, construct, use and maintain the said turnout and trackage constructed by plaintiff to connect therewith.

By further provision in the order the Coast Line was given option, pending the action or further order of the court, to use the turnout and track to reach and serve the Power Company, and in the event it be finally determined in this action that plaintiff is entitled to construct and operate the turnout and track to reach and serve the power plant it was ordered that Coast Line have option to purchase one-half interest in said turnout and track.

It was stated in the briefs that there was a stipulation between Seaboard and Coast Line "that the Bridge Company need not file any pleadings herein, and that no advantage would be taken of the fact that it did not."

From the foregoing order the defendant Atlantic Coast Line Railroad Company appealed.

James B. McDonough, Jr., and Varser, McIntyre & Henry for plaintiff, appellee.

M. V. Barnhill, Jr., and F. S. Spruill for defendant, appellant.

DEVIN, C. J. When considered alone the facts set forth in the plaintiff's complaint might be regarded as sufficient to invoke the aid of equity to prevent injustice and to forestall advantage being taken by one of two equal owners in the operation of the essential railroad facilities of the defendant Bridge Company, but as equity follows the law we think the final determination of the matters complained of should abide the plenary presentation of both sides of the controverted questions rather than that the court should attempt to decide the issues by a ruling on a preliminary injunction. The time for answering has not expired and neither defendant has answered.

In the field of equity jurisprudence one of the functions of the court is to interpose its power to prevent undue advantage being taken during litigation, and to maintain the *status quo* until all the essential facts can be properly determined and final judgment rendered. Hence we think the judgment of the court below in some respects goes beyond the scope of equitable jurisdiction and in effect tends to alter the position of the parties in relation to the litigation before all the pleadings have been filed.

Whether the plaintiff shall be permitted over the objection of the defendants to make physical connection with the Bridge Company's track and right of way in order to reach its spur track leading to the power plant is the ultimate question to be determined. The defendants

challenge the power of the court to issue a mandatory injunction which would determine the matter at this stage of the litigation.

The judgment appealed from is in the form of a restraining order or prohibitory injunction, but its effect is in some respects mandatory in that it requires the defendants to permit the plaintiff to make physical connection with the Bridge Company's tracks. The order restrains the defendants (1) from interfering with the construction by plaintiff of the turnout from the Bridge Company's main line at the point indicated; (2) from interfering with plaintiff's use of the telephone block system; (3) from interfering with plaintiff's use of the Bridge Company's tracks and right of way to reach and use the turnout, and defendants are required forthwith to permit the plaintiff to operate over the trackage of the Bridge Company in order to reach, construct, use and maintain the said turnout and the trackage constructed by plaintiff to connect therewith.

A temporary restraining order based on the verified allegations of the complaint may be issued at the time of the institution of a suit for the purpose of preventing the commission or continuance of some act which during the litigation would produce injury to the plaintiff or tend to render judgment in his favor ineffectual. G.S. 1-485. It is an ancillary remedy afforded by the courts of equity and authorized by statute for the purpose of preserving the *status quo* pending the action. *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Board of Trade v. Tobacco Co.,* 235 N.C. 737, 71 S.E. 2d 21; *Arey v. Lemons,* 232 N.C. 531, 61 S.E. 2d 596; *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143; *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80. It will issue to prevent an injury being committed or seriously threatened. *Wilcher v. Sharpe,* 236 N.C. 308, 72 S.E. 2d 662. In addition, a mandatory injunction may be issued to restore the status wrongfully disturbed. *Keys v. Alligood,* 178 N.C. 16, 100 S.E. 113; *Telephone Co. v. Telephone Co.,* 159 N.C. 9, 74 S.E. 636. In the last case cited preliminary injunction issued requiring restoration of a severed telephone connection. "It (a court of equity) may, by its mandate, compel the undoing of those acts that have been illegally done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts." 28 A.J. 211. The court may compel the restoration to the plaintiff of that which was wrongfully taken from him. *Lovett v. Gas Co.,* 65 W. Va. 739 (748). A mandatory injunction based on sufficient allegations of wrongful invasion of an apparent right may be issued to restore the original situation. Joyce on Injunctions, sec. 102. But a preliminary mandatory injunction on *ex parte* application should not be granted, except in case of apparent necessity for the purpose of restoring the *status quo* pending the litigation. 43 C.J.S. 412; *Warner Bros. Pictures v. Gittone,* 110 F. (2) 292; *Town of Leesville v. Kapotsky,* 168 La. 342.

In *Woolen Mills v. Land Co.,* 183 N.C. 511, 112 S.E. 24, the plaintiff's right of way into its premises was obstructed. The issuance of a preliminary mandatory injunction was affirmed. From the opinion of *Justice Adams,* written for the Court in that case, we quote: "When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case it is not necessary to await the final hearing. If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits, and the defendant compelled to undo what he has done." *Elder v. Barnes,* 219 N.C. 411, 14 S.E. 2d 249; *Davis v. Alexander,* 202 N.C. 130 (136), 162 S.E. 372; *Keys v. Alligood,* 178 N.C. 16, 100 S.E. 113. "As a rule such an order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable, and clearly established. . . . As a final decree in the case it would be issued as a writ to compel compliance in the nature of execution." McIntosh, sec. 851; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452. In *Bank v. Bank,* 194 N.C. 720, 140 S.E. 705, a mandatory injunction to carry into effect the final judgment on the merits was affirmed.

"The grant of a preliminary mandatory injunction is, of course, within the prerogative jurisdiction of courts of equity. The injunction is generally framed so as to restrain the defendant from permitting his previous act to operate, or to restore conditions that existed before the wrong complained of was committed." *Anderson v. Waynesville,* 203 N.C. 37 (46), 164 S.E. 583. Such preliminary injunctions are issued to preserve the *status quo* until upon final hearing the court may grant full relief, and are usually issued in cases where the defendant has proceeded knowingly in breach of contract or in willful disregard of an order of court. *Anderson v. Waynesville, supra; Keys v. Alligood, supra.*

The position of the plaintiff Seaboard is that under the facts alleged the Bridge Company is an inactive or passive trustee holding the legal title to the property for the joint benefit of the Seaboard and the Coast Line, and that, pursuant to agreement between the two, the Coast Line maintains and controls the property and operations over it for the benefit of each, with result that in law and equity a fiduciary relationship is imposed upon the Coast Line with respect to its co-owner and joint beneficiary. The plaintiff maintains that the Coast Line becomes the active trustee and as such should not be permitted to derive pecuniary benefit from its position, and should not be permitted to exclude the Seaboard from an opportunity to share in the profitable use of the jointly owned facilities. And further, it is contended that the Bridge Company as

holder of legal title to the property in trust should be required to permit the equal use of its facilities by both beneficiaries. In support of this view the plaintiff cites *Chicago N. & St. P. R. Co. v. Des Moines U. S. Co.*, 254 U.S. 196, and *Chicago N. & St. P. R. Co. v. Minneapolis C. & C. Asso.*, 247 U.S. 490.

If it be conceded, *arguendo*, that the circumstances here when fully developed may be such as to show a fiduciary relationship between the parties and to impose upon the defendants an obligation which would require consent to a reasonable request by one beneficiary with respect to the use of jointly controlled property, yet that question cannot properly be determined until all the parties have had opportunity to be heard.

It does not appear from the complaint that the defendants have committed any wrongful act injurious to the plaintiff's rights or property such as would justify the exercise of the power of a court of equity to remedy by mandatory injunction, or to require the restoration of a status formerly existing.

The gravamen of the plaintiff's complaint is that the defendants have refused to permit the plaintiff to make physical connection with the tracks of the Bridge Company so as to enable the plaintiff to use a spur track therefrom to serve a shipper. The position of the defendants is passive. They have merely refused to comply with the plaintiff's request. Apparently the action is not to restore what has been unlawfully changed, but to crate a new condition not theretofore existing; not to prevent a wrong but to obtain opportunity to exercise a right; not to prevent a disruption of existing service, but to create a new service.

Hence we think the order of the court below went beyond the scope of a temporary restraining order and in effect required the defendants to permit the Seaboard to enter upon the right of way and tracks of the Bridge Company for the purpose of constructing a turnout. This would determine by an interlocutory order the ultimate relief sought in this action in accordance with the prayer in plaintiff's complaint. *Moss Industries, Inc., v. Irving Metals Co., Inc.*, 140 N. J. Eq. 484; *Board of Trade v. Tobacco Co., supra.*

Reference was made in the complaint to a provision in the 1909 agreement between the operating railroad companies that questions and disputes between the parties should be submitted to arbitration, but as no request for arbitration had been filed the matter was not considered by the court below, and is not before us now.

It was stated in the briefs that it had been informally stipulated that the Bridge Company need not file any pleading in this case, but the Bridge Company is the legal owner of the property involved, and as such is a necessary party, and we think should answer.

For the reasons hereinbefore set out we conclude that the mandatory provisions of the restraining order were improvidently entered and the cause is remanded for trial on the issues raised by the pleadings.

Error.

LILLIAN KNITTING MILLS COMPANY v. T. B. EARLE, MRS. MARY B. EARLE AND SAM HOUSTON.

(Filed 30 January, 1953.)

1. Corporations § 7—

An officer or director of a corporation who makes no misrepresentations to a third person as to the financial worth of the corporation and is without knowledge of the making of such representations by any other officer or director, cannot be held liable in fraud for damage resulting to such third person in extending credit to the corporation upon the strength of misrepresentations made by any other officer or director. G.S. 55-56.

2. Same: Fraud § 11—

Plaintiff alleged that defendants, corporate officers and directors, made false and fraudulent statements as to the financial worth of the corporation as an inducement to plaintiff to extend credit to the corporation, and that thereafter defendants had the property of the corporation conveyed to them without payment of consideration in furtherance of their scheme to defraud the corporation's creditors. *Held:* Defendants are entitled to bring out in evidence the fact that one of the pieces of property in question had been reconveyed by the grantee defendant to the corporation.

3. Fraud § 1—

The basis for an action for fraud is a definite and specific representation which is materially false, made with knowledge of its falsity or in culpable ignorance thereof, with intent that it be relied upon, and which is reasonably relied upon by the other party to his damage.

4. Fraud § 12—

Evidence of misrepresentations made by defendants to a third person, of which plaintiff had no knowledge at the time, and which, therefore, could not have been relied on by plaintiff, is without probative force upon the issue of fraud.

5. Same: Corporations § 7—Evidence held insufficient to sustain allegations of fraud on part of corporate officers inducing plaintiff to extend credit to corporation.

This action was instituted by plaintiff against defendants, officers and directors of a corporation, alleging that defendants made false representations to plaintiff as to the financial status of the corporation, promised to advise plaintiff of any material change in the corporation's net worth, which they failed to do, all for the purpose of inducing plaintiff to extend credit to the corporation, which plaintiff did to its damage. *Held:* Upon failure of evidence as to the falsity of the statements made to plaintiff or

the failure of defendants to advise plaintiff of change in the financial status of the corporation or that the assets of the corporation turned over to the receiver were practically worthless as alleged, defendants' motion to nonsuit should have been allowed.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *McLean, Special Judge,* September Civil Term, 1952, of STANLY.

This is a civil action to recover damages resulting from the alleged false and fraudulent representations made by the defendants to induce the plaintiff to extend credit to the Earle Hosiery Corporation, hereinafter called Hosiery Corporation, which caused it to suffer loss.

This case was here on appeal from an order overruling a demurrer to the complaint at the Fall Term, 1950. We affirmed the ruling of the court below and the opinion is reported in 233 N.C. 74, 62 S.E. 2d 492.

The pertinent allegations in the plaintiff's complaint may be stated as follows:

1. That the defendants are citizens and residents of Mecklenburg County, North Carolina, and during the times hereinafter set out were the managing officers and directors of the Hosiery Corporation, a North Carolina corporation, which is now in receivership; that the defendant, T. B. Earle, was the president and treasurer of said corporation, the defendant, Mrs. Mary B. Earle, was the secretary of said corporation, and the defendant, Sam Houston, was the vice-president of such corporation; that the defendants constituted the entire board of directors of the corporation.

2. That the defendant, T. B. Earle, by and with the knowledge, consent and approval of his codefendants, in an endeavor to establish a line of credit with the plaintiff, submitted to the plaintiff by letter dated 7 January, 1949, a financial statement representing the same to be a true and accurate statement of the financial condition of the Hosiery Corporation as of 30 September, 1948.

3. That the plaintiff, relying on the accuracy of said statement, together with the oral representations made by the said T. B. Earle over the telephone and in person as to the financial condition of said Hosiery Corporation, established a line of credit to said Hosiery Corporation; that the said Hosiery Corporation is now indebted to the plaintiff in the sum of $8,373.24, together with interest thereon from 3 June, 1949.

4. That the defendants knew or should have known that the financial statement above referred to was incorrect, and grossly misrepresented the true financial condition of said Hosiery Corporation; that the item shown as an asset on said balance sheet in the amount of $72,543.54 and designated as "Inventories, Merchandise & Material," was grossly in

excess of the true value, and that the defendants well knew or should have known that the same was untrue, inaccurate and misleading; that the defendants knew or should have known that the item listed, "Real Estate, N. Davidson 'Appraised' $24,000.00" was not reasonably worth anything like that amount.

5. That three days after the balance sheet referred to was submitted to the plaintiff, a meeting of the directors of the Hosiery Corporation was held, and the N. Davidson Street property was sold to T. B. Earle for a consideration of $4,000.00; that this action on the part of said defendants was taken for the purpose of cheating and defrauding the plaintiff as well as other creditors of said Hosiery Corporation; and that the plaintiff is advised, informed and believes that the consideration of $4,000.00 was never paid to the Hosiery Corporation.

6. That on 29 April, 1949, the defendants, acting as directors of the Hosiery Corporation, held a special meeting and authorized the conveyance of another piece of real estate situate on Lexington Avenue in the City of Charlotte, to the defendants, T. B. Earle and wife, Mary B. Earle, for an undisclosed consideration; that the property consists of a house and lot which is occupied by the said T. B. Earle and wife, Mary B. Earle, and is reasonably worth $12,500.00; that the plaintiff is informed and believes that nothing was paid to the Hosiery Corporation for this property and that the conveyance was made by the defendants for the purpose of cheating and defrauding this plaintiff.

7. That the said defendants, knowingly and willfully misrepresented the net worth of said Hosiery Corporation for the purpose of showing a good credit picture, and in furtherance of a plan to obtain credit from this plaintiff; that on 31 July, 1946, the defendants filed with Dun & Bradstreet a financial statement showing a net worth of $55,486.35, and on 31 December, 1946, filed with the Federal Government a statement showing a net worth of $29,534.41; that on 30 August, 1947, they filed a statement with Dun & Bradstreet showing a net worth of $65,309.66, and on 31 December, 1947, filed a statement with the Federal Government showing a net worth of only $35,998.11; that on 31 May, 1948, they filed with Dun & Bradstreet a statement showing a net worth of $66,387.51, and on 31 December, 1948, they filed with the Federal Government a statement showing a net worth of only $17,348.91.

8. That on 7 January, 1949, when the defendants, by their false and fraudulent representations, established credit with the plaintiff for the said Hosiery Corporation, they represented to the plaintiff that they would keep it advised as to any change in the financial status of the said Hosiery Corporation; that the defendants continuously thereafter represented to the plaintiff that the Hosiery Corporation was in good financial condition and amply solvent; that the same were false, inaccurate and

untrue, and were made for the purpose of inducing the plaintiff to continue to extend credit to the said Hosiery Corporation when the said defendants knew or should have known that the Hosiery Corporation was insolvent.

9. That the plaintiff relied on the representations made to it by the defendants and extended credit to the said Hosiery Corporation, which is now in receivership, and which has turned over to its receiver assets practically of no value.

The defendants filed an answer in which all the material allegations with respect to fraud and deceit are denied. It is admitted that the Hosiery Corporation was placed in receivership on 14 December, 1949, and that O. W. Clayton was appointed receiver. The defendants in their further answer and defense, allege that on 25 March, 1950, the plaintiff filed a certified claim for $8,373.24 against the Hosiery Corporation with the receiver; that the receivership proceedings are still pending, and the receiver has not paid a dividend on the claim of the plaintiff or on any other claim filed by the creditors of said Hosiery Corporation; that the receiver of the Hosiery Corporation on 3 May, 1951, instituted an action in the Superior Court of Mecklenburg County against T. B. Earle, Mrs. Mary B. Earle, and Sam Houston, and others, to set aside the conveyance dated 12 January, 1949, from the Hosiery Corporation, conveying the N. Davidson Street property to T. B. Earle, and also to set aside a conveyance dated 1 May, 1948 (not 29 April, 1949, as alleged in the complaint), from the Hosiery Corporation to T. B. Earle and wife, Mary B. Earle, of a house and lot on Lexington Avenue in the City of Charlotte, and sets out and makes the pleadings, findings of fact, and the judgment in the receiver's suit, a part of their answer. The trial judge in the receiver's suit found the facts by consent of the parties and entered judgment on his findings. It is disclosed by this judgment that the court found as a fact with respect to the N. Davidson Street property that T. B. Earle paid to the Hosiery Corporation a full, complete and adequate consideration and that the price paid was the reasonable market value thereof; that as to the Lexington Avenue property it was found as a fact that T. B. Earle and wife, Mary B. Earle, borrowed $7,500.00 from a building and loan association and secured the amount by giving a deed of trust thereon; that the proceeds of the loan were paid to the Hosiery Corporation, but since the court could not determine whether T. B. Earle and wife paid the full consideration for this property they were directed to reconvey the property to the receiver of the Hosiery Corporation, subject to the outstanding loan.

A. L. Patterson, treasurer and general manager of the plaintiff, Lillian Knitting Mills Company, testified that he had a conversation with T. B. Earle, president of the Hosiery Corporation; that thereafter he received

a letter from the Hosiery Corporation dated 7 January, 1949, and a financial statement dated 30 September, 1948. The letter reads as follows:

"Gentlemen:

"As per our conversation several days ago, we are pleased to attach hereto a copy of our financial statement as of September 30, 1948. This, we believe, will serve your purpose and as soon as we have a new statement prepared, will be glad to send you a new copy.

"On this statement, you will note that our inventory is very heavy as we had loaded up for the anticipated fall business. We, however, are changing our method of operations and from now on our inventory will not be nearly as heavy as in the past due to this change of policy.

"As agreed with you, all invoices will be taken care of strictly within the 10 day period and we will endeavor to give you a detailed order twice a week to be shipped to us directly at Charlotte.

"Trusting that we will be able to do a volume of business with you, we remain,

Yours very truly,
EARLE HOSIERY CORPORATION
T. B. EARLE."

That the financial statement showed assets of $127,556.90, which included inventories of merchandise and materials of $72,543.54, and N. Davidson Street real estate at an appraised value of $24,000.00. The remaining assets consisted of cash in bank, accounts receivable, and the depreciated value of the plant. The liabilities were listed as accounts payable, $24,319.84; notes payable to bank, $33,500.00; capital stock, $10,000.00, and surplus, $59,737.06.

Mr. Patterson further testified that he relied on the financial statement and Mr. Earle's representations to him as president of Earle Hosiery Corporation in extending them credit.

It further appears from the plaintiff's evidence that from January, 1949, until, but not including, 13 May, 1949, the plaintiff shipped to the Hosiery Corporation merchandise invoiced in a total amount of $56,497.34 and received payment therefor in strict accordance with the original 10 day credit terms as confirmed in the letter hereinabove set out. But beginning with 13 May, 1949, and continuing until and including 3 June, 1949, the plaintiff shipped to the Hosiery Corporation eight shipments of merchandise, the aggregate value of which totaled $9,373.24. No payment was made for any of this merchandise until 15 July, 1949, when the Hosiery Corporation remitted the sum of $1,000.00 on account, leaving a balance of $8,373.24, which still remains unpaid and is the amount for which judgment was obtained in the trial below.

The evidence further discloses that four of the eight shipments of merchandise made by the plaintiff after 13 May, 1949, to the Hosiery Corporation, were made after the Hosiery Corporation had failed to remit within 10 days for the shipment invoiced on 13 May in accordance with the agreement upon which the original credit was extended. The value of the merchandise shipped after default totaled $7,622.85, being the major portion of the unpaid balance now due the plaintiff.

O. W. Clayton, receiver of the Hosiery Corporation, testified that according to the books of the Hosiery Corporation, the sum of $7,500.00 was credited to the Hosiery Corporation, being the proceeds of a loan secured by T. B. Earle from the Pyramid Life Insurance Company on the N. Davidson Street property. The receiver further stated that he had this property appraised twice, but did not state the value as determined by either appraisal. He also testified that the books of the Hosiery Corporation have entries which show that T. B. Earle advanced money to the Hosiery Corporation from time to time in the aggregate sum of approximately $15,000.00 and for which sum he did not file any claim against the corporation with him as receiver.

The trial judge refused to permit the receiver to testify on cross-examination with respect to the status of the Lexington Avenue property, to which refusal the defendants duly excepted. If permitted to testify, he would have stated that T. B. Earle and wife, Mary B. Earle, had conveyed the property to him as required by the judgment in the receiver's suit; that he had sold the property subject to the outstanding loan and was holding the proceeds from the sale, along with other assets, for distribution to the creditors of the Hosiery Corporation.

W. L. Hemphill testified that he was a certified public accountant; that in September, 1949, he went to the office of the Hosiery Corporation to make an audit for the creditors of the corporation; that in questioning Mr. Earle about the statements filed with Dun & Bradstreet referred to in the pleadings herein, and the discrepancies between the net worth shown on those statements and the net worth on the statements submitted to the Federal Government; that Mr. Earle stated to him that the difference came about by the overstatement of inventories on those submitted to Dun & Bradstreet; that "he wanted to show a better credit picture to his creditors." This witness also stated that he had the real estate described in the pleadings appraised, but did not disclose the result of the appraisal.

The defendants offered no evidence, and the court submitted the following issues to the jury which were answered as indicated.

"1. Did the defendants induce the plaintiff to extend credits to the Earle Hosiery Corporation by fraud and deceit as alleged in the complaint?

"Answer: Yes.

"2. What amount, if any is the plaintiff entitled to recover of the defendants?

"Answer: $8,373.24."

From the judgment entered on the verdict, the defendants appeal and assign error.

G. T. Carswell, Charles W. Bundy, and Richard M. Welling for defendants, appellants.

R. L. Smith & Son for plaintiff, appellee.

DENNY, J., after stating the case: The defendants assign as error the failure of the trial judge to sustain their motion for judgment as of nonsuit interposed at the close of the plaintiff's evidence, while the appellee relies solely on the case of *Solomon v. Bates,* 118 N.C. 311, 24 S.E. 478, and the principles of law applied therein with respect to the liability of bank directors, to sustain the verdict below.

In the case of *Solomon v. Bates, supra,* this Court, prior to the adoption of our comprehensive laws regulating banks, said, "Where the object of the suit is to charge the directors with liability for a breach of trust, the rule is well settled that relief may be had against any or all those who concurred in the wrong, the tort being treated as several as well as joint. . . . It is quite well settled that an action can be brought against the directors by the depositors and other creditors for damages caused by their gross mismanagement, neglect and false representations, and this without first applying to the corporation itself or to the receiver to bring such action. . . . But both as to third parties and stockholders alike it is a good cause of action against directors that they declare the dividend, as in this case, out of the capital stock or deposits of the bank, and not out of its earnings . . ., and also that they caused false reports to be published by the directors of the condition of the bank. . . . It is not necessary that the directors should know that such reports are false. It is their duty to know that they are true."

The general rule with respect to the liability of bank directors is not altogether applicable to officers and directors of a private corporation. It is said in 7 Am. Jur., Banks, section 316, page 227, *et seq.*, "It is now settled that the directors of a bank are personally liable, at the suit of a depositor, for damages sustained by reason of the insolvency of the corporation when the depositor is induced to place money in the bank solely by false representations of solvency made to the general public by the directors, who ought to have known, and who, by the use of ordinary care, such as it was their duty to have exercised, might have known, that such representations were false. A false report of the condition of the bank

made by the directors of a state bank to officials to whom such report is required to be furnished or a false advertisement published concerning the condition of the bank may give rise to an action against them in favor of persons making the deposits upon reliance of such a report or advertisement." This same authority, 13 Am. Jur., Corporations, section 1088, page 1020, states: "The cases are agreed that a director or officer of a corporation is not liable, merely because of his official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in it."

The law as stated by the above authority was applied by this Court in *Harper v. Supply Co.,* 184 N.C. 204, 114 S.E. 173, and the verdict sustained against all the directors of the defendant corporation where they had actually participated in the perpetration of the fraud. And also in *Mills v. Mills,* 230 N.C. 286, 52 S.E. 2d 915, where the president of the corporation had signed a bill of sale in which the items listed were at variance with the actual inventory of the merchandise supposed to be transferred thereby. See also *Brite v. Penny,* 157 N.C. 110, 72 S.E. 964.

Moreover, it is provided by G.S. 55-56, that in case of fraud by the officers, directors, managers, or stockholders of a corporation, "the court shall adjudge personally liable to creditors and others injured thereby the officers, directors, managers, and stockholders who were concerned in the fraud."

In this case there is no evidence to support the allegations in the complaint to the effect that Mrs. Mary B. Earle and Sam Houston participated in the negotiations that led to the establishment of a line of credit with the plaintiff. Or that they or either of them assured its officials thereafter that the Hosiery Corporation was solvent. Neither is there any evidence that they participated in the preparation of the financial statement furnished to the plaintiff or that they knew of its existence. There is no evidence on this record that Mrs. Mary B. Earle or Sam Houston ever communicated with any representative or official of the plaintiff at any time before or after 7 January, 1949.

Furthermore, the plaintiff's allegations as to fraud with respect to the conveyance of the N. Davidson Street property are not supported by the evidence. In fact, no loss to the Hosiery Corporation is established as a result of the transaction in connection therewith. According to the evidence, three separate appraisals were made of this property at the request of the receiver and Mr. Hemphill, the certified public accountant, but nowhere in the record is it revealed whether the appraisals were greater or less than the amount shown in the financial statement furnished the plaintiff, or the actual amount the Hosiery Corporation received therefor.

The evidence also reveals that the Lexington Avenue property was transferred 1 May, 1948, and not in April, 1949, as alleged in the complaint. It is further disclosed by the record that this property was not listed as an asset of the Hosiery Corporation in the financial statement as of 30 September, 1948, and furnished to the plaintiff on 7 January, 1949. However, since the plaintiff alleged in its complaint that the transfer of this property was made in April, 1949, for the purpose of cheating and defrauding the plaintiff, it was error to refuse to permit the receiver of the Hosiery Corporation to testify as to the status of the property at the time of the trial.

What are the facts with respect to T. B. Earle? Has the plaintiff established those essential elements of actionable fraud or deceit necessary to a recovery against him? We do not think so.

"The essential elements of actionable fraud or deceit are the representation, its falsity, *scienter,* deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss." *Electric Co. v. Morrison,* 194 N.C. 316, 139 S.E. 455; *Berwer v. Insurance Co.,* 214 N.C. 554, 200 S.E. 1; *Hill v. Snider,* 217 N.C. 437, 8 S.E. 2d 202; 37 C.J.S., Fraud, section 3, page 215.

The plaintiff alleges that on 7 January, 1949, when the defendants established credit with the plaintiff for the Hosiery Corporation, they represented to the plaintiff that they would keep it advised as to any change in the financial status of the Hosiery Corporation; that they continuously thereafter repeated to the plaintiff that the Hosiery Corporation was in good financial condition and amply solvent. No evidence whatever was offered in support of these allegations.

The plaintiff also alleges that in furtherance of defendants' plan to obtain credit from it, they furnished certain financial statements to Dun & Bradstreet in the years 1946, 1947, and 1948 in which the value of the inventories are overstated. The defendants admit in their answer that certain financial statements were furnished to Dun & Bradstreet but they deny that they knowingly or willfully misrepresented the net worth of the Hosiery Corporation. Conceding that Mr. Earle's statement with respect to the financial reports furnished to Dun & Bradstreet constitutes evidence of a fraudulent practice, there is no evidence that these reports played any part in the establishment of credit with the plaintiff. In fact, the evidence is to the effect that the information with respect to these statements was not obtained until Mr. Hemphill, the certified public accountant, was making his audit for the creditors of the Hosiery Corporation in September, 1949. Moreover, Mr. Patterson, the treasurer and

general manager of the plaintiff, testified that he relied on the financial statement (as of 30 September, 1948) and Mr. Earle's representations to him as president of the Hosiery Corporation in extending them credit.

It is alleged in the complaint that the amount of $72,543.54 designated in the financial statement furnished plaintiff as "Inventories, Merchandise & Material," was grossly in excess of the true value. However, no evidence was offered in support of this allegation.

It is further alleged in the complaint that the assets of the Hosiery Corporation turned over to its receiver are practically of no value. The plaintiff offered no evidence in support of this allegation. The value of the assets turned over to the receiver by the Hosiery Corporation, the amount of the claims against the corporation filed with the receiver, and whether the Hosiery Corporation is solvent or insolvent cannot be ascertained from the evidence offered in the trial below.

A creditor of a corporation in order to recover his claim against an officer or director of a corporation for fraud or deceit, must show more than an unpaid claim against the corporation. The creditor must establish an actual loss flowing from the fraudulent misrepresentations of such officer or director. "Fraud without damage or damage without fraud is not actionable; but, where both concur, an action lies." 37 C.J.S., Fraud, section 3, page 215.

We do not think the evidence adduced in the trial below is sufficient to support a verdict for fraud or deceit. Hence, the failure of the court below to sustain the defendants' motion for judgment as of nonsuit is

Reversed.

PARKER, J., took no part in the consideration or decision of this case.

RUTH KARPF v. W. B. ADAMS AND F. C. TATE, TRADING UNDER THE FIRM NAME OF ADAMS & TATE CONSTRUCTION COMPANY, AND ABE M. NOBER,

and

B. H. RUNYON v. W. B. ADAMS AND F. C. TATE, TRADING UNDER THE FIRM NAME OF ADAMS & TATE CONSTRUCTION COMPANY AND ABE M. NOBER.

(Filed 30 January, 1953.)

1. Appeal and Error § 29—

Exceptive assignments of error not brought forward in the brief, as well as those brought forward in the brief but in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court 28.

2. Highways § 4b—

Conflicting evidence as to whether defendant construction company erected reasonable warning signs at a particularly dangerous place along a highway under construction *held* to require the submission of the issue of negligence to the jury.

3. Trial § 23a—

Conflicts in the testimony are for the jury and not for the court.

4. Jury § 4—

In examining prospective jurors, counsel have the right to ask questions seeking to elicit information which would show bias or prompt counsel to exercise their right of challenge, but the court should carefully supervise such interrogation in the exercise of a sound discretion.

5. Same: Trial § 48—

Counsel, in interrogating prospective jurors, stated that the accident in suit was one of a series of eleven accidents at the place in question. The trial court, upon objection and motion for new trial by opposing counsel, immediately cautioned the prospective jurors not to consider any reference to any accident other than the one in suit. *Held:* The court removed the prejudicial effect of any impropriety, and the denial of motion for new trial was proper.

6. Evidence § 26: Negligence § 18—

As a general rule, evidence of other accidents or occurrences is not competent and should not be admitted.

7. Same: Highways § 4b—Evidence of other accidents at the place in question held competent to show the dangerous condition or character of the place of injury.

Plaintiffs' evidence was to the effect that the car which struck them slowed to fifteen or twenty miles per hour before entering upon that part of the highway under construction that was covered with a binder, that the car immediately went out of control and skidded to the side of the road where it struck both plaintiffs. *Held:* Evidence of similar accidents which occurred on the same morning under approximately the same circumstances at the same place was competent for the purpose of showing the dangerous condition or character of the place of injury.

8. Appeal and Error § 6b—

Objection and exception to a contention not supported by the evidence should be taken at the time such contention is asserted, and when the court does not submit such contention to the jury, objection thereto cannot be raised by an exception to an excerpt from the charge in which the court, at the instance of appellant, cautions the jury that there was no evidence to support the contention.

9. Appeal and Error § 6c (6)—

Where a party is not satisfied with the statement by the court of his contention that there was no evidence to support a contention of the adverse party, he should request further instructions on the point at the time.

10. Appeal and Error § 6c (5)—

An exception to an excerpt from the charge does not ordinarily challenge the omission of the court to charge further on the same aspect of the case.

11. Highways § 4b: Negligence § 21—Evidence held not to require submission of issue of primary and secondary liability.

The evidence disclosed that plaintiffs were struck by a car driven by one defendant which, though being driven at not more than twenty miles per hour, went out of control and skidded immediately it was driven upon an oil binder placed upon the highway under construction by the other defendant. *Held:* If the driver of the car was guilty of negligence he was a joint tort-feasor, and the question of his liability was properly presented to the jury under the issue of concurring negligence of defendants, and the evidence did not require the submission of an issue as to primary and secondary liability.

12. Same: Negligence § 19a—Evidence held not to require submission of issue of insulating negligence.

The evidence disclosed that plaintiffs were struck by a car driven by one defendant which, though being driven at not more than twenty miles per hour, went out of control and skidded immediately it was driven upon an oil binder placed upon the highway under construction by the other defendant. *Held:* Whether the negligence of the driver of the car insulated the negligence of the construction company is not an issue of fact but a question of fact directed to the question of proximate cause, which was properly submitted to the jury under the issue of concurring negligence of defendants, and the refusal of the court to submit an issue as to insulating negligence is not error.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant Construction Company from *Carr, J.*, February Term, 1952, HARNETT.

Two civil actions to recover compensation for personal injuries sustained by plaintiffs when struck by an automobile operated by defendant Nober, consolidated for the purpose of trial.

In March 1951, defendants Adams & Tate Construction Company, a copartnership, hereinafter referred to as the Construction Company, were engaged in resurfacing a part of U. S. Highway 301 in the area of Godwin, N. C. To a point about 500 yards south of Godwin, a top layer of asphalt had been laid on both sides of the highway. From that point south on the western side only, the tack coat—a binder between the asphalt and the lower layer of the road—had been put or poured when the construction force stopped work at noon on Saturday, 17 March. This tack coat consists of an oily substance and is very slippery when wet. The asphalt coat or layer is one and one-half inches or more thick so that the west side of the road was one and one-half inches lower than the completed east side. It rained during that week end and was raining in the

early morning of 19 March so that a portion of the road having the exposed tack coat was wet and very slippery.

Between 6:00 and 7:00 a.m. on Monday morning, 19 March 1951, plaintiff Karpf and her husband were traveling south on Highway 301. When they reached the one and one-half inch drop-off to the exposed tack coat layer of the highway about 500 yards south of Godwin and drove onto the slick surface thereof, their automobile skidded, went into a spin, and came to rest in the road ditch on the opposite, or eastern, side of the highway, and was headed back north. Plaintiff's husband was operating the automobile at about 15 or 20 m.p.h. at the time he reached and entered on the incomplete tack-coat portion of the road.

The vehicle could not be driven out of the ditch under its own power. Other motorists stopped. Plaintiff Runyon, traveling north, drove by the stalled vehicle, stopped, and walked back on the left shoulder to lend assistance. A motorist with a truck passed the Karpf vehicle and backed up to the front thereof preparatory to attaching a chain to pull it out of the ditch. While the parties were so engaged, defendant Nober approached the scene from the north. When he entered on the unfinished, oily west half of the highway, traveling 15 or 20 m.p.h., his vehicle skidded across the highway and struck both Mrs. Karpf and plaintiff Runyon. Mrs. Karpf, at the time, was standing near the rear wheel of her car, and Runyon was within about ten feet thereof. Mrs. Karpf was critically and permanently injured. Her pelvis was badly fractured and a part thereof, including the bony canal through which birth takes place, was left in a "detached and dislocated condition." There were other serious injuries it is unnecessary to detail. Runyon suffered a comminuted fracture of his right clavicle and several ribs, damage to his lungs, and other injuries.

The plaintiffs offered evidence tending to show there was a sign about one and one-half miles north of Godwin reading "Road under Construction," and that there were no other warning signs from that point to the place the slippery, oily section of the highway was left exposed about 500 yards south of Godwin; that there were no signs on or near the place the road was then actually under construction; that the incomplete, slippery section was not protected by a barricade or other device; and there was nothing to warn a motorist of the danger.

After the Karpf vehicle and the Nober vehicle had skidded and spun into the ditch, an ambulance which had been called to take the injured parties to the hospital approached the scene. When the operator came in sight of the wreck, he slowed down to about fifteen miles per hour and when the ambulance "struck the oil" it "went into a spin, turned around about twice right there on top of the highway" and when it stopped it "was right even with the Karpf car." The operator testified that just as

soon as he got on the oily surface and touched his brakes, the ambulance went into a spin. He likewise testified that he saw no signs or other warnings.

One McClellan likewise testified that about 5:45 on the morning of 19 March he passed through Godwin, going south, and that "when he hit the oil, he began to slip," and his vehicle "went into a spin and came to rest on the lefthand side of the road, going south, over in a ditch, turned up, bottom up; in other words, sideways, on the ground." He was traveling about 25 m.p.h.

The Construction Company in its answer admits that (1) they were engaged in the "reconstruction" of the section Highway 301 in question; (2) "there was a part of the west side of the road several hundred feet long that had been treated with an asphalt primer when the work suspended on Saturday afternoon 17 March 1951, which had to dry out before putting on the top layer of asphalt;" and (3) "the asphalt primer was slippery, especially when wet." Its evidence was to like effect. However, its testimony in respect to warning signs and the diligence it had exercised to give the motoring public notice of the condition of the road was in sharp conflict with that offered by plaintiff. It offered evidence tending to show that signs were placed at about 100-foot intervals on the west shoulder of the highway both north and south of the point of the accident reading: "SLIPPERY WHEN WET," "ONE WAY TRAFFIC," "SLOW TO 15 MPH.," and "WET OIL." Its evidence discloses that the tack coat can be covered immediately after it is put down but that on this occasion it had been on the highway in an exposed condition "two or three days."

Nober pleaded a cross action against the Construction Company and the Construction Company pleaded sole negligence, primary negligence, and joint tort-feasorship of Nober.

At the conclusion of plaintiffs' evidence in chief, Nober's motion for judgment of nonsuit was sustained. At the conclusion of the evidence Nober suffered a voluntary nonsuit on his cross action against the Construction Company. The motions for judgment of nonsuit duly entered by the Construction Company were denied.

In each case the court submitted issues of negligence, contributory negligence, and damages on the cause of action alleged against the Construction Company. It likewise submitted, in the *Karpf case,* a fourth issue as follows:

"4. Was the plaintiff, Ruth Karpf, injured by the concurring negligence of the defendants Adams & Tate Construction Company, and the defendant Abe Nober, as alleged in the cross-action of the defendant Adams & Tate Construction Company?"

An identical issue was submitted in the *Runyon case.*

In each case the jury answered the first issue "yes" and the second and fourth issues "no." It awarded damages in the *Karpf case* in the sum of $55,000 and in the *Runyon case* in the sum of $20,000. Defendant Construction Company moved to set aside the verdict and for a new trial for that the damages awarded were excessive. By consent the motion was continued to be heard out of term and out of the county. At the hearing on the motion the court, by and with the consent of the plaintiffs, reduced the award of damages to $30,000 in the *Karpf case* and to $11,000 in the *Runyon case.* Judgments were duly entered on the verdicts rendered as thus amended and defendant Construction Company excepted and appealed.

Everette L. Doffermyre and Wilson & Johnson for plaintiff appellees.
Neill McK. Salmon and Robert H. Dye for defendant appellants.
James MacRae for defendant Nober, appellee.

BARNHILL, J. There are twenty-nine exceptive assignments of error in the record. Those not brought forward and discussed in appellant's brief are deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562; *S. v. Avery,* 236 N.C. 276; *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324; *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217.

There are other assignments of error which are brought forward in the brief "in support of which no reason or argument is stated or authority cited." To these Rule 28, *supra,* likewise applies.

The evidence offered by plaintiffs clearly required the submission of issues to the jury. The conflicts of testimony were for the twelve, and not the court, to consider in finding the facts. *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551; *Gold v. Kiker,* 216 N.C. 511, 5 S.E. 2d 548; *Hughes v. Lassiter,* 193 N.C. 651, 137 S.E. 806; *Furlough v. Highway Commission,* 195 N.C. 365, 142 S.E. 230.

During the selection of the jury, counsel for defendant Nober stated to the jury that this was one of a series of accidents of which there were eleven. Appellant immediately objected and moved for a new trial. Thereupon, the presiding judge carefully and fully cautioned the prospective jurors that they should not permit the remark of counsel to influence their decision in these cases if they should be chosen as jurors, which caution was in part as follows: "The counsel are now determining whether or not you will be accepted as jurors to try a case in which there are two plaintiffs involved, and it has been stated to the Court at the outset that these two plaintiffs were injured in the same accident, and at the same time, and they are the injuries that the plaintiffs are suing for here, which is conceded arose out of the same transaction, the same time,

and you will not consider any reference to any other accident at or about the same place, or time; you will disregard that and do not permit it in any way to influence any verdict that you might render in these cases, if you should be chosen as a juror."

Having so cautioned the prospective jurors, the court denied the motion and appellant excepted. In this ruling we can perceive no substantial error.

When prospective jurors are being questioned by counsel in the selection of a jury to try a pending action, it is essential that they be informed as to the nature and purpose of the cause to the end that counsel may ascertain whether they, or any one of them, have information, or have formed an opinion, which might disqualify them or prompt counsel to exercise their right of challenge. At times this necessitates the statement of facts which may, at least on the surface, appear to be prejudicial to the adversary parties. Even so, it is a necessary preliminary part of a trial by jury.

While the exercise of the right to seek this type of information rests largely in the discretion of the trial judge and should be carefully supervised by him, we perceive no abuse of discretion or invasion of rights of the appellant here.

Perhaps in giving the number of accidents which had occurred at the same place, counsel inadvertently exceeded the bounds of propriety. If so, the very careful caution of the judge was sufficient to remove any prejudicial effect thereof.

In this connection we may note that counsel for appellant, if they desired, had the right to examine the jurors concerning the impression the remark had made on their minds. Yet the record fails to disclose that they challenged or attempted to challenge any juror by reason thereof.

The evidence of similar accidents which happened on the morning of 19 March under approximately the same circumstances at the place where plaintiffs were injured was admitted over the objection and exception of appellant. The assignments of error directed to these exceptions afford no grounds for a new trial.

As a general rule, evidence of other accidents or occurrences is not competent and should not be admitted. 20 A.J. 278. But there are clearly defined and well-recognized exceptions to this rule.

Evidence of other similar accidents or injuries at or near the same place and at approximately the same time, suffered by persons other than the plaintiff, are competent: "(1) To show the existence of a defective or dangerous condition . . . and the dangerous character of the place of injury . . ." 20 A.J. 282; Anno. 65 A.L.R. 380; 81 A.L.R. 686; *Alcott v. Public Service Corp.*, 74 A. 499; *Lebanon v. Graves*, 199 S.W. 1064; *Texas & P. R. Co. v. Watson*, 190 U.S. 287, 47 L. Ed. 1057.

"Evidence of similar occurrences is admitted where it appears that all the essential physical conditions on the two occasions were identical; for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to a matter which cannot reasonably be expected to have affected the result." *Perry v. Bottling Co.*, 196 N.C. 690, 146 S.E. 805; 196 N.C. 175, 145 S.E. 14; *Broadway v. Grimes*, 204 N.C. 623, 169 S.E. 194. The relevancy of this testimony is based upon the ground that the conditions and circumstances were substantially the same and the occurrences were separated only by a very brief interval of time. *Conrad v. Shuford*, 174 N.C. 719, 94 S.E. 424; *Pickett v. R. R.*, 200 N.C. 750, 158 S.E. 398; *Etheridge v. R. R.*, 206 N.C. 657, 175 S.E. 124.

The appellant assigns as error the following excerpt from the charge of the court:

"The defendant Construction Company calls attention to the fact that there has been some suggestion in respect to her loss of capacity to bear children, and her loss of capacity to have sexual relations; some reference has been made,—some contention has been made as to that, but the defendant Construction Company contends that no definite evidence as to that has been admitted by the court as competent evidence; that no doctor has testified to that effect, and that there is no definite evidence that the jury should consider indicating that she has been affected in that way, and that such contention arises upon no evidence that has been declared competent by the court in this case, and no doctor has given an opinion that she is handicapped and is not capable of having sex relations, or having children. The defendant Construction Company contends and insists that you should take that into consideration and find that contention is not founded upon evidence."

The exception is untenable.

Since the court below gave no such contention in behalf of Mrs. Karpf, we are not now required to say whether there is sufficient evidence to support a legitimate contention that the injuries she received are of such nature as to render her incapable of normal sex relations or of bearing children. It does not appear when or under what circumstances or by whom the contention was made. In any event, that was the time for the defendant to take notice thereof, except, and request a proper caution to the jury. Even if we concede there is some merit in the exception, it came too late.

Furthermore, it appears that it was the defendant who specifically called the matter to the attention of the court during the charge to the jury. If it desired further instruction as to the sufficiency of the evidence

to support the contention and thus to raise a question of law for this Court to decide, it should have so requested at the time.

Moreover, the defendant does not challenge the correctness of the contention as given by the court. Its challenge is bottomed upon the argument that the court should have further charged there was no evidence to support the contention made by plaintiff. But an exception to what the judge did say does not, ordinarily, challenge its omission to charge further on the same aspect of the case. *S. v. Jones,* 227 N.C. 402, 42 S.E. 2d 465, and cases cited.

While appellant in its answer asserts that defendant Nober was and is primarily liable for any injuries suffered by plaintiffs, there is no evidence in the record which necessitated the submission of the issue based on this allegation tendered by the appellant. The jury has exculpated Nober. However, even if we concede that he was likewise guilty of negligence which was one of the proximate causes of the injuries sustained by plaintiffs, then he was a joint tort-feasor and liable as such. The fourth issue submitted adequately presented this phase of the case.

The appellant likewise tendered in each case an issue as follows:

"Was the negligence of the defendant Adams & Tate Construction Company insulated by the negligence of defendant Nober, as alleged in the answer of the defendant Adams & Tate Construction Company?"

Whether the independent negligent action of another insulates the negligence of a defendant in an action such as this is not an issue of fact. It is a question of fact directed to the question of proximate cause which, in turn, is an essential element of actionable negligence. *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197. Whether plaintiffs' injuries were proximately caused by the negligence of the defendant is the real and only issue which should not be dissected into questions directed—affirmatively or negatively—merely to its constituent elements. It follows that there was no error in the refusal of the court to submit the issue tendered.

We have carefully examined the other exceptive assignments of error brought forward and discussed in appellant's brief. None of them present any new or novel question of law or possess sufficient merit to require discussion. The appellant has had a fair trial. The judge has substantially reduced the awards made by the jury. It must abide the result.

We pause to note that the statement by this Court from time to time that exceptions are untenable or are without sufficient merit to require discussion or the like constitutes no criticism of or reflection upon counsel in the case. The diligence of attorneys prosecuting appeals to this Court in pointing out and calling to our attention rulings of the court below which may have unduly or improperly influenced the verdict rendered and the resulting careful examination thereof we are required to make in the light of the record as a whole constitute one of the great safeguards

our judicial system provides to assure fair and impartial trials for all litigants.

In the trial below we find

No error.

PARKER, J., took no part in the consideration or decision of this case.

JEREMIAH NEWKIRK v. HUGH PORTER, HENRY NEWTON, HANNAH NEWTON CARR, ELIZABETH HIGHSMITH, HATTIE STRINGFIELD, CALLIE NEWKIRK, ROSA NEWKIRK, HATTIE BEATTY, WALTER HIGHSMITH, HAYES NEWTON, CARRIE HERRING, HATTIE NEWTON HIGHSMITH, GENEVA HENDERSON, WILLIE HERRING, AND ANNIE TODD.

(Filed 30 January, 1953.)

1. Adverse Possession § 1—

Adverse possession for seven years under color of title, G.S. 1-38, or for twenty years without color of title, G.S. 1-40, ripens title in the possessor.

2. Adverse Possession § 3—

Adverse possession sufficient to ripen title in the possessor must be actual, open, visible, notorious, continuous and hostile to the true owner's title and to all persons for the full statutory period.

3. Adverse Possession § 6—

Claimant's possession must be continuous and uninterrupted for the full statutory period in order to ripen title in him, since if there is a break in his possession, the constructive possession of the true owner interferes and destroys the effectiveness of the prior possession.

4. Adverse Possession § 7—

The requirement of continuity of possession does not mean that one person must be in possession for the full statutory period, since the possessor may tack his possession with the possession of any person or persons with whom he is in privity, including the possession of his grantor when the deed embraces the property in dispute, or the possession of his ancestor from whom his title is cast.

5. Same—

Where the description in the grantee's deed does not embrace the land in dispute, the grantee ordinarily is not entitled to tack the possession of his grantor, since in such instance the grantee's possession is generally independent of the deed and is adverse to his grantor as well as all other persons.

6. Boundaries § 3b—

Where the calls in a deed are inconsistent, the general rule is that natural objects and monuments control courses and distances, and ordi-

narily another's line, when called for and if known and established, is a monument within the meaning of the rule.

7. Adverse Possession §§ 6, 7—Where trustee's deed is chain in claimant's title, failure of evidence of conveyance to trustee creates hiatus.

Plaintiff offered in evidence a deed to his father registered more than twenty years prior to the institution of the action, and trustee's deed to the purchaser at foreclosure, executed less than seven years prior to the institution of the action, and deed from such purchaser to plaintiff. *Held:* The failure of evidence of a transfer of the legal title by plaintiff's father to the trustee creates a *hiatus*, so that the evidence establishes continuity of possession only from the date of the execution of the trustee's deed, which, being less than seven years, is insufficient to be submitted to the jury either upon a claim of adverse possession for twenty years or for seven years under color.

8. Adverse Possession § 7—

Plaintiff may not assert that title by adverse possession acquired by his father prior to his death passed to plaintiff under deeds from a trustee in a deed of trust when plaintiff introduces no evidence of conveyance of the legal title by his father to the trustee. Further, in this case, the record failed to disclose on what date plaintiff's father died, and therefore failed to fix the duration of the father's possession.

9. Appeal and Error § 8—

An appeal will be determined in accordance with the theory of trial, and therefore where the case is tried upon the theory of adverse possession, the cause may not be retained on the theory of a processioning proceeding.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Morris, J.*, March Term, 1952, of PENDER.

Civil action between adjoining landowners involving claim of title by adverse possession. In dispute is a strip of land about 224 feet wide lying between the location of the dividing line as contended by the plaintiff and its location as contended by the defendants. The strip in dispute extends in a straight east-west course for more than a mile and contains about 30 acres.

The main body of the plaintiff's land, a tract of "101.7 acres, more or less," lies north of the disputed area; the defendants' tract of "121 acres, more or less" lies to the south.

The plaintiff claims under or in connection with these deeds which describe by metes and bounds the 101.7-acre tract: (1) deed of H. B. S. Garriss and another to W. M. Gurganous dated 7 January, 1884, filed for registration 28 December, 1885; (2) deed made by W. M. Gurganous and wife to J. M. Newkirk (father of the plaintiff) dated 16 August, 1910, filed for registration 18 August, 1910; (3) deed made by W. T. Wallace, Trustee, to C. L. Carter and William Brice, dated 3 December, 1942, filed for registration 10 December, 1942; and (4) deed made by C. L. Carter

and wife and W. M. Brice and wife to Jeremiah Newkirk and wife, Mazie Newkirk, dated ..... October, 1943, filed for registration 4 October, 1943. In connection with the foregoing record title the plaintiff testified that W. T. Wallace and Carter and Brice "both owned the land since my father died. They had a note on it and . . . a mortgage on it. . . . My daddy did not sell it to me, but Mr. Carter did."

The defendants claim title to the 121-acre tract as heirs at law of Edmond Newton, who died in 1907. They offered in evidence the following unbroken paper title running back to 1850: (1) deed made by Mary Shaw to Elizabeth Innis, dated 26 September, 1850, filed 28 January, 1891, with the north-boundary call being as follows: "Beginning at a water oak in the Creek; running thence E 330 poles to a stake in the back line; . . ."; (2) deed of Elizabeth Innis and another to Edmond Newton dated 19 June, 1871, filed 17 September, 1889, with the north-boundary call being as follows: "Beginning at a red oak near the run of Moore's Creek, running N. 88 W. 375 poles to a stake in the back line; . . ." The evidence in connection with the court survey and map thereof tends to show that the northern boundary, according to defendants' contention, has a fixed terminus on Moore's Creek "at a red oak now down," and runs thence S. 86 E. 6,187 feet to its eastern terminus.

Here it is to be noted (1) that the defendants hold under the senior record title and (2) that the plaintiff's deed calls for the defendants' line as the boundary between the two tracts of land.

It also appears from the court survey and map thereof that when the courses and distances set out in the plaintiff's deed are run out on the ground, the plaintiff's north-south lines extend across the entire breadth of the defendants' tract and even beyond its outermost southern boundary, so as to envelop all the defendants' tract except a small corner consisting of a few acres on the eastern end thereof.

However, the plaintiff made no contention that his land swallowed up the defendants' as indicated by the course and distance calls in his deed. The evidence discloses that prior to and at the time of the survey the plaintiff contended that the true dividing line was located about 224 feet south of and parallel to the location as contended by the defendants. As to the location on the ground of the line which the plaintiff contends is the true dividing line, his surveyor, Henry G. Vann, testified that in running the line he started at the western terminus on Moore's Creek near a big water oak that was marked, ". . . it had been marked several times, blazed for some purpose." From this beginning point on the Creek, the line was run south 86 E 138 feet to the white oak (which was treated as a line tree and used for the purpose of fixing the western terminus on Moore's Creek) and continuing the same course an over-all distance of 6,187 feet to a point where the distance in the deed "gave out." The entire distance

of this line is through uncleared woodland, and after passing the white oak which is located 138 feet east of the western teminus of the line on Moore's Creek, no other marks were found along the line for a distance of approximately 5,000 feet (except perhaps a stump), and then two or three marked gums were picked up. As to this, surveyor Vann said: "5,000 feet East of Moore's Creek there was a branch holly and big gums, and there was a very plainly marked line through those gums when I got over away from the branch east."

Early in the trial the plaintiff conceded in response to an inquiry of the court that his claim of ownership in the disputed area is based on adverse possession, and in the brief filed here on appeal the plaintiff states that his claim of ownership of the disputed area "is based on adverse possession for more than 20 years."

This action was instituted 9 November, 1949.

The plaintiff offered evidence tending to show that his father and his father's grantor, W. M. Gurganous, for more than 40 years claimed the land up to the line as contended by the plaintiff; that the defendants' ancestor, Edmond Newton, treated it as the dividing line; that the main cleared portion of plaintiff's land near the western end of plaintiff's tract extends down into and reaches about two-thirds the distance across the disputed area, embracing a small acreage thereof; that this land was cleared by W. M. Gurganous and has been cultivated some 40 years by the plaintiff, his father (J. M. Newkirk), and W. M. Gurganous; that a tobacco barn is located on the disputed area and a dwelling house partially thereon; that the barn was built during the period his father claimed ownership, more than 20 years prior to the commencement of this action, and the dwelling by the plaintiff some 10 or 15 years ago.

Other evidence of possession of the disputed area—principally the small cleared portion thereof—on the part of the plaintiff and some of his predecessors in title is omitted as not being pertinent to decision in view of the theory of the trial below.

The defendants' 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.

Rountree & Rountree and Wyatt E. Blake for plaintiff, appellant.

Moore & Corbett for defendants, appellees.

JOHNSON, J. The single question presented by this appeal is whether the plaintiff made out a *prima facie* case of title by adverse possession to the disputed strip of land.

In this jurisdiction title to land may be acquired by the requisite acts of adverse possession (1) under color of title for a period of 7 years, G.S. 1-38, or (2) under claim of right, without color of title, for a period of 20 years, G.S. 1-40. See 1 Am. Jur., Adverse Possession, Section 185.

In either case, in order to bar the true owner of land from recovering it from an occupant in adverse possession, the possession relied on must have been actual, open, visible, notorious, continuous, and hostile to the true owner's title and to all persons for the full statutory period. *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347. See also these cases in which the elements of title by adverse possession are specifically treated: *Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851; *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Battle v. Battle,* 235 N.C. 499, 70 S.E. 2d 492; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Gibson v. Dudley,* 233 N.C. 255, 63 S.E. 2d 630; *Wallin v. Rice,* 232 N.C. 371, 61 S.E. 2d 82; *Ramsey v. Nebel,* 226 N.C. 590, 39 S.E. 2d 616; *Alexander v. Cedar Works,* 177 N.C. 137, 98 S.E. 312; *May v. Mfg. & Trading Co.,* 164 N.C. 262, 80 S.E. 380.

Continuity of possession being one of the essential elements of adverse possession, in order that title may be ripened thereby, such possession must be shown to have been continuous and uninterrupted for the full statutory period. *Perry v. Alford,* 225 N.C. 146, 33 S.E. 2d 665; *Ward v. Herrin,* 49 N.C. 23; *Holdfast v. Shepard,* 28 N.C. 361; 1 Am. Jur., Adverse Possession, Sec. 148. This for the reason that if the possession of the adverse claimant be broken, the constructive possession of the true owner intervenes and destroys the effectiveness of the prior possession. *Hayes v. Lumber Co.,* 180 N.C. 252, 104 S.E. 527; *Williams v. Wallace,* 78 N.C. 354; *Malloy v. Bruden,* 86 N.C. 251.

However, in order to fulfill the requirements as to continuity of possession, it is not necessary that an adverse possession be maintained for the entire statutory period by one person. Continuity may be shown by the tacking of successive possessions of two or more persons between whom the requisite privity exists. 1 Am. Jur., Adverse Possession, Sec. 151. And, as stated by *Hoke, J.,* in *Vanderbilt v. Chapman,* 172 N.C. 809 (812), 90 S.E. 993, "The privity referred to is only that of possession and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves." See also *Johnston v. Case,* 131 N.C. 491, 42 S.E. 957; Mordecai's Law Lectures, Second Ed., p. 688; Anno.: 17 A.L.R. 1128.

Accordingly, a grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title, may tack his grantor's possession of such land to that of his own for the purpose of

establishing adverse possession for the requisite statutory period. *Vanderbilt v. Chapman, supra.*

Similarly, the adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. *Vanderbilt v. Chapman, supra; Barrett v. Brewer,* 153 N.C. 547, 69 S.E. 614; Mordecai's Law Lectures, Second Ed., p. 688. See also *Jacobs v. Williams,* 173 N.C. 276, 91 S.E. 951; *Land Company v. Floyd,* 167 N.C. 686, 83 S.E. 687; 1 Am. Jur., Adverse Possession, Sec. 153.

But the rule with us is that a deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed. *Boyce v. White,* 227 N.C. 640, 44 S.E. 2d 49; *Blackstock v. Cole,* 51 N.C. 560. See also *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79; *Ramsey v. Ramsey,* 229 N.C. 270, 49 S.E. 2d 476; 1 Am. Jur., Adverse Possession, Sec. 156; Anno.: 17 A.L.R. 2d 1128. Nothing else appearing, the mere noninclusion of the disputed area in the description raises the inference that the grantee claimed it independently and began a holding which was adverse to the grantor as well as to other persons. *Blackstock v. Cole, supra.*

Also, where the calls for location of boundaries to land are inconsistent, the general rule is that natural objects and artificial monuments control courses and distances. *Nash v. Wilmington and W. R. Co.,* 67 N.C. 413, 418. And in this connection, another's line called for, if known and established, is usually treated as a monument. *Jennings v. White,* 139 N.C. 23, 51 S.E. 799; Mordecai's Law Lectures, Second Ed., p. 814; 8 Am. Jur., Boundaries, Sections 4, 51, and 56.

In the case at hand it is observed that the defendants have the senior record title, and that the plaintiff's deed calls for the defendants' northern boundary as the dividing line between the two tracts. Also, the defendants' evidence tends to give their northern boundary a fixed location on the ground at about where they contend it is located.

The situation presented by these factors no doubt prompted the plaintiff to concede in the court below, and stipulate in brief on appeal, that his claim of ownership of the disputed area is based on adverse possession. This concession in the light of the circumstances under which it was made would seem to support the conclusion that the plaintiff intended thereby to concede that the disputed area is not covered by the description appearing in his deed, and that he intended to claim title thereto by adverse possession based on the theory that he and his predecessors in title, including his father, have occupied the undescribed disputed area in connection with the land actually described in the paper title for more than 20 years.

As to this, however, nothing else having been made to appear, the transfers *sub silento* made by W. T. Wallace, Trustee, to Carter & Brice, and by the latter to the plaintiff, appear to be insufficient on the record as presented to permit the tacking of the possession of the plaintiff's father to that of his own with respect to the undescribed disputed area (*Blackstock v. Cole, supra;* Annotation: 17 A.L.R. 2d 1128, p. 1160), and particularly is this so in view of the fact that the plaintiff's record title to the 101.7-acre tract as offered in evidence shows no conveyance from the plaintiff's father, J. M. Newkirk, to W. T. Wallace, Trustee. Thus, in view of this *hiatus,* the plaintiff's paper title, for present practical purposes, has its inception in the deed of W. T. Wallace to Carter and Brice dated 3 December, 1942. See *Meeker v. Wheeler,* 236 N.C. 172.

Also, it is further noted that the record discloses no evidence tending to show that Carter and Brice exercised any acts of possession during the period of their claimed ownership, which lasted about a year.

It follows, then, that by reason of these *hiatuses* the plaintiff failed to show continuity of possession for the requisite period of 20 years. *Ward v. Herrin, supra.*

Moreover, since these *hiatuses* appear within 7 years next preceding the date of the commencement of the action, it also follows that if it should be conceded *arguendo* that the plaintiff's paper title, when considered on the *prima facie* level, is sufficient to support the inference that it embraces the disputed area and constitutes color of title, even so, the plaintiff failed to show the requisite continuity of possession necessary to ripen title under colorable claim.

Nor was the plaintiff entitled to go to the jury on the theory that his father acquired title to the disputed area by adverse possession prior to his death (*Brite v. Lynch,* 235 N.C. 182, 69 S.E. 2d 169) and that the ripened title thereto passed to the plaintiff under the successive deeds appearing in his paper title. It is enough to say that the *hiatus* in the plaintiff's paper title defeats recovery on this theory. *Meeker v. Wheeler, supra.* Besides, neither the pleadings nor the theory of the trial below encompass this theory. Nor does the record disclose when the plaintiff's father died. Thus the record leaves indefinite and without fixed period of duration the time during which it may be inferred from plaintiff's evidence that his father exercised acts of possession within the disputed area.

Nor does the record justify retaining the cause for trial on the theory of a processioning proceeding under G.S. 38-1 *et seq.* The case was both cast by the pleadings and tried below on the other theory. The theory of the trial prevails on appeal. *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.

In this state of the record, we do not reach for decision the question whether the character of the acts of ownership and possession relied on

by the plaintiff meet minimum requirements necessary to ripen title by adverse possession, either as to the whole of the disputed area or the portions which appear to be cleared and under cultivation and on which permanent structures have been erected. See *Ramsey v. Nebel, supra; Wallin v. Rice, supra.*

We observe in passing that counsel who appeared for the plaintiff in this Court were not his original counsel and hence are not responsible for the theory of the case as originally cast below.

On the record as presented the evidence was insufficient to show title by adverse possession to the disputed area. The judgment below is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

ALBERT E. McLEAN v. RUTH STUDTMAN McLEAN.

(Filed 30 January, 1953.)

1. Divorce § 8a—

In the husband's action for divorce on the ground of two years separation, G.S. 50-6, defendant alleged that whatever estrangement existed between them was occasioned by plaintiff's own wrongful conduct and willful abandonment. *Held:* The answer raises matters of defense upon which defendant has the burden of proof, and therefore defendant is not entitled to nonsuit on the issue of separation upon her evidence in support of such defense.

2. Trial § 22½—

Nonsuit may not be entered on an issue in favor of the party upon whom rests the burden of proof.

3. Husband and Wife § 3—

An antenuptial agreement between the parties that they would separate immediately after the marriage and obtain a divorce is contrary to public policy and void.

4. Same: Divorce §§ 2a, 9b—

Where the husband seeks to justify his separation from his wife on the ground of an antenuptial agreement that they would separate immediately after the marriage and obtain a divorce, the court of its own motion should take judicial notice that such agreement is contrary to public policy, and exceptions to the court's charge stating the husband's contentions in this respect will be sustained notwithstanding the absence of objection in the record to his allegations and evidence in support thereof.

5. Appeal and Error § 6c (6)—

While ordinarily a misstatement of contentions must be brought to the court's attention in apt time, this is not necessary when the statement of

the contention presents an erroneous view of the law or an incorrect application of it.

6. Divorce § 2a—

The fact that plaintiff has married under a mistaken belief that he had obtained a valid decree of divorce may not be considered in determining whether the separation from his wife was due to his own fault.

BARNHILL, J., concurring.

DEVIN, C. J., dissenting.

ERVIN, J., concurs in dissent.

APPEAL by defendant from *Crisp, Special Judge,* at May Civil Term, 1952, of ALAMANCE.

Civil action for absolute divorce from bonds of matrimony on statutory ground of two years separation. Former appeal 233 N.C. 139.

Plaintiff alleges in his complaint:

1. That he is a resident of Guilford County, North Carolina, and has been resident of the State for more than one year next preceding the filing of this complaint, and that defendant is resident of the State of Illinois.

2. That he and defendant were married in Cook County, Illinois, on 16 February, 1933, and lived together as man and wife until 11 October, 1944, when they separated, and have not since then lived together.

3. That there was one child born during the union, who died shortly after birth.

Defendant, answering the complaint of plaintiff, admits that she is a resident of State of Illinois, that she and plaintiff were married as alleged, and that a child was born of the marriage and has died; but she denies all other allegations, expressly denying that they ever "separated" or lived "separate and apart."

And for further defense and bar to this action, defendant avers, and upon the trial in Superior Court offered evidence tending to show that she has in all respects observed her marital vows, duties and obligations to plaintiff, and has done nothing to justify plaintiff separating himself from her, but that if his absence under the circumstances detailed constitutes legal separation, then such separation and living separate and apart were without her consent or fault, and are the direct result and constituent part of the abandonment and desertion of her by plaintiff without any cause. And defendant expressly pleads abandonment and desertion and the conduct of plaintiff, in manner stated, as a defense and bar to this action.

On the other hand, plaintiff replying to the further defense set up by defendant alleges among other things "that it was agreed between the plaintiff and the defendant at the time of their marriage that they could not and would not live together as husband and wife."

And, upon the trial in Superior Court, plaintiff, as witness for himself, in pertinent part, testified: "I don't complain about her conduct during our marriage, the reason was that I never wanted to marry her in the first place. As far as her conduct toward me, after the marriage, is concerned, I have nothing to complain of on that score except one thing. We never lived together and she wouldn't give me a divorce either, that is what we always argued about . . . As to whether I complain of anything she did, as far as I know, I know of nothing wrong that she has done . . ." Then to these questions by the court, plaintiff answered as shown: "Since you were married have you lived with your wife as man and wife? A. At the date of the marriage, yes, right after that, no. Yes, one day is what I mean . . . You say you stayed with her? A. The night we were married, and that is all. That was until two or three o'clock in the morning."

Again, plaintiff testified: "As to whether she never did agree to the idea we were to get married until the baby was born and then get a divorce, that was my understanding at the time we got married . . ." And again, "As to whether my wife, after our marriage, ever agreed for us to break up, well, we had never lived together. I don't see how she could agree to live apart. As to whether during our marriage she asked me to live with her, yes, continually she wanted me to come back to her." And again, plaintiff testified: "I just didn't want to live with the girl, that is all there is to it."

On the other hand, defendant testified in part: ". . . After we found I was going to have a child, we married. No, I did not agree, at the time I married him, that I would give him a divorce after the child was born. No sir, he did not ask me to do that. No, he did not say anything to me which would cause me to feel that he was not sincere in his affection toward me. The day we were married he told me that he was very happy and hoped I was too . . .," and so on.

The case was submitted to the jury on these issues which the jury answered as shown:

"1. Were the plaintiff and defendant married, as alleged in the complaint? Answer: Yes.

"2. Have the plaintiff and defendant lived separate and apart from each other for two years next preceding the institution of this action, as alleged in the complaint? Answer: Yes.

"3. Has the plaintiff been a resident of the State of North Carolina for a period of six months next preceding the institution of this action? Answer: Yes.

"4. Was the alleged separation between the plaintiff and the defendant caused by the fault of the plaintiff? Answer: No."

Upon the verdict rendered judgment was signed. Defendant appeals therefrom and assigns error.

Young, Young & Gordon for plaintiff, appellee.

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

WINBORNE, J. Defendant, as appellant, brings up for consideration twenty assignments of error. It is necessary, however, to give express consideration to these:

Assignments of error numbers 1 and 2, based upon exceptions to the denial of defendant's motions aptly made for judgments as of nonsuit, are untenable. The plaintiff having based his ground for divorce upon two years separation, G.S. 50-6, and defendant having averred by way of further defense and bar to this action, in substance, that whatever estrangement between the parties was occasioned by the plaintiff's own wrongful conduct and willful abandonment, the burden rests upon the defendant to establish the defense or defenses set up in the answer and relied upon by defendant. See *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492, where the authorities are cited. Hence motion for judgment as of nonsuit was properly overruled. See *Wharton v. Ins. Co.,* 178 N.C. 135, 100 S.E. 266; *Hedgecock v. Ins. Co.,* 212 N.C. 638, 194 S.E. 86; *MacClure v. Casualty Co.,* 229 N.C. 305, 49 S.E. 2d 742; *Barnes v. Trust Co.,* 229 N.C. 409, 50 S.E. 2d 2.

In the *Barnes case,* in opinion by *Barnhill, J.,* it is said: "A judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him."

Moreover, there is no request for peremptory instruction.

However, assignments of error eight, eleven, twelve and thirteen, based upon exceptions of same numbers, taken to portions of the charge of the court to the jury are well taken. These portions of the charge recognize the plea of plaintiff that his marriage to defendant was consummated under the agreement at the time, that they would get married and when the child was born they would then separate and get a divorce. And these portions of the charge permitted the jury, in passing upon the fourth issue, to take into consideration evidence offered by plaintiff in this respect. While it is noted that the record does not show that there was any motion to strike the allegation of the pleading, nor was there objection to the admission of the evidence, the plea and the evidence strike at the very foundation of the social life of the State, and are against public policy, of which the court of its own motion takes judicial notice. Plaintiff may not in this manner exculpate himself from fault after the marriage.

While it is true the portions of the charge to which these assignments relate are in the form of contentions—to which objection does not appear to have been made at the time they were given, and ordinarily an error

in stating the contentions of a party should be called to the attention of the court in time to afford an opportunity of correction, otherwise it may be regarded as waived or as a harmless inadvertence, *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Brown,* 227 N.C. 383, 42 S.E. 2d 402; *Williams v. Raines,* 234 N.C. 452, 67 S.E. 2d 343, it is the law in this State that the trial court should not at any time give an instruction which presents an erroneous view of the law, or an incorrect application of it. See *S. v. Hedgepeth,* 230 N.C. 33, 51 S.E. 2d 914; *S. v. Pillow,* 234 N.C. 146, 66 S.E. 2d 657.

In the Hedgepeth case, in opinion by *Barnhill, J.,* this Court declared: "It is the duty of the court to explain and apply the law to the evidence in the case and set the minds of the jury at rest in respect to the principles of law which should guide them in arriving at a verdict. And so it should not at any time give an instruction, even in the form of a contention, which presents an erroneous view of the law or an incorrect application thereof."

Moreover, if it be a fact that plaintiff has married under the mistaken impression that he had obtained a valid decree of divorce, the fact of such marriage may not inure to his benefit nor work to detriment of defendant in determining whether the alleged separation between plaintiff and defendant was caused by his fault.

And since there must be a new trial and other matters to which exception is taken may not then recur, other assignments of error are not considered.

Let there be a

New trial.

BARNHILL, J., concurring: Trial marriage is unknown to the law of North Carolina. Yet, in my opinion, if we approve the trial in the court below, we lend our stamp of approval to that type of marriage contract.

Of course, theologically, marriage is a sacrament, but under the law it is a contract. And here we are concerned with it only as a contract sanctioned by law and with the conditions under which the status thereby created may be dissolved. But even when considered as a contract sanctioned by law, marriage is the keystone of our civilization without which organized society could not long exist. Its maintenance and protection are fundamentals of our public policy. It is so basic that the contract of marriage is set apart and treated as one entirely different from other contracts. It is to continue in force and effect from its inception to its dissolution by death or for a cause and in the manner prescribed by law.

The law as it now exists in this State does not sanction any modification or limitation upon the obligations it imposes by a prenuptial agreement except in respect to the property of the contracting parties.

But here we have a trial in which the plaintiff is permitted to meet the defense of abandonment by proof of a prenuptial agreement that the obligations imposed by the marriage should not be binding on either party.

Plaintiff testified that he left the defendant; that he did not want to live with her; that he wanted to marry another woman; that defendant repeatedly asked him to live with her, but that he refused; that he knew of nothing wrong that she had done; and that he had no complaint about her conduct. Thus, his own testimony entitled defendant to a peremptory instruction on the fourth issue.

But no. There was a prenuptial agreement that the marriage should be nothing more than a farce and plaintiff may now justify what has heretofore been considered an abandonment by proving a prenuptial agreement to separate after marriage. Thus the prenuptial agreement modifies and takes precedence over the solemn contract of marriage. Certainly this was the theory of the trial in the court below.

In my opinion, proof of the prenuptial agreement to separate after marriage and abandon the obligations imposed by the marriage is so diametrically opposed to the fundamental policy of the State it became and was the duty of the court to exclude any and all evidence in respect thereto even without objection by defendant. Certainly it committed error when it submitted this testimony to the jury in its charge as evidence properly to be considered on the fourth issue.

Any person having knowledge of the facts disclosed by this record and the record on the former appeal, *McLean v. McLean,* 233 N.C. 139, would experience a sense of sincere sympathy for the second woman in the triangle. She is innocent of any wrongful conduct and is the victim of plaintiff's machinations.

He married defendant and, according to her testimony, maintained the status of marriage with her over a period of years. He then instituted an action for divorce against her (she being a resident of the State of Illinois) in Guilford County. But when she appeared to defend the action, he submitted to a voluntary nonsuit. He then, by practicing a fraud on the court (*McLean v. McLean, supra*), obtained a decree of divorce in Alamance County. Thereafter he married the second woman and is the father of her child. But the question here involved is so vital and so directly affects the public interest and fundamental public policy of the State that, in comparison, the rights or interest of the individual fade into insignificance. I vote for a new trial.

DEVIN, C. J., dissenting: Twice the court and jury have decided upon the evidence offered that the plaintiff was entitled to a divorce from the

defendant. After the first divorce decree was signed in 1947 the plaintiff remarried and lived as husband and wife with his second wife until February, 1951, when the first divorce decree was set aside by this Court. *McLean v. McLean,* 233 N.C. 139. On the second hearing in Alamance Superior Court, May, 1952, the defendant was present with counsel, and the issues were fought out before a jury. Both plaintiff and the defendant testified, and all the evidence pertinent to the issues, and particularly to the issue whether the separation was caused by the fault of the plaintiff, was submitted to the jury. Again the issues were answered in favor of the plaintiff and the Judge signed the decree of divorce. The plaintiff's evidence was sufficient to carry the case to the jury. There was no objection or exception to any of the evidence offered by the plaintiff.

The majority opinion, however, holds that the trial judge erred in his charge to the jury in stating as one of the plaintiff's contentions that there was an understanding between himself and the defendant at the time they were married in 1933 that they would get married and when the child was born they would separate and get a divorce. This evidence had been admitted without objection. There was no suggestion to the trial judge that the defendant considered or would argue that this evidence was incompetent or improper. It was offered to negative the charge embraced in the 4th issue that the separation was caused by the fault of the plaintiff. The defendant testified in contradiction about the same transaction. This was one of many matters related by plaintiff in his testimony tending to show that there had been a separation not later than 1944 and a living apart for the statutory period. In this case without objection opportunity was given both parties to testify about their relations so that the jury might have the complete picture. The plaintiff's suit was not based upon any antenuptial agreement nor was any contract right based thereon asserted. The separation alleged as the basis of the suit began long afterward. The principle enunciated in *Archbell v. Archbell,* 158 N.C. 408, has no application here. It was only after the defendant had lost her case that she raised the point of any impropriety in the plaintiff's evidence to which she had not theretofore objected.

Counsel for defendant frankly stated in his argument before this Court that he was basing his appeal largely on the question of nonsuit, and that he could hardly expect a jury to break up a subsisting marriage in the attempt to restore one that had long since gone on the rocks. The plaintiff and defendant have not lived together as husband and wife for many years, and there is no hope they ever will. The plaintiff is a Master Sergeant in the United States Army, and has been a resident of Greensboro since 1946. While his conduct in the manner in which he secured the first divorce was improper, after that divorce decree was signed, the second wife married him in good faith, and they lived together for more

than three years and until the first divorce decree was set aside. They are now separated by the law but doubtless hoping to renew their disrupted marriage relation.

I think the verdict and judgment below should not be disturbed.

ERVIN, J., concurs in dissent.

HAROLD E. LINDER AND WIFE, IRENE S. LINDER; J. O. TALLY, TRUSTEE FOR HOME FEDERAL SAVINGS & LOAN ASSOCIATION, INC., OF FAYETTEVILLE, N. C.; HOME FEDERAL SAVINGS & LOAN ASSOCIATION, INC., OF FAYETTEVILLE, N. C., v. HERMAN A. HORNE AND WIFE, THELMA S. HORNE; R. H. DYE, TRUSTEE FOR CROSS CREEK BUILDING & LOAN ASSOCIATION; CROSS CREEK BUILDING & LOAN ASSOCIATION.

(Filed 30 January, 1953.)

1. Boundaries § 6—

In a processioning proceeding, what constitutes the dividing line is a question of law for the court but the location of the line is a question for the jury under correct instructions based upon competent evidence. When the case is referred, the referee must find the facts in accordance with the law upon competent evidence.

2. Boundaries § 5a—

A description must furnish means for identifying the land intended to be conveyed, and therefore a patently ambiguous description is ineffective, but where the description is latently ambiguous it may be made definite and certain by evidence *aliunde* provided the deed itself refers to such extrinsic matter.

3. Same: Boundaries §§ 3c, 5h—Resort may be had to reversing call and to plat of contiguous tract referred to in deed in order to make description certain.

The deed in suit called for a corner beginning at the intersection of two roads or streets which had been widened subsequent to the execution of the deed. The terminus of the second call was to a stake in the line of a contiguous tract as shown by a recorded plat. *Held:* The description in the deed was properly made definite and certain by running the line of the contiguous tract so as to establish its terminus at the street, and then by reversing the call in the deed to locate the stake in the line of the contiguous tract constituting a corner, from which the remaining corners could be ascertained.

4. Boundaries § 3b—

The fact that the right of way of streets and highways is increased to greater widths than originally laid out has no effect upon the location of the boundaries of the fee in lands adjacent thereto.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Bone, J.*, at May Term, 1952, of CUMBERLAND.

Processioning proceeding instituted before Clerk of Superior Court of Cumberland County for the establishment of the true dividing line between certain lands of plaintiffs and certain lands of defendants.

The record on this appeal discloses:

I. That the pleadings raise only one issue, that is, as to what is the true dividing line between lands of plaintiffs and lands of defendants as hereinafter respectively described in report of referee.

II. That the Clerk of Superior Court appointed W. R. McDuffie, surveyor, to survey the line or lines according to the contentions of both plaintiffs and defendants, and to make report of same with a map,—which was accordingly done.

III. That the proceeding, having reached the Superior Court at term by appeal of defendants from order of Clerk of Superior Court declaring the true dividing line—the cause was referred by consent of attorneys for the respective parties.

IV. That the referee, on hearings had, received testimony and evidence offered by the respective parties, among which were (1) a new plat prepared by the court-appointed surveyor, W. R. McDuffie, which was marked "Plaintiffs' Exhibit No. 1," and (2) a plat of the W. M. Walker lands,—a print from the recorded plat appearing in Plat Book S #7, page 108, Cumberland County Registry, marked "Defendants' Exhibit No. 1";

V. That the referee in report filed, declared that the principal question raised by this proceeding involves a construction of the deed to the defendants Herman A. Horne and wife,—a question as to whether the property conveyed thereby to Horne should be located with reference to the south margin of the Morganton Road (1) according to the W. M. Walker plat, or (2) as it existed at the time of the conveyance to Horne;

VI. That the referee made the following findings of fact:

"(1) Both the petitioners Harold E. Linder and wife, and the defendants Herman A. Horne and wife claim from a common grantor, to wit, J. Warren Pate and wife.

"(2) Herman A. Horne and wife, Thelma S. Horne, acquired their title to the property in controversy under a deed dated May 27, 1947, . . . filed for record the 19th day of June, 1947, . . . and recorded . . . Cumberland County Registry, which title conveyed the following described property, to wit: 'Being in Cumberland County, 71st Township, and Beginning at the intersection of the southern margin of the Morganton Road and the eastern margin of Grace Street (now Pinecrest Drive) and

runs thence as the eastern margin of Grace Street south 20 deg. west 150 feet to a stake; thence south 70 deg. east 117.52 feet to a stake in the eastern line of the W. M. Walker subdivision shown on plat recorded in Book S, No. 7, page 108, Cumberland County Registry; thence with said line north 13 deg. east 142.79 feet to the southern margin of the Morganton Road; thence with said road margin north 64 deg. and 30′ west 99.83 feet to the Beginning, . . .';

"(3) Harold E. Linder and wife . . . acquired their title to the property in controversy under a deed dated June 16, 1947, . . . filed for record July 29, 1947 . . . and recorded . . . which deed conveyed the following property, to wit: 'Being in 71st Township and Beginning at a stake in the eastern margin of Grace Street (now Pinecrest Drive) at a point south 20 deg. west 150 feet from the intersection of the southern margin of Morganton Road and the eastern margin of said Grace Street, said point being the southwest corner of the lot conveyed by J. Warren Pate, *et ux,* to Herman A. Horne, by deed dated March 27, 1947, and runs with the southern boundary of the Horne lot south 70 deg. east 117.52 feet to a stake in the eastern boundary of the W. M. Walker subdivision of which this lot is a part; thence as said boundary south 13 deg. west 60.07 feet to a stake at the northeast corner of the lot conveyed by Howard H. Jucks and Douglas M. Clark, *et ux,* to V. L. Lewis by deed recorded in Book 509, page 19, Cumberland County Registry; thence along the northern boundary of the Lewis lot north 70 deg. west 124.36 feet to a stake in the eastern margin of Grace Street north 20 deg. east 59.62 feet to the Beginning . . .';

"(4) On the 10th day of July, 1923, a plat of the W. M. Walker land made by Robert Strange, surveyor, was filed for record in Cumberland County and recorded in Plat Book S #7, page 108, Cumberland County Registry. This plat shows a subdivision of 51 building lots, and the lands in controversy in this proceeding lie within the boundaries of Lots 3 and 4 as shown on said plat. This plat shows the Morganton Road but does not give its width.

"(5) In 1941, the city limits of the City of Fayetteville were extended to include the property in controversy and some time prior to 1941 the State Highway and Public Works Commission of North Carolina acquired a 60-foot right of way for the Morganton Road, but this right of way is not all in actual use. The Morganton Road is paved and the pavement is 20 feet wide with a shoulder and ditch on each side.

"(6) In making his survey, the court-appointed surveyor W. R. McDuffie did not find any markers to indicate where the southern margin of the Morganton Road was and he therefore began his survey at the southeast corner of the property where there were some markers indicating the dividing line between the W. M. Walker property and the land

adjoining it on the south and surveying from these markers he located the southern margin of the Morganton Road according to the W. M. Walker plat at the line 'AB' shown on his (McDuffie's) plat. He also located the southern margin of the Morganton Road according to a 60-foot right of way at the line 'EF,' as shown on his (McDuffie's) plat.

"(7) The name of Grace Street was changed to Pinecrest Drive and this street was widened from 35 feet to 50 feet by taking approximately 7.5 feet off each side prior to the time that the parties to this action received their deeds.

"(8) The deed to Herman A. Horne and wife is the paramount deed in this matter because it was made and recorded prior to the deed to Harold E. Linder and wife, and also because the description of the land in Linder's deed says that it begins at 'the southwest corner of the lot conveyed by J. Warren Pate, *et ux,* to Herman A. Horne.'

"(9) The deed to Herman A. Horne and wife makes reference to the plat of the W. M. Walker subdivision in the following words, 'thence south 70 deg. east 117.52 feet to a stake in the eastern line of the W. M. Walker subdivision (shown on plat recorded in Book S #7, page 108, Cumberland County Registry); thence with said line north 13 deg. east 142.79 feet to the southern margin of the Morganton Road.'

"(10) If the southern margin of the Morganton Road is located in accordance with the plat of the W. M. Walker subdivision, and if approximately 6.67 feet are taken off the eastern margin of Grace Street, which is accounted for by its being widened subsequent to the filing of the plat of the W. M. Walker subdivision, then the description in the deed to Horne, and the description in the deed to Linder are, in substance, reconciled with each other and with adjoining property, and the line 'CD' shown on the latest plat of W. R. McDuffie, surveyor (Plaintiffs' Exhibit No. 1) is the true location of the dividing line between Horne and Linder. The effect of this, however, is to cause Horne's description to project into the right of way of the Morganton Road as it now exists almost to the hard-surfaced portion thereof.

"(11) The plat prepared by W. R. McDuffie (Plaintiffs' Exhibit No. 1) shows a fence which was erected by defendant Herman A. Horne approximately 2.5 feet south of the line 'CD,' but none of the parties claim that this fence is the true dividing line.

"(12) If the right of way of the Morganton Road is taken as 60 feet wide as of the dates of the deeds in question, and is used as a basis for the description contained in the Horne deed, it would cause the dividing line to come through the Linder residence and a few feet off the northern margin of the Linder residence would be on the Horne property."

The referee then submitted to the court his conclusions of law as follows:

"(1) That the reference in the Horne deed to the W. M. Walker subdivision shown on plat recorded in Book S #7, page 108, Cumberland County Registry, is sufficient to require that this plat be taken into consideration in locating the land conveyed by said deed, including the location of the Morganton Road, as shown on said plat.

"(2) That the location of the Morganton Road, as shown on said plat of the W. M. Walker subdivision, controls in the construction of the deeds to both Horne and Linder.

"(3) That the true dividing line between the Horne property and the Linder property is the line from point 'C' to point 'D,' as shown on the latest plat prepared by W. R. McDuffie, Surveyor. (Plaintiff's Exhibit No. 1.)"

And based upon the foregoing findings of fact and conclusions of law, the referee reports to the court his decision as follows:

"That the true dividing line between the land of Harold E. Linder and wife, Irene S. Linder, and the land of Herman A. Horne and wife, Thelma S. Horne, is the line from point 'C' to point 'D' as shown on the latest plat prepared by W. R. McDuffie, Surveyor. (Plaintiffs' Exhibit No. 1.)"

Defendants Herman A. Horne and wife filed exceptions to the report of referee, substantially as follows:

"Exception 1: To that portion of finding of fact #5, in which the Referee finds as a fact, that all of the 60-foot right of way of the Morganton Road is not all in actual use;" for reasons stated.

"Exception 2: To that portion of finding of fact #10, which reads as follows: (Almost to the hard-surfaced portion thereof)," for reasons stated.

"Exception 3: Is the referee's conclusions of law in that they are not in harmony with the evidence, the findings of fact, or the holdings of the Supreme Court, in point as follows:

"Conclusion of law #1 is in error . . .

"Conclusion of law #2 is in error . . .

"Conclusion of law #3 is in error . . .," all for reasons stated.

"Exception 4: That the findings of the Referee, that the true dividing line between Horne and Linder is line 'C' 'D,' is in error in that it does not harmonize with the evidence in the case nor the holding of the Court, with reference to what constitutes the true boundary line."

"Wherefore, these defendants pray the Court that the report of the Referee be set aside, and that the Court on the evidence and true findings of fact determine as a matter of law that the true dividing line between the petitioners and the defendants be established by ascertaining the location of the southern margin of Morganton Road and the east margin of Grace (now Pinecrest) Street as of the 27th day of May, 1947, the date

on which Horne's deed is dated; and declaring the line on the McDuffie map, G-H, to be the true dividing line between Linder and Horne."

When the cause came on for hearing, and being heard in Superior Court upon exceptions to the Referee's report and findings, both as to law and fact, and after hearing argument of counsel and reviewing the report of the Referee, the presiding judge denied the exceptions to the Referee's findings and conclusions, and confirmed the Referee's report in its entirety, establishing the dividing line as therein set forth and therefore adjudged the true dividing line to be as therein set forth, and ordered and directed the surveyor to run and mark the line as herein adjudged, etc.

Defendants except to the judgment and appeal to Supreme Court assigning as error the action of the court in denying their several exceptions, and confirming the several findings of fact and conclusions of law to which they excepted.

Thomas H. Williams and J. O. Tally, Jr., for plaintiffs, appellees.
G. H. Allran and Robert H. Dye for defendants, appellants.

WINBORNE, J. Upon facts found, and approved by the trial court, the location of the true dividing line between the lot of land of petitioners and the lot of land of defendants depends upon the proper location of the lot of land of defendants as described in the deed to them from J. Warren Pate and wife.

In this connection it is settled law in this State that, in a proceeding to establish a boundary line, which is in dispute, what constitutes the dividing line is a question of law for the court, but a controversy as to where the line is must be settled by a jury under correct instructions based upon competent evidence. *Clegg v. Canady,* 217 N.C. 433, 8 S.E. 2d 246; *Huffman v. Pearson,* 222 N.C. 193, 22 S.E. 2d 440, and cases cited. See also *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501.

If the controversy as to location of the dividing line be referred, the facts in respect thereto must be found by the referee in accordance with law and upon competent evidence.

Moreover, decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers. The office of description is to furnish, and is sufficient when it does furnish means of identifying the land intended to be conveyed. Where the language used is patently ambiguous, parol evidence is not admissible to aid the description. But when the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the de-

scription to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought. See *Self Help Corporation v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889, where the authorities are cited. See also *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; *Plemmons v. Cutshall, supra.*

In the light of this principle applied to the deed to defendants it is seen: (1) That the description begins "at the intersection of the southern margin of the Morganton Road and the eastern margin of Grace Street (now Pinecrest Drive)," the location of which is in and of itself indefinite and uncertain; (2) That the terminus of the first call is a stake, an uncertain designation; (3) That the terminus of the second call is "a stake in the eastern line of the W. M. Walker subdivision shown on plat recorded in Book S #7, page 108, Cumberland County Registry." This is certain only to the extent of the line called for. It is uncertain as to location of the stake in the line; (4) That the third call is "thence with said line north 13 deg. west 142.79 to the southern margin of the Morganton Road." This call has in and of itself an uncertain terminus. However, the findings of fact and the accompanying plat of the W. M. Walker subdivision disclose that by adverting to the recorded plat of the W. M. Walker subdivision, and running from the marked southeast corner of the Walker property the southern margin of the Morganton Road as well as the eastern line of Grace Street, as same are shown on the plat, can be located. Therefore, by running the eastern line of the subdivision, the terminus of the third call, of the description in the deed to defendants, can be determined and fixed. Then by reversing the calls from this corner, the beginning corner can be ascertained, and made certain; and then the lines run from it in accordance with the calls. "The general rule is that in order to locate a boundary, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line." *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673, and cases cited. See also *Plemmons v. Cutshall, supra.*

Therefore, it seems clear that the intent of the grantors in the deed to defendants was to invoke the aid of the plat of the W. M. Walker subdivision to make certain a description, which without it would be uncertain and void.

Hence, the facts found and the conclusions of law made by the referee, and approved by the court, lead to the decision that the true dividing line in question is properly located. Moreover, the fact that the rights of way of the Morganton Road, and of Grace Street have been extended to

greater widths than as originally laid out, has no effect upon the location of the boundaries of the fee in lands adjacent thereto. The case of *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603, relied upon by defendants, is distinguishable in factual situation.

All assignments of error have been duly considered, and error is not made to appear.

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

JOHN WAYNE ADAMS, BY HIS NEXT FRIEND, J. H. ADAMS, v. BEATY SERVICE COMPANY, A CORPORATION.

(Filed 30 January, 1953.)

1. Automobiles § 8a—

The operator of a motor vehicle is under duty in the exercise of due care to keep his vehicle under control and to maintain a proper lookout to avoid collision with persons or vehicles, he being under duty to anticipate the presence of others on the highway and to see what he should see in the exercise of due care.

2. Automobiles § 8e—

It is not negligence *per se* to back an automobile on the highway, but in doing so the operator must exercise ordinary care to avoid injury to others by ascertaining the presence of others in the vicinity who may be injured by such movement.

3. Automobiles § 18h (2)—

Plaintiff's evidence tended to show that the operator of a vehicle backed same at a rapid rate, struck the pony upon which plaintiff, a seven year old boy, was riding, knocking him from the pony to the ground and running over his body with the rear wheel of the vehicle. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence.

4. Automobiles § 18g (1)—

No inference of negligence arises from the mere fact of an accident.

5. Trial § 31b—

Failure of the court to explain the law arising on the evidence in the case, as required by G.S. 1-180, constitutes prejudicial error.

6. Same: Damages § 13a—

The failure of the court to give the jury any rule for the measurement of damages constitutes prejudicial error.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *McLean, Special Judge,* at 31 May, 1952, Extra Civil Term, of MECKLENBURG.

Civil action to recover for personal injuries allegedly resulting from actionable negligence of defendant.

The plaintiff alleges in his complaint substantially the following:

That he, John Wayne Adams, is a minor seven years of age, and his father, J. H. Adams, is his duly appointed next friend; that defendant is a corporation engaged in the operation of taxicabs,—carrying passengers for hire; that on 8 July, 1951, at about 6 o'clock p.m., plaintiff was riding a pony along a roadway leading off Sugaw Creek road at a point approximately three blocks west of U. S. Highway Number 29; that this roadway is located partially on the property of plaintiff's father,—approximately one-fourth mile from the corporate limits of the city of Charlotte, North Carolina; that at said time and place one E. M. Honeycutt, as agent, servant and employee of defendant, acting within the course and scope of his employment by defendant, was operating Red Top cab number 42, carrying passengers for hire; that after Honeycutt had driven along said roadway a distance of approximately 600 feet, he attempted to back the taxicab along the roadway into Sugaw Creek road; and that in doing so he backed the taxicab into the pony which plaintiff was riding, thereby causing plaintiff to be thrown to the ground, and his body to be run over by the right rear wheel "of defendant's taxicab," to his serious and permanent injury.

And plaintiff further alleges that his injuries were proximately caused by the negligence of defendant, in that, summarily stated: Honeycutt attempted to back the taxicab, when in the exercise of due care he could and should have turned the taxicab around, and driven forward, in safety to persons he knew or should have known were using said roadway; that he backed the taxicab without keeping it under control, and without keeping a proper lookout for traffic upon the roadway; and that he operated the taxicab recklessly, and in willful and wanton disregard for the rights and safety of others, and so as to endanger or be likely to endanger the rights and safety of plaintiff, and others, all in violation of G.S. 20-140.

Defendant, answering the allegations of the complaint, admits that plaintiff is a minor seven years of age, that plaintiff's father is his duly appointed next friend; that it is a corporation; that the roadway is located as alleged; that plaintiff was riding a pony at the place therein described, or in said vicinity; and that at the time and place alleged E. M. Honeycutt was operating Red Top cab number 42, along said roadway. But defendant denied all other allegations of the complaint.

And defendant, for a further answer and defense, and in bar of plaintiff's right to recover, averred in pertinent part substantially the following:

"2. That defendant is informed, advised and believes, that on July 8, 1951 the said E. M. Honeycutt with two passengers in his cab, was seeking to locate certain parties who lived on a road leading off the Sugaw Creek road, not far from the city limits of Charlotte. That after turning off the Sugaw Creek road and going approximately 100 feet up a side road, it was determined that they were on the wrong road, and therefore, E. M. Honeycutt backed said taxicab about 50 feet and came to a dead stop, and was then and there discussing with said passengers the direction he should proceed from said point. That while said taxicab was stopped on said side road, a young boy, the minor plaintiff, emerged from a side road on the other side of Sugaw Creek road, riding a pony at a full, fast and furious gallop, and at a runaway speed, crossing said Sugaw Creek road at an angle with said pony apparently out of control, and as it raced up to said taxicab, which had stopped in said road, said pony dashed up to and within a few feet of said vehicle, threw his front feet forward and lowered his head, and came to a complete stop hurling said minor plaintiff through the air, and against the upper portion of the rear end, or trunk, of said taxicab, the pony after dismounting its rider trotted around said taxicab and headed for the stable.

"3. That the taxicab operated by E. M. Honeycutt was not in motion at the time minor plaintiff was thrown from said pony, and it is specifically denied that the wheels of said taxicab passed over any part of the body of minor plaintiff. That the driver of said taxicab was in, or what appeared to be, a public road and there were no signs or notices that requested the public to keep out or not travel this road.

"4. It is specifically denied that any injury received by said minor plaintiff was in any wise attributable to any act of negliegnce on the part of this defendant, or the driver of said taxicab. The injury sustained by said minor plaintiff was due to his inability to control the speed and conduct of the pony upon which he was riding, and the sudden stop of said pony upon its approach to said vehicle, and the lowering of its head, which after traveling at the fast and furious speed caused said minor plaintiff to be hurled through the air and strike the rear end of said vehicle which was then and there stopped in said road."

The parties to this action through their respective attorneys in the court below, stipulated in pertinent part:

"1. That the motor vehicle, to wit: Red Top Taxicab No. 42, involved in the accident complained of in this action, was on July 8, 1951, owned by and registered in the name of the defendant, Beaty Service Company.

"2. That at the time complained of in the complaint the said motor vehicle was being driven by one E. M. Honeycutt, with the knowledge and consent of the defendant, Beaty Service Company.

"3. That Chapter 3 of the ordinances of the city of Charlotte, North Carolina, were duly enacted and were in full force and effect on July 8, 1951, and the court may take judicial notice thereof and the same may be introduced into evidence.

"4. That the accident complained of by the plaintiff took place at a point less than one-half mile from the corporate limits of the city of Charlotte, North Carolina."

Upon the trial in Superior Court, plaintiff offered the testimony of John Hope Adams, father of, and next friend to plaintiff, of Ronald Hope Adams, 14-year-old brother of plaintiff, and of W. J. McCorkle, which tends to show that they were at the pony barn of John Hope Adams, 225 to 250 feet from the point where the accident occurred which is in a "little road" that leads off the north side of the Sugaw Creek road down to the pony barn,—at which John Hope Adams kept seven ponies for hire for riding; that the point of the accident was forty to fifty feet from the Sugaw Creek road, and on the side of the "little road" or "driveway" next to the barn; that neither of them saw the accident, nor did either of them see the plaintiff and his pony, or the taxicab immediately before, and at the scene of the accident; but that they heard the noise and went to the scene.

The testimony of these witnesses tends further to show:

That this "little road" was in part on the land of John Hope Adams, and on his side of it there is a fence; that "there is just enough room for two cars to squeeze through the road itself"; that about six o'clock after noon on 8 July, 1951, a clear day, and still daylight, the taxicab in question stopped on this road or driveway, as sometimes referred to, headed in the direction of, and near to the pony barn; that John Hope Adams, accompanied by W. J. McCorkle, drove his automobile down the road around the taxicab, and pulled right in front of it, and stopped in "the turning space," John Hope Adams saying, "I pushed right in front of him"; that (again quoting John Hope Adams) "a little bit further down there was a place out in the field where he usually turned around . . . where he turned around and came out forward; that the turning space was not on his property, but on the other side of other property that he had . . . rented."

W. J. McCorkle testified that "when he came in a Red Top cab was in the driveway, and we pulled around to the side of the barn; that he and . . . plaintiff's father walked around by the side of the barn to look at a pony, and heard an impact; that it sounded like a car striking something, or like a car and something had run together."

Ronald Hope Adams testified that "The Red Top cab drove down to near the pony barn where he was; that there was a man and a woman in the back seat, and a man in the front seat; that the man wanted to know

where Mr. Watson lived and he told him that he did not know; that the man then rushed his motor and started out and that's all he heard; that his father and Mr. McCorkle were at the pony barn . . . that after he spoke to the man in the cab he turned around and started to walk off and heard the car taking off pretty fast . . . backing," and "that he did not see the cab back up from where he left it up to where the accident took place,"—"he just backed straight out, on our side of the road."

And John Hope Adams testified that he "heard the cab leaving, that he heard it crank up, and it was a matter of seconds when he heard a crash . . ."

And Ronald Hope Adams also stated that before the accident plaintiff "went off on his pony . . . I forget when he went . . . just what time." However, on cross-examination, the witness testified that he did not believe he said that.

And the evidence further tends to show that when plaintiff's brother, Ronald Hope Adams, reached the scene, he being the first to get there, plaintiff was lying on the ground,—all of his body except his head being underneath the cab between the right front and right rear wheels, and the pony, 39 to 40 inches high, and 18 years old, was standing there against the fence.

Mr. McCorkle testified that when he first got there the plaintiff was in the general vicinity of the right rear wheel of the cab, right in front of the rear wheel—when they picked him up.

And the father of plaintiff testified that he got his car and came back,—one wheel being in the ditch, and passed the cab on the right,—both drivers' seats being together as he passed. The evidence further tends to show that plaintiff was put in his father's car from the right side, and then taken to the hospital.

And the evidence also tends to show that when examined at the hospital the body of plaintiff had a regular pattern of bruises across the left arm, chest and to the right armpit—about three or three and a half inches wide, and more of diamond shapes than a flat mashed place,—there being slight space between each; that there were marks on the outside of plaintiff's shirt in the nature of discoloration similar to that described on the chest; that the humerus bone of the left arm was broken, and that a doctor found that the lung on the left side had "a minimal partial collapse." In this connection W. J. McCorkle testified that he did not observe the tire of the cab.

There is also evidence tending to show "that the saddle on the left side that protects your leg from the horse was torn off, and the stirrup was torn off and, right behind where you sit, there was a place on the saddle" which has since been repaired.

And there is evidence tending to show that Mr. McCorkle and Ronald Hope Adams did not talk with any of the people in the cab, except as above related, and there is no evidence that the father of plaintiff talked with either of them.

Defendant did not offer evidence. Motions of defendant, aptly made, for judgment as of nonsuit were denied. Defendant excepted.

The case was submitted to the jury upon issues as to negligence of defendant, and as to damages, both of which were answered in favor of plaintiff.

And from judgment on the verdict, defendant appeals to Supreme Court and assigns error.

Frank H. Kennedy, Charles E. Knox, and Marvin Lee Ritch for plaintiff, appellee.

Porter B. Byrum and William M. Nicholson for defendant, appellant.

WINBORNE, J. For determination of this appeal it is necessary to advert to, and consider only two questions arising on assignments of error: (1) To denial of defendant's motions for judgment as of nonsuit, and (2) to failure of the trial judge to properly charge the jury on the rule to be applied in assessing damages.

As to the first question: Taking the evidence offered upon the trial in Superior Court, as shown in the record of case on appeal, and now before this Court, to be true, and in its most favorable light to plaintiff, together with reasonable intendments and legitimate inferences fairly deducible therefrom, we are of opinion, and hold that the evidence is sufficient to withstand demurrer, G.S. 1-183, and to carry the case to the jury.

It is a general rule of law 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. And 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 also requires that the operator must be reasonably vigilant, and that he must anticipate and expect the presence of others. *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211, and cases cited. See also *Henson v. Wilson*, 225 N.C. 417, 35 S.E. 2d 245.

And it is said in *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330, a case somewhat similar to the one in hand: "It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel, and he is held to the duty of seeing what he ought to have seen." This principle is quoted and applied in *Henson v. Wilson, supra.*

Moreover, it is not negligence *per se* to back an automobile on the highway. *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384. And while the law does not forbid the backing of an automobile upon streets and highways, and to do so does not constitute negligence, the driver of an automobile must exercise ordinary care in backing his machine so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. *Taulborg v. Andresen* (Neb.), 228 N.W. 528, 67 A.L.R. 642. See Annotation 67 A.L.R. 647 on subject "Liability for damage or injury while automobile is being backed."

In the light of these principles applied to the evidence in the case in hand, we are of opinion and hold that the evidence taken as true is susceptible of these inferences: (1) That plaintiff was in the "little road" between the taxicab and Sugaw Creek road, as the taxicab backed down the "little road" toward Sugaw Creek road; (2) that if he were there, the operator of the taxicab saw him and his pony, or by the exercise of ordinary care could and should have seen him; (3) that the operator of the taxicab was backing it at fast speed, when he had knowledge of the width of "little road," and of the surroundings, and knew, or ought to have known that under such circumstances a collision with and injury to persons, animals or vehicles upon the "little road" was likely to occur. If the jury should so find the facts from the evidence, and by its greater weight, it was the duty of the operator of the taxicab to exercise ordinary care to avoid collision with plaintiff, and his failure to do so would be negligence. This case is distinguishable in factual situation from the cases of *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Pack v. Auman,* 220 N.C. 704, 18 S.E. 2d 247; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406, relied upon by appellant.

Defendant denies that the operator of the taxicab was negligent. This raises an issue of fact which alone the jury may decide. We express no opinion upon the weight of the evidence.

It is appropriate to say that no inference of negligence arises from the mere fact of an accident or injury, nor from the failure of the operator of the taxicab to turn around under the surroundings as revealed by the evidence in the case in hand.

Now as to the second question: G.S. 1-180, as rewritten by Chapter 107, Session Laws 1949, provides that the judge in giving a charge to the petit jury, either in a civil or criminal action, shall declare and explain the law arising on the evidence given in the case. And decisions of this Court are uniform in holding that failure of the judge to observe and comply with the provisions of this statute is error for which a new trial must be ordered. See *Wilson v. Wilson,* 190 N.C. 819, 130 S.E. 834; *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Lewis v. Watson,* 229

N.C. 20, 47 S.E. 2d 484; *S. v. Washington,* 234 N.C. 531, 67 S.E. 2d 498. See also *Hawkins v. Simpson, post,* 155, where the authorities are assembled.

In *Wilson v. Wilson, supra,* in opinion by *Varser, J.,* it is said, "This statute C.S. 564 (now G.S. 1-180) created a substantial legal right in the parties . . . It is error to fail to comply with it. In the instant case the court . . . did not state the rule for the admeasurement of damages . . ." A new trial was granted.

Applying these provisions of the statute to case in hand, it is seen that the charge of the trial court fails to give to the jury any rule of damage in such cases. This was prejudicial error, for which defendant is entitled to a new trial.

Hence, let there be a

New trial.

PARKER, J., took no part in the consideration or decision of this case.

BOARD OF COMMISSIONERS OF ROXBORO v. MAGGIE BUMPASS, ELSIE BUMPASS DOGGETT AND HUSBAND, J. W. DOGGETT, HUBERT LUNSFORD, DEFENDANTS, AND THE FOLLOWING INTERPLEADERS: ROXBORO BUILDING & LOAN ASSOCIATION, T. F. DAVIS, TRUSTEE, JOHN D. CLAY AND WIFE, GERTRUDE M. CLAY, AUSTIN B. CLAY, MRS. AUSTIN B. CLAY AND DEE A. CLAY.

(Filed 30 January, 1953.)

1. Betterments § 6: Pleadings § 19b—

Since the statute requires that petition for betterments be filed in the action in which judgment for the land has been rendered, the filing of such petition by several claimants cannot result in a misjoinder of parties and causes, although the better practice would be for each claimant to file his claim separately. G.S. 1, Art. 30.

2. Betterments § 1—

The right to betterments is based upon the equitable principle that a person in possession who has made valuable improvements under the *bona fide* belief that he is the owner of the land should not be required to surrender possession to the true owner without compensation for such betterments to the extent that they permanently enhance the value of the land, and therefore claim for betterments cannot accrue until the owner seeks and obtains the aid of the court to enforce his right of possession.

3. Same—

The remaindermen had a tax foreclosure set aside to the extent that the tax deed purported to convey the remainder, but the conveyance of the life

estate by the tax foreclosure was not affected. *Held:* Persons in possession under the tax foreclosure are not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman.

APPEAL by interveners from *Sharp, Special Judge,* October Special Term, 1952, PERSON. Affirmed.

Civil action to foreclose tax lien, heard on demurrer to petition of interveners for betterments.

On and prior to 29 September 1942, title to the *locus* was vested in defendant Elsie Bumpass Doggett, subject to an estate for life therein owned by defendant Maggie Bumpass. On said date plaintiff instituted this action to foreclose its lien for past-due taxes as authorized by law. The land was sold to R. P. Burns and the sale was confirmed 25 January 1943. Burns assigned his bid to the defendant Lunsford, and the commissioners executed a foreclosure deed to said assignee which is of record in the Person County Registry.

On 27 April 1946, Lunsford conveyed the land to the interpleader Dee A. Clay, and on 17 May 1948, he conveyed a part thereof to intervener John D. Clay. Each built valuable improvements on the respective shares owned by them, partly out of funds borrowed from the intervener Roxboro Building & Loan Association.

On 7 April 1949, defendants Elsie Bumpass Doggett and husband appeared and moved to vacate the order of sale, the decree of confirmation, and the foreclosure deed in so far as they affect or attempt to convey her remainder interest in said land. The motion as to the husband was allowed but was denied as to Elsie Bumpass Doggett. On her appeal to this Court (233 N.C. 190, 63 S.E. 2d 144), the judgment was reversed, and at the April Term, 1951, judgment was entered in accord with the opinion of this Court, decreeing that said foreclosure proceeding and the deed executed pursuant thereto are in all respects void in so far as they attempt to convey the remainder interest of Elsie Bumpass Doggett in the *locus.*

Thereafter, the interpleaders filed a joint petition for betterments under the provisions of G.S. Ch. 1, Art. 30. The defendant Elsie Bumpass Doggett appeared and demurred to the petition for that it fails to state a cause of action for betterments and on other grounds stated in the written demurrer filed, including the following:

"4. That the petition for betterments does not state facts sufficient to constitute a cause of action against the defendant, Elsie Bumpass Doggett, in that it does not appear that the interests of John D. Clay and Dee A. Clay have terminated by reason of the death of Maggie Bumpass, whereas it does appear upon the face of said petition that the petitioners

John D. Clay and Dee A. Clay are still in possession of the premises therein described holding under the life estate of Maggie Bumpass."

In respect to the questions involved on this appeal Elsie Bumpass Doggett is the real defendant and Dee A. Clay and John D. Clay are the primary petitioners. Therefore, for convenience of discussion, she will hereafter be referred to as the defendant and they, as the interveners.

The demurrer was sustained and petitioners appealed.

R. B. Dawes, Beam & Beam, and Davis & Davis for interpleaders and petitioners.

Robert I. Lipton, A. A. McDonald, and Victor S. Bryant, Jr., for defendant Elsie Bumpass Doggett.

BARNHILL, J. The interpleader John D. Clay has no interest in the claim filed by Dee A. Clay, and Dee A. Clay has no interest in the claim of his cointervener except such as may arise out of some warranty in his deed of conveyance. Even so, the demurrer for that there is a misjoinder of parties and causes cannot be sustained. This, for the simple reason the statute under which the interveners must proceed, General Statutes Ch. 1, Art. 30, requires that a claim for betterments be filed in the action in which judgment for land has been rendered. Proper pleading would require each group of interveners to file a separate and distinct claim uncomplicated by reference to the claim of the other. That may still be done—if this is the proper case in which to present the claims.

But the fourth cause for demurrer quoted in the statement of facts presents a more serious question, to wit: Have the claims of the interveners accrued so as to be presently the subject of litigation in this action? To find the answer requires an examination of the law permitting an occupant of land to claim compensation for improvements placed thereon.

Under the ancient common law anyone who put improvements on real property did so at his own peril. The rule of the civil law was more liberal and permitted one who had made permanent improvements on land in his possession under the *bona fide* belief that he was the owner of it to exact of the true owner compensation for the improvements—to the extent they enhanced the value of the land—less reasonable rents and profits, before surrendering possession to the holder of the superior title. 27 A.J. 262. See also 42 C.J.S. 421 *et seq.*

In the development of the law of equity the chancellors followed and extended the civil law rule so that, generally speaking, one who establishes a superior title to land is not permitted to recover possession thereof until and unless he pays the occupant his claim, properly and promptly presented, for just compensation for improvements of a permanent nature placed thereon when obvious equity and principles of fair

play demand it, on the conception that no man should be unjustly enriched at the expense of another who has acted in good faith. *Pritchard v. Williams,* 176 N.C. 108; *Wharton v. Moore,* 84 N.C. 479; 27 A.J. 262; 42 C.J.S. 421 *et seq.*

While this principle has been invoked under varying circumstances, it is ordinarily, if not exclusively, applied in cases where the occupant is in possession under the *bona fide* belief that he is the owner. *Faison v. Kelly,* 149 N.C. 282.

In this State this phase of the law controlling the right of the occupant, holding under color of title believed to be good, to claim compensation for improvements of a permanent nature before surrendering possession to the holder of a superior title was reduced to statutory form in 1871. Ch. 147, Laws of 1871-72. This statute as amended, is now General Statutes, Ch. 1, Art. 30. It controls decision here.

"A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause."

This statute creates no independent cause of action. *Rumbough v. Young,* 119 N.C. 567; *Wood v. Tinsley,* 138 N.C. 507. It merely declares that: "The owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession; and if it has been enhanced in value by improvements made under the belief that he was the owner, the *increased* value he ought not to take without some compensation to the other." *Merritt v. Scott,* 81 N.C. 385; *Wharton v. Moore, supra; Wood v. Tinsley, supra; Pritchard v. Williams,* 181 N.C. 46, 106 S.E. 144; *Rogers v. Timberlake,* 223 N.C. 59, 25 S.E. 2d 167; *Harrison v. Darden,* 223 N.C. 364, 26 S.E. 2d 860.

"The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements and had reason to believe the title good under which he and they were holding the premises." *Wood v. Tinsley, supra.*

The wording of the statute clearly limits its application to possessory actions or actions in which the final judgment may be enforced by execu-

tion in the nature of a writ of possession or writ of assistance. And the right to claim compensation does not arise until the owner of a superior title asserts his right of possession and obtains a judgment which entitles him to eject the occupant—though the last sentence would seem to permit the defendant to assert his claim in his answer and have an issue directed thereto submitted to the jury on the trial of the main issue. *Faison v. Kelly, supra;* 42 C.J.S. 456.

The claim accrues when the owner seeks and obtains the aid of the court to enforce his right of possession. *Faison v. Kelly, supra; Merritt v. Scott, supra; Wharton v. Moore, supra; Justice v. Baxter,* 93 N.C. 405; *Pritchard v. Williams,* 176 N.C. 108; *Rogers v. Timberlake, supra.* The law awards to the owner the land and his rents and to the occupant the value of his improvements. *Harriett v. Harriett,* 181 N.C. 75, 106 S.E. 221.

"A claim for betterments under the statute cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed under a judgment declaring the plaintiff the owner of the land." *Wood v. Tinsley, supra.* The plaintiff who establishes a superior title is entitled to judgment for the land "but no writ of ouster should issue until defendant's judgment for betterments is satisfied. *Albea v. Griffin,* 22 N.C. 9." *Bond v. Wilson,* 129 N.C. 325; *Harriett v. Harriett, supra;* 27 A.J. 282; 42 C.J.S. 470.

The sole question is: "How much was the value of the *property* permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the *bona fide* holder of the same?" *Pritchard v. Williams,* 181 N.C. 46; G.S. 1-346; 27 A.J. 273.

Many other states have adopted statutes controlling the right to, and prescribing the procedure for asserting, a claim for betterments. In those jurisdictions where the local statute does not provide otherwise, the great preponderance of cases on the subject are in accord with our decisions. See Anno. 44 A.L.R. 479, 89 A.L.R. 635, 104 A.L.R. 577.

A consideration of the pertinent statute and our decisions thereunder leads to the conclusion that the interveners now possess no claim for betterments presently enforceable in the pending action. The defendant has not asserted a present right of possession or sought a judgment of ouster. Indeed, she is not entitled to possession. All that she has done, through her motion in the cause, is to remove a cloud from her title to the remainder interest created by the foreclosure proceeding and the deed executed pursuant thereto. *Rumbough v. Young, supra.*

The interveners are in the rightful possession of the land and are entitled to the use of the improvements they have placed thereon. Until the life estate of Maggie Bumpass they now own falls in and the owner

of the remainder becomes entitled to possession, there can be no judgment of ouster. At that time the right of possession may rest in someone other than the defendant. And furthermore, there may not then be any improvements on the land for which the true owner must pay.

It would seem to be clear, therefore, that the petition of interveners is premature and is made in the wrong action. They have no claim to assert. That claim will accrue when and if the remainderman, after the termination of the life estate, seeks to eject them from the premises. *Rumbough v. Young, supra.*

No doubt the petitioners will desire to keep the buildings they have erected on the premises in a state of good repair and insure them against damage or destruction by fire. If the parties are unable to reach a satisfactory agreement in respect thereto, the court below has the authority to enter such order as he may deem advisable for the protection of all the parties pending the termination of the outstanding life estate owned by petitioners.

The judgment entered in the court below is

Affirmed.

MONTINE C. STANSEL, ADMINISTRATRIX OF MABEL R. HARGROVE, DECEASED, V. J. C. McINTYRE, DOING BUSINESS AS TEXTILE MOTOR FREIGHT, AND CHARLES EDWARD ADCOCK (ORIGINAL PARTIES DEFENDANT) AND JAMES H. AUSTIN AND MRS. JAMES H. AUSTIN (ADDITIONAL PARTIES DEFENDANT).

(Filed 30 January, 1953.)

1. Automobiles § 18a: Torts § 5—

A truck and a car collided. In the suit by the administratrix of a passenger in the car, who was fatally injured in the collision, against the owner and operator of the truck, the defendants are entitled to have the driver of the car joined as a codefendant for contribution, together with her husband upon the theory that he was liable for her negligence under the family car doctrine, but it is incumbent upon them to allege and prove that the driver of the car was guilty of negligence which concurred in producing the injury. G.S. 1-240.

2. Pleadings § 19c—

A demurrer admits the truth of the facts properly alleged in the pleading.

3. Judgments § 32—

Ordinarily, in order for a judgment to constitute an estoppel there must be identity of parties, of subject matter and of issues, and it is required further that the estoppel be mutual.

4. Same—

A judgment constitutes an estoppel only between the parties thereto and their privies.

5. Same: Automobiles § 21: Torts § 5: Pleadings § 31—Prior judgment between owners of vehicles involved in collision held properly pleaded by one of them in subsequent action by administratrix of passenger in car.

In an action by the owner and operator of a truck against the driver of the car involved in a collision with it, in which the driver of the car filed a counterclaim, it was adjudged that neither was entitled to recover because of the jury's finding that the driver of the car was guilty of negligence constituting a proximate cause of the accident. In this action by the administratrix of a passenger in the car against the owner and operator of the truck, these defendants had the driver of the car joined as a codefendant under G.S. 1-240, and alleged the prior judgment as constituting *res judicata*. *Held:* The prior judgment was properly pleaded since as between these defendants and the driver of the car it constituted *res judicata* upon the issue of the actionable negligence of the driver of the car, and motion to strike such averments and demurrer thereto were properly denied. Further, it would seem that such prior judgment would be *res judicata* on that issue as against the husband of the driver of the car, sought to be held liable for her negligence under the family car doctrine.

6. Automobiles § 25—

The family purpose doctrine obtains in North Carolina.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by defendants Austin from *Morris, J.*, at October Civil Term, 1952, of ROBESON.

Civil action instituted 16 December, 1949, by Montine C. Stansel, Administratrix of Mabel R. Hargrove, deceased, against J. C. McIntyre, doing business as Textile Motor Freight, and Charles Edward Adcock, driver of McIntyre's truck and trailer, to recover damages for the alleged wrongful death of Mabel R. Hargrove, heard upon motion of defendants Austin to strike, and upon demurrer of defendants Austin to the third further answer and defense of defendants McIntyre and Adcock.

The action arose out of a collision on 16 August, 1949, on U. S. Highway 74, near Polkton, Anson County, North Carolina, between a truck and trailer owned by defendant McIntyre and operated by defendant Adcock, traveling in eastern direction, and an automobile operated by Mrs. James H. Austin, in which plaintiff's intestate, Mrs. Hargrove, was a passenger, traveling in western direction. Mrs. Hargrove died as a result of the collision. The complaint of plaintiff filed in the action alleges various acts of negligence on the part of defendants McIntyre and Adcock as proximate cause of the collision and consequent injury to and death of Mrs. Hargrove.

The defendants McIntyre and Adcock, answering, denied the allegations of negligence set out in the complaint, and, as a further answer and defense, and in bar of right of plaintiff to recover herein, averred that Mrs. James H. Austin, driver of the automobile in which Mrs. Hargrove was a passenger, was negligent, and that her negligence was the sole proximate cause of the injuries to and death of Mrs. Hargrove.

And for a second further answer and defense and as a cross-action under G.S. 1-240 against James H. Austin and his wife, Mrs. James H. Austin, defendants McIntyre and Adcock set up claim for contribution from Mrs. Austin and her husband, as alleged joint tort-feasors. And these defendants aver, in substance, that the automobile in which Mrs. Hargrove was riding was owned by James H. Austin, and maintained by him as a family purpose car, and that it was being operated as such by Mrs. Austin at the time of the collision here involved, and they move that the Austins be, and they were named additional defendants, and served with process.

Thereafter, the Austins filed answer denying in material aspect the averments so made against them, and averred sole negligence in various aspects on part of defendants McIntyre and Adcock proximately causing the injury to and death of Mrs. Hargrove. And in paragraph 14 the Austins averred that the answering defendant, Mrs. James H. Austin, had previously in an action, which was then pending in Superior Court of Scotland County, made claim against defendants McIntyre and Adcock for $100,000 for the injuries sustained by her in said collision.

In this connection, prior to the institution of the present action, defendants McIntyre and Adcock had sued Mrs. Austin in Scotland County for recovery of damages for property damage and personal injuries, respectively, arising out of the same collision, and Mrs. Austin had there filed a counterclaim seeking to recover damages for her personal injuries.

These Scotland County actions were twice before the Supreme Court, as reported in 232 N.C. 189 and 235 N.C. 591, and were pending at the time the Austins filed answer in the present case.

Subsequently a trial was had in the Scotland County cases, and the cases consolidated for purpose of trial were submitted to the jury upon appropriate issues, and upon verdict returned judgment was rendered in Superior Court, and, on appeal, affirmed by Supreme Court. See 235 N.C. 591.

Thereafter defendants McIntyre and Adcock, by permission of the court, filed herein an amendment to the answer filed by them in this action, and for said amendment averred, for a third answer and defense, the matters of record constituting the judgment rolls in the Scotland County cases, above referred to, pleading and attaching copies of complaints, answers and issues submitted to and answered by the jury, and

the judgments of the court constituting same, as a bar to the plea of defendant Mrs. James H. Austin that the death of plaintiff's intestate, Mrs. Hargrove, was due solely to the negligence of these answering defendants, and that said defendant Mrs. Austin was in no way negligent; and that the judgments of the court in said actions are *res judicata* of the issue as to whether the negligence of defendant Mrs. James H. Austin was one of the proximate causes which contributed to the injuries to plaintiff's intestate, resulting in her death. Wherefore, these answering defendants pray judgment in accordance with these averments.

In this connection, it appears that of the issues submitted to the jury in the Scotland County actions, these were answered by the jury as shown:

"1. Was the plaintiff J. C. McIntyre and the plaintiff Charles E. Adcock injured and damaged by the negligence of the defendant, Mrs. James H. Austin, as alleged in the complaint? Answer: No.

"4. Was the defendant Mrs. James H. Austin injured and her property damaged by the negligence of the plaintiffs, as alleged in the cross-actions? Answer: Yes.

"5. Did the defendant, Mrs. James H. Austin, by her own negligence contribute to her injury and damage as alleged in the replies? Answer: Yes"; and that upon this verdict of the jury the court entered judgment in each of the Scotland County actions adjudging that plaintiff recover nothing of defendant and that defendant recover nothing of plaintiff.

The defendants Austin moved the court to strike from the record the third further answer and defense set out in the amendment to answer of defendants McIntyre and Adcock, for that "A. The facts therein set forth are irrelevant and immaterial to the matters at issue herein, and are highly prejudicial" to movants, and "B. The allegations of paragraphs 1, 2 and 3 of said third further answer and defense do not constitute a proper plea to be made by answer or amendment to answer, they being, if any plea, a reply to the answer of the defendants Austin to the original answer of the defendants McIntyre and Adcock."

And the defendants Austin demur to the third further answer and defense of defendants McIntyre and Adcock, and for their cause of demurrer show:

"(A) That paragraphs 1, 2 and 3 of said Third Further Answer and Defense, wherein those defendants purport to plead a plea in bar to the demurring defendants' plea that the death of plaintiff's intestate was due to the sole negligence of the defendants, McIntyre and Adcock, do not set forth facts sufficient to constitute a defense nor a plea in bar nor to entitle said defendants, McIntyre and Adcock, to the relief demanded, for that the facts, records and judgments therein pleaded do not constitute an adjudication that the negligence of the defendant, Mrs. James H.

Austin, was one of the proximate causes of the death of plaintiff's intestate, and are not *res judicata* to that effect."

The cause came on for hearing at October Civil Term, 1952, of Superior Court of Robeson, upon the motion and the demurrer of the defendants Austin as above set forth, and, after consideration thereof, the court, being of opinion that both should be disallowed, ordered that said motion to strike be, and it is denied, and said demurrer is overruled.

To this order defendants Austin except, object, and appeal to Supreme Court and assign error.

Smathers & Carpenter, McLean & Stacy, and James B. Mason for defendants, appellees.

McKinnon & McKinnon for defendants, appellants.

WINBORNE, J. Appellants assign as error the rulings of the trial court (1) in denying their motion to strike, as irrelevant, immaterial and prejucial, the "third further answer and defense" which by permission of court was filed by the original defendants, McIntyre and Adcock, as an amendment to their answer, and (2) in overruling their demurrer to the "third further answer and defense" of original defendants, for that the matters averred do not constitute an adjudication that the negligence of Mrs. Austin was one of the proximate causes of the death of plaintiff's intestate, Mrs. Hargrove, and, hence, are not *res judicata* to that effect.

However, in the light of the provisions of the statute G.S. 1-240, formerly C.S. 618 as amended, and of pertinent decisions of this Court, error in these respects is not made to appear.

It is provided by this statute, G.S. 1-240, that in an action arising out of a joint tort wherein judgment may be rendered against two or more persons or corporations, who are jointly and severally liable, and only one, or not all of the joint tort-feasors are made parties defendant, those tort-feasors made parties defendant may, at any time before judgment is obtained, upon motion, have the other such joint tort-feasors brought in and made parties defendant in order to determine and enforce contribution. *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434; *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335; *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73; *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505.

In the *Evans case, supra,* opinion by *Devin, J.,* now *Chief Justice,* decisions of this Court in reference to provisions of G.S. 1-240 are summarized in this manner: "The purpose of the statute is to permit defendants in tort actions to litigate mutual contingent liabilities before they

have accrued . . . so that all matters in controversy growing out of the same subject matter may be settled in one action . . . though the plaintiff in the action may be thus delayed in securing his remedy."

Moreover, this Court has held that where a plaintiff in a tort action does not demand any relief against an alleged joint tort-feasor brought into the action, on motion of the original defendant, pursuant to the provisions of G.S. 1-240, the burden is upon the original defendant to prove his cross-action for contribution. *Pascal v. Transit Co., supra.*

And in the case in hand, the original defendants, McIntyre and Adcock, having invoked the aid of this statute, G.S. 1-240, for the purpose of determining and enforcing contribution, as between them and Mrs. Austin, have the burden of alleging and proving facts constituting her a joint tort-feasor with them in respect to the collision between the truck and trailer owned by defendant McIntyre and operated by defendant Adcock, and the automobile operated by Mrs. Austin in which it is alleged by plaintiff Mrs. Hargrove was then a passenger and sustained injuries resulting in death. Such controversy is between the original defendants, McIntyre and Adcock, on one hand, and Mrs. Austin on the other, authorized to be injected in the plaintiff's action, to the end that settlement of the whole controversy be had in a single action. *Gaffney v. Casualty Co.,* 209 N.C. 515, 184 S.E. 46; *Freeman v. Thompson, supra; Godfrey v. Power Co., supra.*

In the light of this statute, G.S. 1-240, and these principles applied to the factual situation in hand, it would seem that the matters sought to be stricken are both material and relevant to the cross-action of the original defendants against Mrs. Austin.

Therefore, admitting the truth of the facts averred in the "third further answer and defense," pleaded by the original defendants, as is done when the sufficiency of a pleading to state a cause of action is challenged by demurrer, this question arises: Is the judgment in the Scotland County actions determinative of the question as to whether or not Mrs. Austin was a joint tort-feasor with McIntyre and Adcock in respect to the same collision there involved when it becomes the subject matter of another tort action instituted by a plaintiff who was not a party to the Scotland County case? Bearing in mind that the controversy here as to right to contribution, within the provisions of G.S. 1-240, is one between McIntyre and Adcock, on one hand, and Mrs. Austin on the other, who were the parties to the Scotland County cases, settled principles of law dictate an affirmative answer. See *Armfield v. Moore,* 44 N.C. 157; *Crawford v. Crawford,* 214 N.C. 614, 200 S.E. 421; *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554; *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570; *Current v. Webb,* 220 N.C. 425, 17 S.E. 2d 614; *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240; *Craver v. Spaugh,* 227 N.C. 129,

41 S.E. 2d 82; *Tarkington v. Printing Co., supra; King v. Neese,* 233 N.C. 132, 63 S.E. 2d 123; *Herring v. Coach Co., supra; Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805; *Coach Co. v. Stone,* 235 N.C. 619, 70 S.E. 2d 673.

Generally to constitute a judgment an estoppel there must be identity of parties, of subject matter, and of issues. And it is elementary that the estoppel of a judgment must be mutual, and "ordinarily the rule is that only parties and privies are bound by a judgment." See *Leary v. Land Bank, supra.*

Moreover, in *Current v. Webb, supra,* the Court, quoting from 2 Freeman on Judgments, Sec. 670, states: " 'There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, wherever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court.' "

And, continuing in the *Current case,* " 'It is not necessary that precisely the same parties were plaintiffs and defendants in the two suits; provided the same subject in controversy, between two or more of the parties, plaintiffs and defendants in the two suits respectively, has been in the former suit directly in issue, and decided.' " See other cases cited, including *Leary v. Land Bank, supra.*

And in the *Tarkington case, supra, Stacy, C. J.,* speaking in respect to a similar situation, stated the principle as follows: "The prior suit as between the then parties litigant determined the question whether the driver of the automobile was contributorily negligent or a joint tort-feasor with the owner and driver of the truck in bringing about the collision. Hence, as between the parties there litigant, this matter would seem to be *res judicata,*" citing *Cannon v. Cannon, supra.*

And in *Herring v. Coach Co., supra,* another case similar to the one in hand, opinion by *Devin, J.,* it is declared: "The rule seems to have been established that when in a cross-action by the defendant against an additional defendant for contribution as joint tort-feasor, it appears that in a previous action between them it had been determined that the additional defendant had not been contributorily negligent, the question could not again be raised in a suit between the same parties," citing the *Tarkington, Cannon* and *Current cases, supra.*

Conversely, the rule applies to the factual situation instantly presented where in the previous suit it has been determined that the additional defendant had been contributorily negligent, the question may not again be raised in a controversy between the same parties.

Finally, while the "third further answer and defense" under consideration expressly relates to Mrs. James H. Austin, and not to James H.

Austin, appellants in their brief call attention to the fact that McIntyre and Adcock in their joint answer aver that James H. Austin was the owner of the automobile and responsible under the family purpose doctrine. And it is asserted that "as a party to the matters in question for the first time he is clearly entitled to have a full trial of all matters alleged," and that "the allegations of the Scotland cases as to him are prejudicial to his defense of the case and are no bar to his right to plead such defenses as he has." As to this, it may be conceded that the question is not presented by this appeal, but if it were presented, the position taken by appellants may not be conceded to be tenable. The family purpose doctrine with respect to automobiles obtains in North Carolina. See *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17, and among other cases see *Robertson v. Aldridge,* 185 N.C. 292, 116 S.E. 742. Hence, if it be found that the automobile in question was owned and maintained by James H. Austin, and was being operated by Mrs. Austin, all within the family purpose doctrine, *quaere,* is he, James H. Austin, under the principle of *respondeat superior,* estopped by the judgment on the verdict in the Scotland County cases in respect to the issues on which original defendants now seek contribution from Mrs. Austin? Compare *Leary v. Land Bank, supra.*

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

DANIEL GILLIS HAWKINS, BY HIS NEXT FRIEND, EDGAR CARLISLE HAWKINS, *v.* CHARLES H. SIMPSON AND NORTH STATE MILLING COMPANY, A CORPORATION.

(Filed 30 January, 1953.)

1. Automobiles §§ 17, 18i—

When presented by the evidence adduced, it is incumbent upon the court to instruct the jury with respect to the duty imposed by law upon a motorist to avoid injuring children whom he sees or by the exercise of reasonable care should see on or near the highway.

2. Trial § 31b—

A declaration of the law in general terms, together with a statement of the contentions of the parties, is insufficient, but the court should also declare and apply the law to every substantial and essential feature of the case arising on the evidence, even without a prayer for special instructions. G.S. 1-180.

HAWKINS *v.* SIMPSON.

APPEAL by plaintiff from *Sink, J.*, September Civil Term, 1952, of GUILFORD (Greensboro Division).

This is a civil action to recover damages for personal injuries sustained by the plaintiff, a twenty-seven months' old child, resulting from the alleged negligence of the defendant, Charles H. Simpson, an agent and employee of the corporate defendant, who, at the time of the accident complained of was acting within the scope of his employment.

According to the evidence, on 5 September, 1951, about 1:00 p.m., the plaintiff, Daniel Gillis Hawkins, while standing on or near the edge of the traveled portion of an unpaved street (Fowler Street, High Point, N. C.), was hit and injured by an automobile owned by the corporate defendant and operated by the individual defendant.

Issues were submitted to the jury and the first one answered as indicated:

"1. Was the plaintiff, Daniel Gillis Hawkins, injured as a proximate result of the negligence of the defendants, as alleged in the complaint?

"Answer: No.

"2. If so, what amount in damages is he entitled to recover?

"Answer: ....."

Judgment was entered on the verdict and the plaintiff appeals and assigns error.

Schoch & Schoch for plaintiff, appellant.

Jordan & Wright for defendants, appellees.

DENNY, J. G.S. 1-180 provides that the trial judge "shall declare and explain the law arising on the evidence given in the case." The appellant, by exceptions and assignments of error based thereon, points out specifically wherein he contends the court in the trial below failed to instruct the jury on the substantial features of the case.

An examination of the charge discloses that the trial court defined actionable negligence and proximate cause in general terms and then proceeded to give the contentions of the parties, instruct the jury as to the burden of proof and as to the measure of damages should the jury reach that issue. However, the court did not declare and explain the law arising on the evidence in the case. The plaintiff, a child twenty-seven months of age, was entitled, among other things, to have the court instruct the jury with respect to the duty imposed by law upon a motorist to avoid injuring children whom he may see, or by the exercise of reasonable care should see, on or near the highway. *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871, 162 A.L.R. 999; *S. v. Gray,* 180 N.C. 697, 104 S.E. 647.

In the case of *S. v. Merrick,* 171 N.C. 788, 88 S.E. 501, *Hoke, J.,* in speaking for the Court, said: "The authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect."

It has been repeatedly held by this Court that a statement of the contentions of the parties together with a bare declaration of the law in general terms is not sufficient to meet the requirements of the provisions of G.S. 1-180. It is imperative that the law be declared, explained, and applied to the evidence bearing on the substantial and essential features of the case. *S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675; *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *S. v. Washington,* 234 N.C. 531, 67 S.E. 2d 498; *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Flying Service v. Martin,* 233 N.C. 17, 62 S.E. 2d 528; *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53; *S. v. Herbin,* 232 N.C. 318, 59 S.E. 2d 635; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921; *S. v. Fain,* 229 N.C. 644, 50 S.E. 2d 904; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; *Ryals v. Contracting Co.,* 219 N.C. 479, 14 S.E. 2d 531; *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435; *Nichols v. Fibre Co.,* 190 N.C. 1, 128 S.E. 471.

The plaintiff is entitled to a new trial and it is so ordered.

New trial.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1953

H. L. PERKINS, J. W. PERKINS AND N. C. NEWMAN, PARTNERS, v.
B. L. LANGDON.

(Filed 25 February, 1953.)

1. Landlord and Tenant § 16½—

In the absence of a covenant to the contrary, the landlord generally has the right to sell the premises subject to the lease without incurring liability to the tenant, since ordinarily the sale neither terminates the leasehold estate nor deprives the tenant of any of his rights.

2. Same: Frauds, Statute of, § 11: Registration § 5c—

Where the landlord transfers the premises to an innocent purchaser for value without notice, actual or constructive, of a parol lease for a three year term, the grantee takes the unencumbered fee, and the destruction of the leasehold estate by the transfer is a wrong to the lessee entitling lessee to recover of the lessor the resulting damages without averring demand upon the grantee for possession and his refusal. G.S. 22-2, G.S. 47-18.

3. Landlord and Tenant § 16½: Frauds, Statute of, § 11—

Testimony of lessees to the effect that lessor leased the premises by parol for a term of three years and covenanted not to sell same during the period of the lease, together with lessor's admission that he sold the premises at the end of the first year, *is held* sufficient to establish a *prima facie* case in favor of lessees, and lessor's motion to nonsuit was properly denied, notwithstanding that part of the testimony of one of lessees may be susceptible to the conflicting inference that the lease was for three years with privilege of renewal so as to make the contract invalid under the statute of frauds. G.S. 22-2.

4. Trial § 22c—

Inconsistencies or contradictions, even in plaintiff's evidence, do not justify nonsuit, since it is for the jury and not the court to resolve such conflict.

5. Landlord and Tenant § 16½—

In the lessee's action for wrongful termination of his parol lease as a result of the sale of the premises by the landlord to a purchaser for value without notice, plaintiff lessee has the burden of proving that the purchaser did in fact take title without actual or constructive notice of the lease.

6. Notice § 2—

While ordinarily a party who has information which is reasonably calculated to put him upon inquiry is charged with constructive notice of all that a reasonable inquiry would have disclosed, the rule of constructive notice does not apply if the matters of which he has notice are not reasonably sufficient to excite inquiry, or are insufficient to impose upon him the duty to make such inquiry.

7. Same: Landlord and Tenant § 16½—Question of purchaser's constructive notice of lease held for jury upon the evidence in this case.

Plaintiff lessees instituted this action to recover damages resulting from the alleged wrongful termination of their three year parol lease by lessor's conveyance of the property at the end of the first year to an innocent purchaser for value without notice. Plaintiffs' evidence tended to show that under the lease they were to be in possession of the property only a part of each year, and that at the time of the sale lessees were not in possession. One of the purchasers testified that he knew plaintiffs had a three year lease but that defendant lessor told him that the contract of lease permitted him to sell after one year. Plaintiffs also offered in evidence allegation of lessor's answer admitting that the purchaser had no notice. *Held:* Whether the purchaser with notice of the lease was under duty to make inquiry in the face of lessor's positive statement that the lease contract permitted him to sell after one year is a question for the jury, and upon all the evidence the question of the purchasers' constructive notice of the lease was properly submitted to the jury and lessor's motion for peremptory instructions thereon in his favor was properly overruled.

8. Contracts § 25a—

The measure of damages for breach of contract is the amount which would have been received if the contract had been performed as made, including loss of prospective profits when such loss is the natural and proximate result of the breach, may be ascertained with reasonable certainty, and be such as may reasonably be supposed to have been within the contemplation of the parties when the contract was executed. Plaintiff must allege and prove such special damage.

9. Same: Landlord and Tenant § 16½: Damages §§ 1c, 11—Competency of evidence to show loss of prospective profits resulting from breach of lease contract.

Plaintiffs instituted this action to recover for breach of a parol lease of tobacco warehouses for a period of three years upon allegations that de-

fendant lessor sold the property at the expiration of the first year to a *bona fide* purchaser for value without notice, actual or constructive. The allegations of the complaint laid proper predicate for the recovery of loss of prospective profits as special damages. Evidence of plaintiffs' promotional work during the first year causing a nonrecurring expense, but resulting in the major tobacco companies sending buyers to the market and the acquisition of government graders, together with evidence of profits made the year before and the first year of the operation of the warehouses by plaintiffs, as well as testimony of statements by lessor tending to show he expected increased business, and opinion evidence of witnesses, based upon operations at the market during the second two years and their experience in the business, as to the value of the lease for the second two years, *is held* competent on the issue of special damages.

10. Evidence § 46d—

The value of the use of property may be proved by the opinion evidence of witnesses acquainted with the property and the facts bearing upon its use.

11. Evidence § 52—

Form of hypothetical question to expert witnesses in this case *held* in substantial compliance with approved rules governing the reception of such evidence.

12. Appeal and Error § 38—

Appellant has the burden not only of showing error but also that the alleged error was material and prejudicial, since verdicts and judgments are not to be set aside for mere error and no more.

13. Damages § 13a—

The court's charge on the issue of damages *held* without error in this case.

APPEAL by defendant from *Carr, J.*, and a jury, at May Civil Term, 1952, of ALAMANCE.

Civil action to recover damages for alleged breach of rental contract.

The defendant, being the owner of two leaf tobacco sales warehouses located in the City of Fayetteville, entered into a rental contract with the plaintiffs whereby the defendant leased the warehouses and their equipment to the plaintiffs for the three marketing seasons of 1947, 1948, and 1949. The contract rests in parol. There is no controversy respecting its general terms: The plaintiffs were to finance operation of the warehouses and pay the defendant 30% of all gross commissions derived from producer sales of tobacco (these commissions being 2½% of sales), plus 30% of the tobacco basket rentals. The plaintiffs were to have possession two weeks before the opening of each tobacco selling season and surrender possession one week after the close of each season.

The plaintiffs entered into possession of the warehouses and equipment in the summer of 1947 and fulfilled the obligations imposed upon them

by the contract for the marketing season of 1947, including the payment to the defendant of all rentals due him for that season.

After the close of the 1947 marketing season, while plaintiffs were out of possession, the defendant, by deed dated 14 January, 1948, sold the warehouses and equipment covered by the rental contract to third parties, and by letter dated that day notified the plaintiffs of such sale. The purchasers took immediate possession of the warehouse property.

Thereupon the plaintiffs instituted this action, alleging in their original complaint that the defendant in selling and disposing of the warehouses at the end of the first marketing season breached the rental contract and wrongfully deprived the plaintiffs of the use and occupancy of the property for the remaining two years of the term.

The case was first tried at the May Term, 1949, of the Superior Court of Alamance. From a verdict and judgment in favor of the plaintiffs the defendant appealed, and in this Court demurred *ore tenus* to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. By decision reported in 231 N.C. 386, 57 S.E. 2d 402, the demurrer was sustained and the cause was remanded to the Superior Court. Thereafter the plaintiffs, under leave of court, on 4 March, 1950, filed an amended complaint by which the plaintiffs amplified their allegations to include, among other things, these additional averments: (1) that the defendant agreed as a part of the rental contract that he would retain ownership of the leased property "and not sell same" during the three-year term of the lease; and (2) that the defendant violated the terms of his contract by selling the property on 14 January, 1947, to R. H. Barber (Barbour) and P. L. Campbell and their spouses, who purchased "for value, in good faith, and without notice" of the rental contract.

Thereupon, the defendant moved to strike portions of the amended complaint, and from an order denying the motion the defendant again appealed to this Court. Decision modifying and affirming the court below is reported in 233 N.C. 240, 63 S.E. 2d 565. However, it is noted that there was no modification of the plaintiffs' crucial averments to the effect that (1) the defendant covenanted not to sell the leased property during the term, and (2) that the purchasers of the property took title as *bona fide* purchasers for value and without notice of the lease.

On retrial below issues were submitted to and answered by the jury as follows:

"1. Did the plaintiffs and the defendant enter into an oral contract by the terms of which it was agreed that plaintiffs would rent the defendant's two warehouses for the three tobacco marketing seasons of 1947, 1948 and 1949, as alleged in the original complaint? Answer: YES.

"2. If so, did the defendant agree to retain the ownership of said warehouses and not sell the same for said term of three years, as alleged in the amended complaint filed March 4, 1950? Answer: YES.

"3. Did the purchasers of the warehouses from the defendant purchase in good faith for value and without notice of the contract of rental with the plaintiffs for the said term of three years as said contract was described in the original complaint? Answer: YES.

"4. Did the purchasers of the warehouses from the defendant purchase in good faith for value and without notice of a contract of rental with the plaintiffs for the said term of three years as said contract was described in the amended complaint filed March 4, 1950? Answer: YES.

"5. Did the defendant breach the contract, as alleged by the plaintiffs? Answer: YES.

"6. What amount of damages, if any, are plaintiffs entitled to recover of the defendant? Answer: $48,100.00."

From judgment entered upon the verdict, the defendant appealed, assigning errors.

Brooks, McLendon, Brim & Holderness and James R. Nance for plaintiffs, appellees.

Robert H. Dye, Cooper & Cooper, and Sanders & Holt for defendant, appellant.

JOHNSON, J. The case comes here on a record of some 350 pages, embracing 221 exceptions, most of which are brought forward and argued *pro* and *con* in the briefs which total 96 pages. All exceptions brought forward have been duly considered, and the entire record has been carefully studied and fully examined. However, the vital issues around which the controversy revolved in the court below seem to be: (1) whether the defendant agreed not to sell the leased property during the term, (2) whether the purchasers took title charged with notice of the lease or as *bona fide* purchasers for value without notice of the lease, and (3) the issue of damages. Accordingly, we limit discussion to such of the defendant's exceptions as seem to bear materially on these factors. The exceptions not discussed are overruled. See *S. v. Lea,* 203 N.C. 13, 164 S.E. 737; *S. v. Lea,* 203 N.C. 35, 164 S.E. 737; *Rider v. Lenoir County,* 236 N.C. 620, 73 S.E. 2d 913.

When the case was called for trial, the defendant, prior to the introduction of any evidence, moved for judgment on the pleadings. The motion was denied. The defendant's exception then noted is brought forward.

Here the defendant makes the contention that a parol lease for not more than three years (not being within the provisions of the Statute of

Frauds, G.S. 22-2, or our recording laws, G.S. 47-18), is valid in law and enforceable against a *bona fide* purchaser for value without notice of the lease. On this premise, the defendant urges that it was incumbent on the plaintiffs to make demand on the new owners of the property for possession of the warehouses. As to this, the defendant asserts that the plaintiffs' failure to allege such demand (and refusal) constitutes a fatal defect in pleading which entitles the defendant to judgment on the pleadings.

It may be conceded that ordinarily the owner of leased property may sell it during the term of a lease, and in the absence of a covenant to the contrary the lessee cannot prevent the landlord from selling the premises subject to the lease or resist a change of landlords, or ground a cause of action on such transfer and change of landlords. *Perkins v. Langdon,* 231 N.C. 386, 57 S.E. 2d 402; Mordecai's Law Lectures, 2d Ed., pp. 596 and 597; 51 C.J.S., Landlord and Tenant, Sec. 258 (a), p. 895; 35 C.J., p. 1213 *et seq.;* 32 Am. Jur., Landlord and Tenant, Sec. 89.

This is so because such transfer of the reversion, subject to the lease, neither terminates the leasehold estate nor deprives the tenant of any of his rights in the land. 32 Am. Jur., Landlord and Tenant, Sec. 89. See also G.S. 42-8.

But a different situation is presented where the lessor under a parol lease for not more than three years transfers the reversion to an innocent purchaser for value who has no notice of the tenancy, and nothing sufficient to put him upon inquiry exists at the time of sale. In such case, while there is some authority for the proposition that the purchaser takes subject to the outstanding lease and is bound by its terms, whatever they may turn out to be (Tiffany, Real Property, 3rd Ed., Vol. 1, Sec. 110, citing *Bramhall v. Hutchinson,* 42 N. J. Eq. 372, 7 A. 873; and American Law of Property, Vol. 1, Sec. 3.59), nevertheless, by what we consider to be the better reasoned line of authority, where the lessor transfers the reversion to an innocent purchaser for value who has no notice of the tenancy, and nothing sufficient to put him upon inquiry exists at the time of the sale, the transfer destroys the leasehold estate of the tenant, is a wrong done to the lessee, and renders the lessor liable to the lessee in an action at law for damages. *Williams v. Young,* 78 N. J. Eq. 293, 81 A. 1118; *Grover v. Norton,* 183 N. Y. Supp. 731; *Raisin v. Shoemaker,* 200 N. Y. Supp. 615, affirmed 238 N.Y. 630, 144 N.E. 921. See also Annotation, L.R.A. 1915C, p. 194; 32 Am. Jur., Landlord and Tenant, Sec. 89; 51 C.J.S., Landlord and Tenant, Sec. 258.

In *Williams v. Young, supra,* the New Jersey Court, some twenty years after its decision in *Bramhall v. Hutchinson, supra* (cited by Tiffany and relied on by the defendant) had this to say: "When defendant wrongfully conveyed the land in question to an innocent purchaser for value without notice of complainant's leasehold estate, the leasehold

estate in the land was necessarily destroyed. The absolute and unrestricted title of such purchaser rendered the further existence of a leasehold estate impossible. The conveyance to the innocent purchaser was, in effect, a conveyance of the term and the reversion. Complainant thereby became entitled to recover from defendant in an action at law, . . ."

In *Grover v. Norton, supra,* it is stated: "But where a lessor transfers to an innocent purchaser for value, who had no notice of the tenancy, and nothing sufficient to put him upon inquiry existed at the time of the sale, the transfer destroys the leasehold, is a wrong to the lessee, and renders the lessor liable to the lessee in an action for damages."

This rule seems to be in accord with the letter and spirit of our registration statute, the Connor Act, adopted in 1885, now codified as G.S. 47-18. This statute provides in pertinent part as follows: "No conveyance of land, or contract to convey, *or lease of land for more than three years* shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies; . . ." (Italics added.)

The fact that these parol leases for not more than three years (also valid as not being within the Statute of Frauds, G.S. 22-2) are excepted from the operation of the Connor Act (G.S. 47-18) is not to be interpreted as meaning that a lessee under such lease is protected at all hazards or that his rights are superior to those of a *bona fide* purchaser for value from the lessor. These short-term parol tenancies are merely exempted from the operation of the Connor Act. This being so, we look for guidance to the law as it stood prior to the passage of this Act and as it now stands where the Act has no application.

As to this, the true rule is that a *bona fide* purchaser for value without notice of outstanding equities takes title absolute. But where upon the sale of land the rights of a tenant under one of these short-term parol leases becomes involved, the facts respecting whether the lessee was or was not in possession at the time of the sale ordinarily becomes a crucial factor in determining whether the purchaser stands in the protected position of a *bona fide* purchaser for value without notice of the lease, and where the lessee is in actual possession, the purchaser ordinarily takes subject to the lease, although he has no actual knowledge thereof. Actual possession is treated as the equivalent of notice to the purchaser and as a substitute for registration. *Webber v. Taylor,* 55 N.C. 9; *Edwards v. Thompson,* 71 N.C. 177; *Tankard v. Tankard,* 79 N.C. 54; *Heyer v. Beatty,* 83 N.C. 285; *Bost v. Setzer,* 87 N.C. 187; *Johnson v. Hauser,* 88 N.C. 388; *Staton v. Davenport,* 95 N.C. 11; *Mayo v. Leggett,* 96 N.C. 237, 1 S.E. 622. See also *Allen v. Bolen,* 114 N.C. 560, 18 S.E. 964; 51 C.J.S., Landlord and Tenant, Sec. 258; *Raisin v. Shoemaker, supra;*

Eckman v. Beihl, 116 N.J. 308, 184 A. 430; *Huddleston v. Ward* (Ohio), 68 N.E. 2d 580; 39 Am. Jur., Notice and Notices, Sec. 18; Annotation, 74 A.L.R. 355.

It is here noted that our registration act of 1885 (G.S. 47-18) contains a proviso that in cases where deeds were executed prior to 1 December, 1885, actual possession excepted the cases from the operation of the act and stood as the equivalent of registration. Prior to 1885 in cases involving conveyance of leasehold interests in land, and fixing the rights as between the lessee and the purchaser, actual possession of the land was treated as "notice to the world of all equities in favor of the occupant." *Heyer v. Beatty, supra.*

In *Bost v. Setzer, supra* (1882), it is stated: "If for instance a person should purchase an estate from the owner, knowing it to be in the possession of a tenant, he is bound to inquire into the estate which the tenant had, and has an implied notice of the nature of the title."

But to constitute constructive notice, the possession must be open, notorious, and exclusive and existing at the time of the purchase. *Edwards v. Thompson, supra.*

The logic and fundamental fairness of this rule which protects a *bona fide* purchaser for value without notice of an existing parol lease is inescapable when we realize that in the absence of such rule, in many situations no amount of inquiry or inspection of the premises would protect a purchaser as a matter of law from these hidden equities; whereas, the rule which treats the actual, open possession of the lessee as notice to the world fully protects a lessee in possession. Besides, on principles of natural justice the burden of giving notice of these undisclosed encumbrances and equities should be placed upon him who has knowledge thereof, namely, the owner, or lessee if he has the right of possession.

The application of the rule urged by the defendant, permitting the engrafting of these hidden equities, would unduly burden land titles.

It necessarily follows from what we have said that the motion for judgment on the pleadings was properly denied.

Next is the exception based on refusal to allow the defendant's motion for judgment as of nonsuit.

It is admitted that the defendant sold the premises at the end of the first year. Therefore, decision on the question of nonsuit may be made to turn on whether the plaintiffs showed *prima facie* that the rental contract contained a covenant that the defendant would not sell the property during the three-year term of the lease. The plaintiffs testified unequivocally it was agreed that the defendant would not sell during the term. This, with the admission that the property was sold at the end of the first year, made it a case for the jury on the question of breach of contract and recovery of nominal damages at least. *Sineath v. Katzis,* 218 N.C. 740,

12 S.E. 2d 671; *Bowen v. Bank,* 209 N.C. 140, 183 S.E. 266; 15 Am. Jur., Damages, Sections 5 and 7.

We have considered the defendant's contention that part of the testimony of the plaintiff H. L. Perkins is susceptible of the inference that he claimed the lease was for three years with privilege of two more, so as to bring the contract within the Statute of Frauds and entitle defendant to judgment of nonsuit on the theory that the alleged contract is violative of the Statute of Frauds, G.S. 22-2. At most, the testimony relied on by the defendant was nothing more than an inconsistency or contradiction in the witness' testimony in chief. As to this, the rule is that it is for the jury, and not for the court, to resolve the discrepancies and dispose of the contradictions in testimony. *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864.

This brings us to the exception based on the ruling of the trial court in denying the defendant's motion for peremptory instruction in his favor on the third issue.

On this issue the burden of proof was on the plaintiffs to show that the purchasers of the warehouses took title from the defendant "for value and without notice of the contract of rental with the plaintiffs for the said term of three years as said contract was described in the original complaint."

The defendant in urging that he was entitled to a peremptory instruction relies chiefly on the testimony of the witness R. H. Barbour, one of the purchasers of the warehouse property. This witness said he knew from his conversations with the defendant that the plaintiffs had a three-year lease on the property, but the witness further said the defendant told him the contract permitted him to "sell after one year." Thus, on the basis of the information of purchaser Barbour, given him by the defendant, the plaintiffs' lease was enforceable for only one year. This being so, it does not follow as the only inference deducible from Barbour's testimony that the purchasers had notice of a "contract of rental with the plaintiffs for the . . . term of three years. . . ."

But the defendant here insists that in any event the testimony of Barbour shows at least that the purchasers had knowledge of a lease agreement between the defendant and the plaintiffs, and that this knowledge was sufficient to excite attention and charge the purchasers with the duty of making direct inquiry of the lessees, and that such inquiry, if made, would have disclosed the actual terms of the contract as claimed by the lessees.

We apprehend the general rule to be, as recognized by numerous authoritative decisions of this Court, that ordinarily where a party has information which is reasonably calculated to excite attention and stimulate inquiry, he is charged with constructive notice of all that reasonable

inquiry would have disclosed, the theory being that knowledge which one has or ought to have under the circumstances is in legal contemplation imputed to him. *Ijames v. Gaither,* 93 N.C. 358; *Hulbert v. Douglas,* 94 N.C. 122; *Bryan v. Hodges,* 107 N.C. 492, 12 S.E. 430; *Rouse v. Bowers,* 111 N.C. 360, 16 S.E. 684; *Loan Association v. Merritt,* 112 N.C. 243, 17 S.E. 296; *Wittkowsky v. Gidney,* 124 N.C. 437, 32 S.E. 731. See also 39 Am. Jur., Notice and Notices, Sec. 12.

But to charge one with notice, the activating information known to the party sought to be charged must ordinarily be such as may reasonably be said to excite inquiry respecting the particular fact or facts necessary to be disclosed in order to fix the party charged with notice. 39 Am. Jur., Notice and Notices, Sec. 15; *Zeller v. Milligan,* 71 Cal. App. 617, 236 P. 349; *Anderson v. Blood,* 152 N.Y. 285, 46 N.E. 493; *Fire Asso. of Phila. v. Flournoy,* 84 Tex. 632, 19 S.W. 793.

Also implicit in the principles that underlie the doctrine of constructive notice is the concept that before one is affected with notice of whatever reasonable inquiry would disclose, the circumstances must be such as to impose on the person sought to be charged a duty to make inquiry. *Truitt v. Grandy,* 115 N.C. 54, 20 S.E. 293; *Kian v. Ketalogiannis,* 158 Va. 129, 163 S.E. 535, 82 A.L.R. 894; *Hoy v. Bramhalf,* 19 N. J. Eq. 563, 97 Am. Dec. 687; *Hood v. Fahnestock,* 1 Pa. St. 470, 44 Am. Dec. 147; *S. & E. Motor Hire Corporation v. New York Indem. Co.,* 255 N.Y. 69, 174 N.E. 65, 81 A.L.R. 1318; *Armourdale State Bank v. Homeland Ins. Co.,* 134 Kan. 245, 5 P. 2d 786; 39 Am. Jur., Notice and Notices, Sec. 12.

The gist of the defendant's contention is that the purchasers were in duty bound to go behind and make inquiry as to the truthfulness of the positive representation which admittedly the defendant made to the purchasers to the effect that he had the right "to sell the property after one year."

The plaintiffs' position *contra* is that upon the whole of the evidence it was inferable that the purchasers, not being apprised of anything calculated to excite inquiry or stimulate doubt as to the reliability of the representations made to them by the defendant, were justified in accepting as true, and acting on, the representations as made by the defendant.

And in support of the plaintiffs' position it is noted that this controverted question of whether the purchasers are chargeable with notice of the lease, as presented by the third issue, is not required to be resolved wholly and solely on the basis of the testimony of purchaser Barbour, as suggested by the defendant. Relevant facts and circumstances susceptible of substantial probative force arise from other sources. First, it is of controlling importance, as tending to support the inference that the purchasers were not charged with notice of the three-year lease, that the defendant owner, rather than the lessees, admittedly was in possession of

the property at the time of the sale. And, further, it is noted that the plaintiffs offered in evidence these portions of the defendant's answer to plaintiffs' allegations that the purchasers took title to the warehouse property as *bona fide* purchasers: ". . . It is admitted that neither the purchasers nor the defendant had notice of, nor was there in fact, any such contract between the defendant and the plaintiffs as alleged by the latter, and that the grantees named in said deed were purchasers for value, in good faith, and have retained possession thereof since their purchase."

True, the foregoing admission, contained in the defendant's pleadings, relates to the plaintiffs' allegations respecting the terms of the lease agreement as set out in the plaintiffs' amplifying amendment, upon which the fourth issue is based. Nevertheless, the admission set out in the defendant's answer relates in general terms to the lease agreement, and the admission was offered by the plaintiffs and received in evidence without qualification or restriction. We think it has probative value as bearing on the third issue as well as the fourth.

It thus appears that the evidence was not all one way on the crucial question of notice. And particularly is this so when we bear in mind, as we must, that the question here presented is not only (1) whether inquiry, if made of the lessees by the prospective purchasers, would have revealed the facts which really existed, *i.e.*, that the plaintiffs claimed under an unconditional lease for the full term of three years, with no right of sale reserved by the defendant as he claimed, but also (2) whether, acting as ordinarily prudent persons would have done, the purchasers were called upon, under the circumstances, to make inquiry of the lessees.

Manifestly, upon the record as presented the question of notice presented by the third issue was an open question for the jury, and the motion for peremptory instruction was properly overruled.

We come now to the exceptions dealing with the issue of damages. The case was tried below on the theory that if the defendant breached the lease agreement as alleged, then and in that event the plaintiffs were entitled to recover for profits prevented or lost in consequence of the defendant's wrong.

The defendant challenges this theory of the trial. He contends that profits prevented may not be made the subject of recoverable damages in a case like this one, and in connection with numerous exceptions grouped and brought forward he asserts that the trial court erred (1) in the reception of evidence tending to support the plaintiffs' claim for damages based on loss of prospective profits, and (2) in charging the jury on the theory that the measure of damages is related to the loss of prospective profits.

In resolving the legal question here presented, we recur to fundamental principles. In accordance therewith, the general rule is that a party who is injured by breach of contract is entitled to compensation for the injury

sustained and is entitled to be placed, as near as this can be done in money, in the same position he would have occupied if the contract had been performed. Stated generally, the measure of damages for the breach of a contract is the amount which would have been received if the contract had been performed as made, which means the value of the contract, including the profits and advantages which are its direct results and fruits. *Newby v. Atlantic Coast Realty Co.,* 180 N.C. 51, 103 S.E. 909; *Winston Cigarette Mach. Co. v. Wells-Whitehead Tobacco Co.,* 141 N.C. 284, 53 S.E. 885; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277; 15 Am. Jur., Damages, Sec. 43.

It follows, therefore, that recovery may be had both for gains prevented and losses sustained by reason of the breach, including loss of prospective profits. *Troitino v. Goodman, supra; Cary v. Harris,* 178 N.C. 624, 101 S.E. 486; 15 Am. Jur., Damages, Sec. 43, and Sec. 149 *et seq.* However, to "warrant a recovery for loss of profits in an action for breach of contract, it must be made to appear that such loss of profits was the natural and proximate, not remote, result or consequence of the breach of the contract, and such as may reasonably be supposed to have been within the contemplation of the parties when the contract was made as the probable result of its breach." 15 Am. Jur., Damages, Sec. 152. See also *Wilkinson v. Dunbar,* 149 N.C. 20, 62 S.E. 748; *Cary v. Harris, supra; Troitino v. Goodman, supra.*

This is but an application of the rule enunciated and applied in the old English case of *Hadley v. Baxendale,* 9 Exch. 341, which with us through the years has been followed as the controlling guide in determining the measure of damages in breach of contract cases where special damages, arising out of special circumstances, are alleged and proved. We quote from the decision: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.,* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise

generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them . . ."

Under application of the foregoing principles, we think it may be stated as a general rule that the prospective profits from an established mercantile business, prevented or interrupted by breach of contract, are properly the subject of recovery when it is made to appear (1) that it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that such profits can be ascertained and measured with reasonable certainty, and (3) that such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of a breach. 15 Am. Jur., Damages, Sections 152 and 157. See also 32 Am. Jur., Landlord and Tenant, Sections 32 and 194; Annotation, 104 A.L.R. 132, p. 139; *Troitino v. Goodman, supra; Brewington v. Loughran,* 183 N.C. 558, 112 S.E. 257; *Cary v. Harris, supra; Harper Furniture Co. v. Southern Express Co.,* 148 N.C. 87, 62 S.E. 145; *Johnson v. R. R.,* 140 N.C. 574, 53 S.E. 362; *Hadley v. Baxendale, supra; Neal v. Jefferson,* 212 Mass. 517, 99 N.E. 334; *Dyal v. Wimbish,* 124 F. 464; Williston on Contracts (1937 Edition), Vol. 5, sections 1345, 1346, and 1346A; Restatement of the Law of Contracts, Vol. 1, Sections 329, 330, and 331.

In *Cary v. Harris, supra,* the owner of a hotel sued the tenant to recover unpaid rents. The tenant set up a counterclaim for damages growing out of a breach of the covenants in the lease. In support of the counterclaim and as bearing upon the measure of damages, evidence was offered concerning the prior operational experience of the hotel. The defendant testified respecting what the income was and gave her opinion as to the value of the lease the season following its breach. This Court, with *Brown, J.,* delivering the opinion, laid down the rule of damages as follows:

"The rule is, in the admeasurement of damages in a case of this kind, that the party injured may recover all the damages, including gains prevented as well as losses sustained, as were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty." (Citing cases.)

Neal v. Jefferson, supra, involves loss of profits for breach of lease. There the defendant breached a one-year lease of a Florida hotel and cottage. The contract was breached after one year's operation by virtue of the defendant's sale of the premises. Recovery was allowed on the basis of estimated lost profits. There it was said: "The *quantum* of such prospective profits was not so speculative or uncertain as to preclude

their recovery. . . . There was evidence of the actual receipts and expenditures during the time that the plaintiff was in possession. He testified as an expert to his opinion of what could be realized during the two following years and of the value of the leasehold estate in view thereof. Looking at the evidence of his knowledge and experience we cannot say this was wrong. . . ."

In *Dyal v. Wimbish, supra,* the plaintiff leased defendant a tobacco warehouse for three seasons. The lessee agreed to pay the lessor a specified sum per thousand pounds of all first-hand tobacco sold. Plaintiff had operated defendant's warehouse under a similar lease for four years previous. Defendant wrongfully breached the contract and refused to allow plaintiff to get possession for the 1939 season. The plaintiff was permitted to recover damages based on the loss of prospective profits and the recovery was upheld on appeal, with the Court making this observation: "There is no doubt the evidence tended to show the profits made by Wimbish from the leasing of the Planters Warehouse in previous years was properly admitted."

The defendant in urging that the evidence bearing on prospective profits should have been excluded, cites and relies on these decisions: *Sloan v. Hart,* 150 N.C. 269, 63 S.E. 1037; *Machine Co. v. Tobacco Co., supra; Brewington v. Loughran, supra; Harris v. Smith,* 216 N.C. 352, 4 S.E. 2d 880; *Steffan v. Meiselman,* 223 N.C. 154, 25 S.E. 2d 626.

The defendant places chief stress upon the decision in *Sloan v. Hart, supra,* which was an action by a lessee to recover damages for breach of a lease contract. There the Court said the measure of damages was "the difference between the rent agreed upon and the market value of the term," and went on to say: "By rental value is meant, not the probable profits that might accrue to the plaintiffs, but the value, as ascertained by proof, of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined."

However, there is a clear factual distinction between the *Sloan case* and the case at hand. In the *Sloan case,* as stated at the bottom of page 275: "There is no allegation in the complaint of any special damages, and no evidence to support the claim." In the present case there is both allegation and proof of special damages.

Similarly, upon close scrutiny the other cases cited by the defendant are found to be factually distinguishable from the case at hand. Without further discussion it is enough to say that these cited decisions may not be interpreted as committing this Court to the unvarying rule that the loss of prospective profits upon interruption or destruction of an established business is too remote or speculative to sustain recovery therefor.

It may be conceded that recovery based on the loss of prospective profits, usually being too dependent upon uncertain and changing con-

tingencies, is not allowed as a matter of course, nevertheless we adhere to the rule explained by *Mr. Justice Lamar* in the case of *Howard v. Stillwell & Bierce Mfg. Co.* (1891), 139 U.S. 199, 11 S. Ct. 500, 35 L. Ed. 147: "But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

We do not interpret the decisions of this Court cited by the defendants as being at variance with this rule. The rationale of the cited decisions is that when prospective profits are conjectural, remote, or speculative, they are not recoverable. 15 Am. Jur., Damages, Sec. 152. See also *Sprout v. Ward,* 181 N.C. 372, 107 S.E. 214; *Coles v. Lumber Co.,* 150 N.C. 183, 63 S.E. 736.

Accordingly, when we come to consider the defendant's numerous exceptions to the reception of evidence, the question for decision involved in most instances is (1) whether the challenged evidence comes within the bounds and limits of the approved general rule governing the allowance of prospective profits, or (2) whether it is conjectural, remote, or speculative, and therefore beyond the bounds of the rule.

The evidence bearing on the issue of damages, received, in large part, over the defendant's objections and exceptions, may be summarized as follows:

The Fayetteville tobacco market was first opened in 1946 with three warehouses: the Langdon, the Mack, and the Cumberland. None of the major tobacco companies sent buyers to the market that year. Nor were government-paid graders furnished, as was customary on established markets. The buyers who appeared were principally representatives of small, independent companies or speculators; the grading service was paid for by local contributions. The market as a whole operated in 1946 "pretty poorly." The total sales of the market were 6,420,612 pounds at an average of about 48c per pound.

The defendant owned that year only one of the three warehouses. From it he made net about $4,000. Toward the end of the year he started negotiations for the purchase of the Mack Warehouse, which was about the same size as his original Langdon house. The purchase was consummated prior to the time he concluded the lease agreement with the plaintiffs, and both warehouses were included in the lease. The two warehouses had total floor space of 94,000 square feet. This represented 69.4% of the total market floor space, and gave the plaintiffs 69.4% of

the total market selling time. The total market selling time, as is the custom in the tobacco trade, was allocated to the different warehouses on the basis of relative floor space.

The lease was made early in 1947. Following this the plaintiffs spent much time, from March until the season opened in August, at the task of building up the market; they made various trips to the home offices of the leading tobacco manufacturing companies in an effort to have these companies place buyers on the market, and to Washington for the purpose of arranging for government-paid graders. In both these undertakings the combined efforts of the plaintiffs and other interested citizens proved successful. In addition to a number of large independent companies, these companies sent buyers in 1947: American Tobacco, R. J. Reynolds, Liggett-Myers, and China American Tobacco Company.

With the coming of these leading tobacco companies, the Fayetteville market became in 1947, the first year of plaintiffs' lease, what is known in the trade as a "stabilized market."

The plaintiff J. W. Perkins also spent much time during the spring and summer on promotional work—"drumming tobacco in about 12 or 14 counties, calling on farmers from house to house, . . ." The plaintiffs also sent out about 60,000 circulars announcing the coming arrival on the Fayetteville market of buyer-representatives of these major tobacco companies. They also did "radio advertising—newspaper advertising, went to tremendous expense at that."

In this and other promotional work of like kind the plaintiffs incurred during the first year of operations expenses of a nonrecurring nature amounting to about $7,400.

The Fayetteville market sold during the year 1947 about 7,883,992 pounds of tobacco at an average price of about 40c per pound, as against 6,420,612 pounds for the year 1946. The two warehouses operated by the plaintiffs, with 69.4% of the total market floor space and selling time, drew 77% of the total market sales. The defendant's 30% share of the receipts from the two warehouses in 1947 amounted to $22,741.79. This was paid to the defendant by the plaintiffs in accordance with the lease. After payment of this and other items of operating expense (including the nonrecurring expense items of $7,400), the plaintiffs' net profits for 1947 amounted to $23,874.08.

The foregoing line of evidence was relevant and admissible as tending to show that the plaintiffs' business, allegedly interrupted and broken up by the defendant's wrong, was (along with the Fayetteville market) an established going concern and had been successfully conducted for such length of time that the profits thereof were reasonably ascertainable. *Outcault Adv. Co. v. Citizens Nat. Bank,* 118 Kan. 328, 234 P. 988, 41 A.L.R. 194. *Cf. Sinclair Ref. Co. v. Hamilton & Dotson,* 164 Va. 203,

178 S.E. 777, 99 A.L.R. 929; *Howard v. Stillwell and Bierce Mfg. Co., supra.*

It was also in evidence that during the negotiations leading up to the consummation of the lease that the plaintiffs told defendant they contemplated building up the business to the point where the defendant's net profits would "grow all the way from $25,000 to $35,000 per season"; that the defendant "was very tickled to hear that." And while he said "he would a whole lot rather see it than hear tell of it," the evidence discloses that from his information respecting the plaintiffs and their long, successful experience in the tobacco industry, he was convinced as he put it in speaking to them: "You fellows are going to make good tenants, going to make me good renters." He told the plaintiff Newman: "I feel reasonably sure things are going to be different. I feel good about it."

This line of evidence was relevant and competent as shedding light on the extent of profits that may reasonably be supposed to have been within the contemplation of the parties, when the contract was made, as the probably result of a breach. *Hadley v. Baxendale, supra.* Also, there was evidence tending to show that the parties contemplated it would be necessary for the plaintiffs to incur during the first year substantial non-recurring expenses, and that the profits would likely increase the second and third years.

In 1948 the total warehouse floor space of the Fayetteville market was increased from 132,436 square feet to 339,000. After the defendant's two warehouses were sold, their floor space was increased by the new owners from 94,000 square feet to 165,000. Gross sales on the Fayetteville market for 1948 were 8,612,160 pounds at an average price of about 49c, and for 1949 the gross sales were 8,348,286 pounds at an average of about 47c per pound. For the years 1948 and 1949 the Langdon warehouses, operated by the new owners, had about 48.5% of the total market floor space and sold about 48.5% of the total market sales. However, assuming that the floor space of the Langdon houses had not been increased by the new owners, but with the other competing houses increased as they were increased, the Langdon houses would have had about 35.074% of the market floor space. This evidence was relevant and admissible as tending to furnish further bases upon which to estimate prospective profits. 15 Am. Jur., Damages, Sec. 157.

It was fully developed by the testimony of numerous witnesses that the floor space increases made by the competing warehouses after the close of the 1947 season vitally reduced the relative selling time and comparative volume of sales made by the Langdon warehouses in the hands of the new owners. And these changes, including the floor-space additions made by the new owners of the Langdon houses, necessarily became vital factors in estimating the prospective profits of the plaintiffs for the

years 1948 and 1949. A study of the record leaves the impression that the jury fully understood the impact of these factors as bearing on the issue of damages.

The court permitted the plaintiffs J. W. Perkins and N. C. Newman each to testify (over objection and exception of the defendant) that in his opinion the value of the lease agreement for the years 1948 and 1949 was $41,201.83 each year, or a total for the two years of $82,403.66.

This testimony was admissible under the general rules governing opinion testimony. It is well established that the value of the use of property may be proved by the opinion evidence of witnesses acquainted with the property and the facts bearing upon its use. 20 Am. Jur., Evidence, Sec. 900; Wigmore on Evidence, Third Ed., Sec. 1918 *et seq.*

Here it is noted that these witnesses were subjected to lengthy cross-examinations in which it was disclosed that the floor space increases made by the competing warehouses after the 1947 season necessarily became vital factors in estimating the prospective profits of the plaintiffs for the years 1948 and 1949.

The plaintiffs were also permitted to introduce in evidence, over objections and exceptions of the defendant, various opinions of disinterested witnesses as to the fair value of the plaintiffs' lease for the years 1948 and 1949. These opinions were given by witnesses shown to have had years of experience in operating auction warehouses like the ones involved here, in the same and other tobacco belts. Each witness also stated that he was familiar with the Fayetteville market in 1948 and 1949. These opinions placed the value of the plaintiffs' lease for 1948 and 1949 at figures ranging from $27,000 to $35,000 a year.

Illustrative of this kind of evidence is the testimony of the witness Odell King, in part as follows:

"Q. Mr. King, if the jury should find from the evidence in this case and by its greater weight that Mr. Langdon entered into a contract to rent or lease his two tobacco warehouses in Fayetteville to the Perkins brothers and Mr. Newman, the plaintiffs in this case, for the tobacco marketing seasons of 1947, 1948 and 1949, upon a commission basis of 30% of the gross profits or commissions of sale, going to the owner of the warehouse, Mr. Langdon, together with 30% of the basket rentals for each of the three years, and that the plaintiffs, the Perkins brothers and Mr. Newman, for the year 1947, were in possession of these two warehouses of Mr. Langdon for that tobacco marketing season, and that during that season they grossed $74,741.16, and had expenses of $52,238.34, in which expenses they paid Mr. Langdon $22,741.79 rent, and that they had a net profit of $23,874.08, and that during that year of 1947 the Fayetteville tobacco market, that is all the warehouses had a square foot area of warehouse space of 132,436 square feet of which the two Langdon

warehouses, rented to the plaintiffs, had 69.4% of the total warehouse floor space, and that the entire market sold 7,883,000 pounds of tobacco, of which the plaintiffs, the Perkins brothers and Mr. Newman, sold approximately 77% of all tobacco sold, and that all of the tobacco sold for $2,430,000, that is the Langdon warehouses, and there was a net profit of $23,874.00 approximately, and of the expense of $52,000.00 in round figures, there was approximately $7,400 in nonrecurring expenses that they would not have to expend for the years 1948 and 1949, and that in 1948 there had been an increase of floor space of the entire Fayetteville warehouse markets from 132,436 square feet, to 339,000 square feet approximately, of which the warehouses that Mr. Langdon had leased or rented to the plaintiffs had then 48.5% of the floor space, instead of 69.4% that they had in 1947, and there was sold on the warehouses 3,900,000 pounds at 49c a pound, whereas the sale price was approximately 40c a pound in 1947, . . . and that in 1949 with the same floor space as in 1948, in the whole Fayetteville tobacco market of 339,000 square feet, the market sold 8,348,000 pounds at an average sale price of approximately 47c per pound, and of that tobacco the Big Farmers Warehouse, which was the new name of the two Langdon warehouses, leased to the plaintiffs in this case, sold 48.5% of the total amount of tobacco sold on the market; would you have an opinion, based upon your knowledge of warehouse conditions in Fayetteville during those years of 1948 and 1949, and based upon the figures which I have given you, as to your opinion, if any, satisfactory to your own mind, as to the value of the contract of the Langdon warehouses to these plaintiffs in the years 1948 and 1949?

"A. I have got one thing in mind.

"Q. Just answer the question. Do you have an opinion?

"A. Yes, I do.

"Q. What is that opinion?

"A. In consideration of the experience I have had, operating expenses, knowing what ours have been, quoting figures on what they had in 1947, their first year there, I would say from $32,000 to $35,000 each year.

"Q. Mr. King, if the jury should find from the evidence in this case and by its greater weight, all of the factual situations that I have just read to you in my previous question, but when you come to the year 1948 with this change, you would find that the floor space in the Wellons Warehouse and in the Planters Warehouse, without making any increase on the floor space in the Big Farmers Warehouse, leaving that at 94,000 instead of increasing it to 165,000, if you find with that factual situation, that the percentage of the floor space of the entire market as to the Big Farmers Warehouses that had been leased to these plaintiffs, amounted to 35.074% of the floor space, what would be your opinion upon that factual situation, if you have such opinion satisfactory to yourself and based

upon experience as to the value of the leased property to these plaintiffs for the years 1948 and 1949, based upon an average of 35.074% of the floor space?

"Q. Do you have an opinion about it?

"A. I do.

"Q. What is that opinion?

"A. Basing 48% on the first question and on this 35%, I would say from $30,000 to $33,000 each year."

This line of testimony was in substantial compliance with approved rules governing the reception of expert testimony by means of hypothetical questions. Stansbury, North Carolina Law of Evidence, Sec. 137; 58 Am. Jur., Witnesses, Sections 851 to 858; Wigmore on Evidence, Third Ed., Sections 672 to 686.

In determining the admissibility of the challenged evidence we have not overlooked these special factors: (1) that the size of the tobacco crop is controlled by government regulations; (2) that a floor price is fixed each season for the different grades and that this tends to stabilize the market price of tobacco; and (3) that State law requires warehousemen to keep and report accurate records of all sales of tobacco. See G.S. 106-457 *et seq.*

A careful examination of the exceptions relating to the reception of plaintiffs' evidence tending to show loss of profits leaves us with the impression that the main thread and volume of the evidence, when tested by approved rules, to which we adhere, was relevant and admissible. The deviations were slight and not of sufficient moment to upset the result reached below. *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312. 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. Rainey,* 236 N.C. 738, 74 S.E. 2d 39; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797.

Also, our examination of the exceptions relating to the charge disclose no substantial merit. Judge Carr correctly charged the jury in effect that the measure of damages was the value of the contract for the unexpired term which was lost by reason of the breach, after deducting the amount the plaintiffs made from other operations in 1948 and 1949. *Neal v. Jefferson, supra; Cary v. Harris, supra.*

Prejudicial error has not been made to appear. While the verdict is substantial, it is sustained by the record. The judgment will be upheld.

No error.

BOARD OF MANAGERS OF THE JAMES WALKER MEMORIAL HOSPITAL OF WILMINGTON, NORTH CAROLINA, v. THE CITY OF WILMINGTON AND NEW HANOVER COUNTY.

(Filed 25 February, 1953.)

1. Constitutional Law § 10b—

All reasonable doubt must be resolved in favor of the constitutionality of an act of the General Assembly, and a statute will not be declared unconstitutional unless it is clearly so. But when a statute clearly transgresses the authority vested in the Legislature by the Constitution, it is the duty of the Court to declare the act unconstitutional.

2. Statutes § 2—

Chap. 906 Session Laws 1951, Chap. 470 Public-Local and Private Laws 1939, Chap. 8 Public-Local Laws 1937, which authorize the City of Wilmington and the County of New Hanover to make provision for the hospitalization and medical care of the indigent sick and afflicted poor of the city and county, are all local acts relating to health and are void as being in direct conflict with Art. II, sec. 29, of the Constitution of N. C.

3. Municipal Corporations § 5: Estoppel § 10: Waiver § 1—

A municipality cannot be estopped from challenging the constitutionality of laws affecting it in its governmental capacity, nor may it by its acts waive its right to attack such statutes as unconstitutional.

4. Statutes § 12—

A statute which is unconstitutional is void and cannot have any effect. Therefore provision in such unconstitutional act for the repeal of prior statutes can have no effect, and such prior statutes remain in force.

5. Taxation § 4—Providing medical care for indigent sick is not necessary expense within meaning of Art. VII, sec. 7, unless authority is delegated.

A municipality which is exempt from the provisions of G.S. 160-229 and a county which is exempt from the provisions of G.S. 153-152, and which therefore are not agencies of the State in caring for the indigent sick, Constitution of N. C., Art. XI, sec. 7, may not incur a debt or levy a tax for the purpose of defraying the expenses of a hospital in caring for the indigent sick of the city and county, since such expense is not a necessary governmental expense of the city and county within the meaning of Art. VII, sec. 7, of the Constitution of N. C. The provisions of Chap. 66 Public-Local Laws of 1915, Chap 38 Private Laws 1907, Chap. 12 Private Laws 1901, providing that such city and county make payments to a designated hospital for this purpose without a vote of the people, are void.

6. Trial § 54—

In a trial by the court under agreement of the parties, the rules as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial, since the court is to determine what he will consider and his rulings are subject to review.

7. Appeal and Error § 40d—

Where the findings of fact of the trial court are supported by competent evidence they will not be disturbed, and the fact that some incompetent evidence may also have been admitted cannot be held prejudicial.

8. Declaratory Judgment Act § 2a—

The determination of the obligation of a municipality to make payments to a hospital under local acts of the Legislature is a proper case for a declaratory judgment, and nonsuit is properly denied in such action upon pleadings and evidence properly presenting such question.

9. Declaratory Judgment Act § 3—

In a suit under the Declaratory Judgment Act the court may make such award of costs as may seem equitable and just, and where the proceeding is to declare the rights, status and other legal relations existing among the three parties to the suit, it is equitable that the costs be equally divided among the three parties.

10. Health § 1—

The obligation to pay the costs for medical care of the indigent sick and afflicted poor rests upon the State, Art. XI, sec. 7, of the Constitution of N. C., and not upon a county of the State unless the General Assembly has delegated to it such duty.

11. Municipal Corporations § 7a: Counties § 1—

A county and a city within the county joined in providing funds for the medical care of the indigent sick and afflicted poor of the city and county. *Held:* A contention of the city that its taxpayers had discharged its obligation when a county-wide tax was levied for this purpose, is untenable.

DEVIN, C. J., concurring.

APPEALS by plaintiff and both defendants from *Carr, J.*, at August Civil Term, 1952, of NEW HANOVER.

Civil action for a declaratory judgment adjudging the rights of the plaintiff to support from both defendants for the care of the indigent sick and afflicted poor of the city and county in James Walker Memorial Hospital of Wilmington, and for a mandatory injunction compelling the City of Wilmington to pay one-half of such expense, and in the alternative in the event the Court should hold the city not liable, the County of New Hanover should pay all.

Judgment was rendered by the court as follows:

"This cause came on to be heard before his Honor Leo Carr, Judge Presiding at the August 1952 Civil Term of the Superior Court of New Hanover County, North Carolina, and being heard, and all parties having waived a jury trial and agreed that the Court might hear the evidence, find the facts and render judgment; and, after hearing all of the evidence of all parties and the argument of counsel, the Court finds the following facts:

"1. The General Assembly of 1881 passed an Act authorizing the City of Wilmington and County of New Hanover to buy property and build a hospital or dispensary and the City and County purchased Block 227 of the official plan of the City of Wilmington for that purpose and erected thereon a hospital or dispensary and the same was operated by the defendants through a Board of Managers appointed by the defendants with the expense being borne three-fifths by the County and two-fifths by the City.

"2. In 1900, Mr. James Walker offered to build on the property aforesaid a modern hospital and pursuant to the offer of James Walker the City and the County appointed committees to investigate the subject and after the report of said committees and consideration thereof by the City and County, the offer of James Walker was accepted.

"3. In accordance with the offer aforesaid, the said hospital was incorporated in accordance with and under the provisions of Chapter 12 of the Private Laws of the General Assembly of 1901 incorporating the Board of Managers of James Walker Memorial Hospital and granting to said corporation the right of succession, control and management of said hospital, as will more fully appear from said charter, Exhibit 3 attached to the Complaint herein, and the original members of said Board were appointed in accordance with the said charter and the County of New Hanover was to pay three-fifths of the maintenance thereof and the City of Wilmington to pay two-fifths of such maintenance, with the said hospital to be operated under the provisions of Chapter 12 aforesaid, and annual reports of such operation were to be made by said Board of Managers to the City and County. Under the provisions of said charter, it is provided that said hospital shall be operated to provide medical care of sick and infirm poor persons who may from time to time become chargeable to charity of the City and County and for other persons who may be admitted.

"4. The said charter further provided that the management of said hospital should be removed as far as possible from the vicissitudes which generally result when such an institution is left entirely under the control of local municipal authorities subject to changing political conditions and its efficiency in some degree thereby crippled. And for said reasons the management and control of said hospital was under said charter vested in its incorporated Board of Managers.

"5. During the year 1900, James Walker, pursuant to his offer, began the construction of the original building on the site aforesaid, which was not completed at the time of his death, and in and by his will he directed his executors to complete the same, which was done, and thereafter the said structure was presented to the City and County and accepted by them.

"6. After the incorporation of said Board of Managers and the acceptance of the structure as aforesaid, the City and County conveyed all of Block 227 of the official plan of the City of Wilmington containing said hospital structure to said incorporated Board of Managers to hold the same in trust for the use of the hospital so long as the same shall be used and maintained as a hospital for the benefit of the County and City, and in case of disuse or abandonment to revert to the said County and City as their interest respectively appears in the deed aforesaid.

"7. From time to time, until June 30, 1951, the City and County made appropriations to said hospital for the support and maintenance of the indigent sick and afflicted poor treated at said institution who were sent to said hospital from the City and County.

"8. That, under the provisions of Chapter 66 of the Private Laws (*sic*) of the General Assembly of 1915, it is provided that appropriations to be made by the City and County are to be in equal amounts and said Act directs that annual appropriations so made shall be in the sum of at least $15,000. Since 1915 the said appropriations have been made by said City and County in equal amounts.

"9. That, in addition to the statutes passed in 1901, including the charter of said hospital, the following Acts of the Legislature have been passed: Chapter 38 of the Private Laws of 1907, Chapter 66 of the Public-Local Laws of 1915, Chapter 8 of the Public-Local Laws of 1937, Chapter 470 of the Public and Private Laws of 1939, and Chapter 906 of the Session Laws of 1951. Appropriations were made pursuant to the aforesaid Acts except the Act of 1951.

"10. The original charter of the plaintiff was to run for a period of thirty years and thereafter the said charter was amended to give the plaintiff perpetual existence.

"11. Beginning with the fiscal year starting July 1, 1951, the defendant City of Wilmington ceased to make contributions to said hospital or to contribute to the cost of caring for the indigent sick and afflicted poor certified to said hospital for hospitalization and medical care, said action being taken by the City of Wilmington upon its Council being advised that Chapter 906 of the Session Laws of 1951 was unconstitutional and invalid for that said Act violated Article II, Section 29, of the Constitution of North Carolina, and violated Article II, Section 14, of said Constitution, as will more fully appear by the minutes of the Council of the City of Wilmington at its meeting duly held on July 20, 1951.

"12. At the meeting of the Council of the City aforesaid a motion was unanimously adopted providing for calling and holding of a joint meeting of the City Council, the Board of County Commissioners and the Board of Managers of said hospital.

"13. On July 23, 1951, pursuant to the aforesaid action of the City-County, a joint meeting of said Boards was held, including five members of the said Board of Managers, at which meeting the reasons for the City of Wilmington ceasing to make contributions for the purposes aforesaid were fully stated, as will appear from the minutes of the meeting of July 23, 1951.

"14. Thereafter, and on July 25, 1951, the Council of the City of Wilmington, in meeting assembled, stated its reasons for ceasing to make payments to said hospital for the medical care of the indigent sick and afflicted poor, as will more fully appear from the minutes of said meeting.

"15. During the fiscal year beginning July 1, 1951, and ending June 30, 1952, the County of New Hanover paid monthly to said hospital one-half part of the cost of providing medical care and hospitalization for the indigent sick and afflicted poor in the sum of $24,048, which was the balance after crediting $1.50 per person per day paid to said hospital by the Medical Care Commission, and $1.00 per day per person paid by Duke Endowment. Monthly statements were sent by said hospital to the City and County showing the cost and the days of medical care rendered the indigent persons, which amounts as shown therein the Court finds to be reasonable and proper, and that the total expense incurred by said hospital during said fiscal year, after crediting the amounts paid as aforesaid by the Medical Care Commission and Duke Endowment, amounts to $48,096.

"16. That, during the period of years between the completion of the original unit constructed on Block 227 by James Walker, various additions and enlargements have been made to said hospital and the section known as the South Wing and other additions have been made and constructed upon premises adjoining Block 227, the title to which premises was acquired by and is owned by the plaintiff. Certain of the additional structures and additions were made by gifts from interested individual citizens and by grants made by the Federal Government.

"17. The Associated Charities, an organization operating in the City of Wilmington for a number of years, heretofore certified to said hospital indigent persons for hospitalization and medical care, and after the said Associated Charities ceased to exist all indigent persons sent to said hospital from the City and County have been investigated and certified by the New Hanover County Superintendent of Public Welfare since 1946.

"18. That the general fund budget of the City of Wilmington for the fiscal year beginning July 1, 1952, and ending June 30, 1953, has been tentatively adopted and a tax rate of $1.95 upon the $100 valuation of taxable property has been set, and if an appropriation during said fiscal year to the plaintiff in the sum of $24,048 should be made that the general fund budget expenditures of said City would be accordingly increased and

would result in an increase in said tax rate of approximately 4½c upon the $100 valuation of taxable property within the City of Wilmington. The tax rate for said City for the year ending June 30, 1952, was $2.00 upon the $100 valuation.

"19. That the tax valuation of property for the year 1951 in New Hanover County amounted to $89,810,173, and that the tax valuation of property within the boundaries of the City of Wilmington for said year amounts to $60,592,596, and that when the County of New Hanover makes a county-wide tax levy to provide one-half of the costs of any joint appropriation between the said City and County, the County collects approximately 67% of such levy from citizens and property within the City of Wilmington, and that when the City of Wilmington makes a city-wide tax levy to cover the remaining part of any joint appropriation between the City and County all of said one-half part of said joint appropriation is paid by City taxpayers which results in City taxpayers paying approximately 84% of the aggregate sum of any such joint appropriation. During the last three years approximately 72% of the indigent persons certified to said hospital for treatment lived within the City of Wilmington.

"20. That the City of Wilmington at no time instituted any action in Court to have any of the Acts of the General Assembly referred to in this cause declared unconstitutional and the constitutionality of such Acts was not attacked in Court by any proceeding prior to the institution of this action.

"21. That said hospital has no surplus earnings with which it can absorb a deficit of $24,048 incurred in providing medical care and hospitalization for the indigent sick and afflicted poor during the fiscal year beginning July 1, 1951, and ending June 30, 1952, and said hospital cannot continue to operate in an efficient manner unless said sum is paid by one or both of the defendants.

"Upon the foregoing findings of fact, the Court is of the opinion and concludes as a matter of law as follows:

"1. That Chapter 8 of the Public-Local Laws of 1937, Chapter 470 of the Public-Local and Private Laws of 1939, and Chapter 906 of the Session Laws of 1951 contravene Article II, Section 29, of the Constitution of North Carolina, and are therefore void and of no effect.

"2. That it is the legal duty of the defendant City of Wilmington to pay to the plaintiff the sum of $24,048 to cover the deficit incurred by plaintiff in providing hospitalization and medical care for the indigent sick and afflicted poor for the fiscal year beginning July 1, 1951, and ending June 30, 1952, and that the plaintiff is entitled to a *mandamus* to compel the City to pay said amount.

"3. The City of Wilmington has the legal duty to meet with the Board of Commissioners of New Hanover County and make provision for such financial support as in the judgment of said joint Boards the said hospital needs in order to continue its operation in an efficient manner for the fiscal year beginning July 1, 1952, and ending June 30, 1953.

"4. After the said joint Boards determine what the County and City will do in respect to financial support for said hospital for said fiscal year 1952-1953 the Board of Commissioners of New Hanover County will then be under the legal duty to make such appropriations as in the judgment of said Board will be required to pay the balance that will be needed by the said hospital in order to care for the indigent sick and afflicted poor who are certified to said hospital as hereinbefore set forth and treated therein during said fiscal year.

"5. The parties to this action are entitled as a matter of law to have a Judgment entered, as hereinafter set out, and the Court, therefore, enters said Judgment.

"Now, therefore, it is ordered, adjudged and decreed as follows, to wit:

"1. That Chapter 8 of the Public-Local Laws of 1937, Chapter 470 of the Public-Local and Private Laws of 1939, and Chapter 906 of the Session Laws of 1951 are all unconstitutional, void and of no effect.

"2. That it is the legal duty of the defendant City of Wilmington to pay to the plaintiff the sum of $24,048 for the purpose and to cover the period of time as hereinbefore set forth, and the said City of Wilmington is hereby ordered and directed to make said payment to the plaintiff.

"3. That the Council of the City of Wilmington forthwith meet with the Board of Commissioners of New Hanover County to make provision for such financial support as in the judgment of the said joint Boards said hospital needs in order to continue its operation in an efficient manner for the fiscal year beginning July 1, 1952, and ending June 30, 1953, and that the said Council of the City of Wilmington pay during said fiscal year to the plaintiff not less than $7,500.

"4. That after the said Boards determine what the City and County will do in respect to financial support for the said hospital for the fiscal year 1952-1953, the Board of Commissioners of New Hanover County is under the legal duty to and it is hereby ordered that the said Board of Commissioners of New Hanover County make such other appropriation as in the judgment of said Board is required to pay the balance that will be needed by the plaintiff in order to care for the indigent sick and afflicted poor certified and admitted to said hospital during said fiscal year as certified to it by the Superintendent of the County Board of Public Welfare.

"5. It is further ordered that the defendant City of Wilmington pay the costs of this action."

The plaintiff and both defendants appealed, assigning errors.

Isaac C. Wright and Alton A. Lennon for plaintiff, appellant.
Wm. B. Campbell for defendant, City of Wilmington, appellant.
Marsden Bellamy and David H. Scott for defendant, County of New Hanover, appellant.

PARKER, J. For brevity the plaintiff will be referred to as the Hospital, the defendant the City of Wilmington as the City, and the defendant the County of New Hanover as the County. The plaintiff's assignment of Error No. 4: The court's conclusion of law No. 1 that Chapter 8 of the Public-Local Laws of 1937, Chapter 470 of the Public-Local and Private Laws of 1939, and Chapter 906 of the Session Laws of 1951 contravene Art. II, Sec. 29, of the Constitution of North Carolina, and are all unconstitutional and void, and the court's adjudication No. 1 to the same effect. The County's assignment of Error No. 3 is similar, with this addition that if said acts are all unconstitutional then the prior acts of the Legislature are effective to require appropriations for the Hospital to be made one-half by the City and one-half by the County.

The City has challenged the constitutionality of the above three solemn and deliberate acts of the Legislature of the sovereign State of North Carolina, which always presents a serious question for determination by a court. The City having thrown down the gauntlet takes upon itself the burden of proving such acts, or any one or more of them, are unconstitutional beyond all reasonable doubt. "It is an elementary principle of law, as held by the U. S. Supreme Court, that no act can be held unconstitutional unless it is so 'proved beyond all reasonable doubt.' *Ogden v. Saunders,* 12 Wheaton, 213; Cooley Cons. Lim. (7 Ed.), 254. This is quoted with approval in *Sash Co. v. Parker,* 153 N.C. 134. To same purport, *Walker, J., Johnson v. Board of Education,* 166 N.C. 468; *Whitford v. Comrs.,* 159 N.C. 160; *Hoke, J.,* in *Bonitz v. School Trustees,* 154 N.C. 379. All reasonable doubts must be resolved in favor of the constitutionality of legislation. *Allen, J., In re Watson,* 157 N.C. 347. Every presumption is in favor of the constitutionality of an act of the Legislature, and all doubts must be resolved in support of the act. The courts may resort to an implication to sustain an act, but not to destroy it." *Bickett v. Tax Com.,* 177 N.C. 433, 99 S.E. 415. It is too axiomatic to require the citation of authority that when it is clear a statute transgresses the authority vested in the Legislature by the Constitution, it is the duty of the court to declare the act unconstitutional. Any other course would lead to the destruction of constitutional government.

The pertinent part of Art. II, Sec. 29, of the North Carolina Constitution is: "The General Assembly shall not pass any local, private, or

special act or resolution . . . relating to health, sanitation, and the abatement of nuisances." This section of the Constitution was adopted in the General Election of 1916, and manifestly has no application to local, private or special acts relating to health enacted by the Legislature prior to 1916. *Roebuck v. Trustees,* 184 N.C. 144, 113 S.E. 676.

Ch. 906 of Session Laws 1951 reads in part the City and the County "hereby are authorized and directed to enter into a contract with the James Walker Memorial Hospital, making proper and adequate provision for the hospitalization, medical attention, and care of the indigent sick and afflicted poor of said city and county, etc." Ch. 470, Public-Local and Private Laws 1939, contains the exact words quoted from the 1951 Act, except the words "and directed." Ch. 8, Public-Local Laws 1937, provides for the payment of $25,000.00 each by the City and County to the Hospital to provide medical and hospital attention for the care and maintenance of the indigent sick and afflicted poor of the City and County.

In *Board of Health v. Comrs. of Nash,* 220 N.C. 140, 16 S.E. 2d 677, it was held that a law affecting the selection of a health officer of Nash County was a law relating to health; and this act applicable to Nash County only, providing that the county commissioners should approve the election of a health officer, was unconstitutional as violating Art. II, Sec. 29, of the Constitution of North Carolina. See also *Sams v. Comrs. of Madison County,* 217 N.C. 284, 7 S.E. 2d 540. A law undertaking to confer power upon the Board of Aldermen of the City of Winston-Salem and the Board of County Commissioners of Forsyth County to consolidate their public health offices and departments, to name a joint city-county board of health, and to appoint a joint city-county health officer was a law relating to health, and was held void for repugnancy to Art. II, Sec. 29, of the Constitution. *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313.

The Legislature at its session in 1935 enacted Ch. 64, Public Laws 1935 (codified G.S. 160-229), which amends C.S. 2795 (now G.S. 160-229) by adding at the end thereof all of Ch. 64. C.S. 2795 is under Part 5 "Protection of Public Health," Article 15, Ch. 56, Municipal Corporations. G.S. 160-229 is under Part 5 "Protection of Public Health," Sub-Chapter II, Chapter 160, Municipal Corporations. The 1935 amendment empowered the governing body of a town or city to contract with a public or private hospital for medical treatment and hospitalization of the afflicted poor of the town or city. This was a general law applicable to the State as a whole, except as to the counties and cities or towns excepted therefrom, among which was the City of Wilmington. In *Martin v. Raleigh,* 208 N.C. 369, 180 S.E. 786, Ch. 64, Public Laws 1935, was held constitutional, and for a necessary municipal expense not requiring the

approval of the qualified voters of the city as a prerequisite to the validity of the tax and not in violation of Art. VII, Sec. 7, of the Constitution.

Ch. 65, Public Laws 1935 (codified G.S. 153-152), amended C.S. 1335 (now G.S. 153-152) by adding at the end thereof all of Ch. 65. C.S. 1335 is under Art. 8 "County Poor," Ch. 24, Counties and County Commissioners. G.S. 153-152 is under Art. 13 "County Poor," Ch. 153, Counties and County Commissioners. The 1935 Amendment to C.S. 1335 is similar to the 1935 Amendment to C.S. 2795 except that it applies to counties. This was a general law applicable to the State as a whole, except as to the counties exempted, among which was New Hanover. In *Martin v. Wake County,* 208 N.C. 354, 180 S.E. 777, the 1935 amendment was held constitutional and a county tax to provide funds for care of the indigent sick was held for a necessary expense not requiring approval of the voters, and not in violation of Art. VII, Sec. 7, of the Constitution.

It would seem the Legislature at its session in 1935 considered that Ch. 64 of its laws enacted then related to health. This law was enacted as a general law, so as not to conflict with Art. II, Sec. 29, of the Constitution.

The Legislature since 1916, by local, special or private acts, has increased or decreased the jurisdiction of certain courts inferior to the Superior Court, which courts were already *in existence.* The prohibition of Article II, Sec. 29, of the Constitution of North Carolina is against the *establishment* of such courts, and these cases are not in point. *Provision Co. v. Daves,* 190 N.C. 7, 128 S.E. 593; *S. v. Horne,* 191 N.C. 375, 131 S.E. 753; *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484. A local statute was enacted by the Legislature in 1925 enlarging the jurisdiction of the Town of Lumberton, when it already had jurisdiction over streets, to include sidewalks and alleys. The prohibition of the Constitution is against "the laying-out, opening, altering, maintaining or discontinuing highways, streets or alleys" by local, special or private act. This act was held to merely increase the authority already conferred upon the Town of Lumberton in 1907, and was not unconstitutional as violating Art. II, Sec. 29, of the Constitution. *Dees v. Lumberton,* 211 N.C. 31, 188 S.E. 857. The Legislature in 1915 authorized Wilkes County to issue bonds to provide for a uniform, comprehensive, and practical system of roads in the county. The Legislature by local act in 1919 increased the amount of the bond issue. This was held not prohibited by Art. II, Sec. 29, of the Constitution, which prevents the enactment of any local, private, or special act authorizing the laying-out, opening, maintaining or discontinuing of highways. *Commissioners v. Pruden,* 178 N.C. 394, 100 S.E. 695. A school district had been defined as to boundaries, etc., by a Private Law enacted in 1905. The Legislature in 1921 enacted a Private

Law authorizing an increase of the bonds to be issued from $3,000.00 to $50,000.00. This was not repugnant to Art. II, Sec. 29, of the Constitution which prohibits local acts from "establishing or changing the lines of school districts." *Roebuck v. Trustees, supra.*

Hailey v. Winston-Salem, 196 N.C. 17, 144 S.E. 377; *Hill v. Comrs.,* 190 N.C. 123, 129 S.E. 154; *Advisory Opinion,* 227 N.C. 716, relied upon by the Hospital are distinguishable.

A local act is one operating only in a specified locality. *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521. The three acts of the Legislature adjudged unconstitutional by the trial court operate in New Hanover County, and are beyond peradventure local acts.

These three acts do not apply to the poor like building a county home. Under Art. XI, Sec. 7, of the Constitution of North Carolina a county may build a county home for such poor as a necessary expense without the approval of the voters. *Comrs. v. Spitzer,* 173 N.C. 147, 91 S.E. 707. These three acts authorize the City and County to make provision for "the hospitalization, medical attention, and care of the indigent sick and afflicted poor" of the City and County alone. To come within the provisions of these three acts the poor must be sick and afflicted. The constitutional prohibition is against local acts relating to health. It seems clear beyond all reasonable doubt that the three acts adjudged unconstitutional are all local acts relating to health and void, as in direct conflict with Art. II, Sec. 29, of the North Carolina Constitution.

The hospital's assignment of Error No. 6, "His Honor erred in not finding as a fact that the defendant City had given its solemn pledge for its generous support to said hospital for the maintenance and medical care of the sick and infirm poor persons who might from time to time become chargeable to the said City and County." The Hospital in its brief argues under this assignment of error that the City was estopped to challenge the constitutionality of the three laws adjudged unconstitutional by the trial court, and further had waived any right to do so. The City cannot be estopped from challenging the constitutionality of laws affecting it in its governmental capacity. "A municipality is not estopped to assert that its policy in a particular matter has been in violation of the Constitution and that it is prohibited from pursuing such course in the future." 38 Am. Jur., Municipal Corporations, p. 378. "The doctrine of *ultra vires* is applied with greater strictness to public than to private corporations, and the rule is that a municipality . . . is not estopped by an act or contract which is beyond the scope of its corporate powers, especially where the party claiming the estoppel was aware of the municipal incapacity or used no diligence to ascertain whether it had the power which it assumed to exercise." 21 C.J., Estoppel, p. 1194-5. C.J. cites in support of this rule of law numerous cases, including *Bank*

v. Comrs. of Oxford, 119 N.C. 214, 25 S.E. 966, 34 L.R.A. 487. This assignment of error is not upheld.

A waiver may be tersely defined as a voluntary relinquishment of a known right. "A waiver is not, however, allowed to operate so as to . . . transgress public policy or morals." 56 Am. Jur., Waiver, p. 105-6. In the general election of 1916 the people of North Carolina by their votes wrote into their fundamental law, The General Assembly shall not pass any local, private or special act "relating to health." Their votes fixed the public policy of the State as to health in that respect. Their decision is final, and no municipal corporation or county can waive the constitutional inhibition.

The trial court was correct in adjudging that Ch. 8 Public-Local Laws 1937, Ch. 470 Public-Local Laws 1939, and Ch. 906 Session Laws 1951 are all unconstitutional and void as in direct conflict with Article II, Sec. 29, of the Constitution. The plaintiff's Assignment of Error No. 4, and the defendant County of New Hanover's Assignment of Error No. 3 to the trial court adjudging those laws unconstitutional are untenable.

The three acts of the Legislature above held to be unconstitutional have not repealed any laws enacted prior thereto. "Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it . . . A void act cannot be legally inconsistent with a valid one. Moreover, an unconstitutional law cannot operate to supersede any existing valid law. Accordingly, where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provisions for the repeal of the prior law will usually fall with it and will not be permitted to operate as repealing such prior law." 11 Am. Jur., Constitutional Law, p. 828-9. "An unconstitutional law is void and is as no law." *S. v. Williams,* 146 N.C. 618, 61 S.E. 61, 17 L.R.A. (N.S.) 299, 14 Anno. Cases 562. Therefore Ch. 23 Private Laws 1881 and Ch. 181 Private Laws 1881; Ch. 12 Private Laws 1901, Ch. 38 Private Laws 1907, and Ch. 66 Public-Local Laws 1915 have not been repealed or modified or in any way affected by the laws enacted in 1937, 1939 and 1951, which are all unconstitutional.

The City assigns as errors the trial court's conclusions of law 2, 3 and 5 and the court's adjudications Nos. 2 and 3—Assignments of Error Nos. 20, 21 and 22.

The trial court's conclusions of law 2, 3 and 5 and adjudications Nos. 2 and 3 were based upon Ch. 66 Public-Local Laws 1915, which is as follows:

"An act to equalize the appropriations, made for the support of the James Walker Memorial Hospital, between the Board of Commissioners of New Hanover County and the Council of the City of Wilmington.

"The General Assembly of North Carolina do enact:

"SECTION 1. That all appropriations made by the Board of Commissioners of New Hanover County and the council of the City of Wilmington for the support of the James Walker Memorial Hospital shall be contributed and paid in equal proportions—one-half by the Board of Commissioners of New Hanover County and one-half by the council of the City of Wilmington.

"SEC. 2. The Board of Commissioners of New Hanover County and the council of the City of Wilmington shall jointly fix the amounts of said appropriations in such sums as they may deem wise and proper: *Provided,* the appropriations in any one year shall not be less than fifteen thousand dollars ($15,000).

"SEC. 3. That all laws and clauses of laws in conflict with this act are hereby repealed.

"SEC. 4. That this act shall be in force from and after its ratification. Ratified this the 4th day of Feb., A. D. 1915."

This act states definitely that its sole purpose is "for the support of the James Walker Memorial Hospital." Is such support a necessary governmental expense within the meaning of Article VII, Sec. 7, of the North Carolina Constitution? The answer under our decisions is "No."

In *Armstrong v. Comrs.,* 185 N.C. 405, 117 S.E. 388, it was held that a hospital for tubercular patients was not a necessary governmental expense for Gaston County.

In *Nash v. Monroe,* 198 N.C. 306, 151 S.E. 634, it was held that the maintenance of a hospital was not a necessary governmental expense for the Town of Monroe. The Court said: " 'For purposes other than necessary expenses a tax cannot be levied within or in excess of the constitutional limitation except by a vote of the people under special legislative authority.' (Citing authorities.) Undoubtedly, if the City of Monroe had the money in its treasury, it could purchase equipment for its hospital. (Citing authorities.) But the City of Monroe did not have such funds in hand and undertook to pledge the faith and credit of the city in order to obtain the money. This cannot be done except in accordance with the methods provided by law." See also *Burleson v. Board of Aldermen,* 200 N.C. 30, 156 S.E. 241.

In *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668, the purpose of the bond issue was to construct an addition to the county hospital to be used principally for the care of the indigent sick and afflicted poor of the county, and this Court said: "The question: Is the building of annex to county hospital a necessary expense within the meaning of Article VII, Sec. 7, of the Constitution of North Carolina? The answer is 'No.' "

In *Sessions v. Columbus County,* 214 N.C. 634, 200 S.E. 418, this Court said: "The finding and conclusion of the trial court that the

hospital here proposed is not a necessary expense of the county within the meaning of Art. VII, Sec. 7, of the Constitution is directly supported by what was said in *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668; *Burleson v. Spruce Pine,* 200 N.C. 30, 156 S.E. 241; *Nash v. Monroe,* 198 N.C. 306, 151 S.E. 634; and *Armstrong v. Comrs.,* 185 N.C. 405, 117 S.E. 388."

There is no finding of fact by the trial court that the City or the County had money in its treasury to support the Hospital. In its findings of fact No. 18 the trial court found that if an appropriation should be made by the City to the Hospital during the fiscal year from 1 July, 1952, through 30 June, 1953, the City would have to increase its tax rate approximately 4½c upon the $100.00 valuation of taxable property.

Art. VII, Sec. 7, of the North Carolina Constitution provides: "No debt or loan except by a majority of voters.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

There is no evidence, nor finding of fact, that a majority of the qualified voters of the City or the County have ever voted to support the Hospital. Such being the case, and as the support of the Hospital is not a necessary governmental expense, neither the City nor the County can contract any debt, pledge its faith or loan its credit, nor can they levy any tax or collect any to support the Hospital, nor can the City or County pay any money derived from such sources for the support of the Hospital.

The trial court's conclusions of law 2, 3 and 5 and adjudications of law 2 and 3 are at variance with our decisions and the City's assignments of error Nos. 20, 21, 22 and 23 thereto are sustained.

The County assigns as Error No. 4 the trial court's conclusion of law No. 4 and that part of its adjudication of paragraph 3 which reads "and that the said council of the City of Wilmington pay during said fiscal year to the plaintiff not less than $7,500.00" and its adjudication paragraph 4. By reason of what is said above this assignment of error is sustained. For the reasons stated above the County's assignment of Error No. 5: That the trial court erred in its adjudication No. 3 is sustained.

Ch. 38 Private Laws 1907 is as follows:

"An Act to Improve the Efficiency of the James Walker Memorial Hospital, of Wilmington, North Carolina.

"The General Assembly of North Carolina do enact:

"SECTION 1. That the Board of Commissioners of New Hanover County, and the Mayor and Board of Aldermen of the City of Wilmington, by and with the consent of the board of audit and finance, be and

they are hereby empowered to appropriate, from time to time, from the public funds of the said county and city, such sums as, in their judgment, may be necessary to run the James Walker Memorial Hospital in an efficient manner.

"SEC. 2. This act shall be in force from and after its ratification.

"In the General Assembly read three times, and ratified this the 7th day of February, A. D. 1907."

For the reasons stated above in respect to the 1915 Act neither the City nor the County can pay any money to support the Hospital derived from taxes, nor contract any debt, pledge their faith or loan their credit for such purpose under this Act.

Ch. 12 Private Laws 1901 is entitled "An Act to provide for the government of the James Walker Memorial Hospital of the City of Wilmington, N. C." This Act is the charter of the Hospital. In Section 3 it is stated that for the purpose of providing the proper means for sustaining the hospital, and for the maintenance and medical care of such sick and infirm poor persons as may be placed therein, the County shall annually provide $4,800.00, and the City $3,200.00, which fund shall be placed in the hands of the Board of Managers to be paid out, under their direction, according to such rules, regulations and orders as they may from time to time adopt. Section 4 of the Act provides that should any portion of this annual appropriation remain unexpended on 1 March of each year, it shall be invested in specified bonds to be known as a Permanent Fund. The income from the Fund may be used for the maintenance of the Hospital, but no part of the Fund shall be used except in case of additional emergency or for some permanent improvement or addition to the Hospital. For the reasons stated above neither the City nor the County can contract any debt, pledge its faith or loan its credit, nor can they levy any tax or collect any to support the Hospital, nor can the City or County pay any money derived from such sources to the Hospital under this Act. *Palmer v. Haywood County, supra.*

Ch. 23 Private Laws 1881 and Ch. 181 Private Laws 1881 have no application to the instant case. These Acts provided for the erection of a hospital in the City of Wilmington by the County and City. Land was bought and a building erected. The plaintiff's charter was granted by Ch. 12 Private Laws 1901. The City and County then conveyed the land upon which they had operated a hospital under the 1881 Law to the plaintiff. The plaintiff was authorized to tear down the old building. Mr. James Walker, a generous and public spirited citizen of Wilmington, North Carolina, in 1900 began the construction of a modern hospital for the plaintiff.

That part of the County's assignment of Error 3 that if the 1937, 1939 and 1951 Laws above mentioned are all unconstitutional "then the prior

acts of the General Assembly are effective to require that the appropriation for the James Walker Memorial Hospital be made one-half by the City of Wilmington and one-half by New Hanover County" is not sustained.

In a trial by the judge, as in the instant case, "the rules as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial, since the judge is to determine what he will consider, and his rulings are subject to review on appeal, with all the information before the court." McIntosh N. C. Prac. and Proc., p. 553.

We have carefully considered the Hospital plaintiff's assignment of Errors Nos. 1, 2 and 3, and they are untenable. If some incompetent evidence was admitted by the trial judge, it was not prejudicial error. The findings of fact are supported by competent evidence.

The plaintiff's assignment of Error No. 5: "His Honor erred in his conclusion of law No. 4 and in the order, paragraph 3 and paragraph 4. This assignment of error is sustained upon the grounds stated above. The trial court was in error in concluding as a matter of law as it did in paragraph 4 and in adjudging as it did in paragraphs 3 and 4.

The plaintiff's Assignment of Error No. 7, which is to the signing of the judgment, is sustained, as the judgment must be modified in accordance with the opinion in this case.

The defendant County's Assignment of Error No. 1: Failure to allow its motions for nonsuit, and its conclusions of law No. 5. The assignments of error for failure to allow its motion for nonsuit are not tenable. The complaint alleges, and the evidence supports the allegations of the complaint, that this is a proper case for a Declaratory Judgment on the part of the plaintiff against both defendants. The County's assignment of error to the court's conclusion of law No. 5 is sustained for reasons set forth above in this opinion.

The defendant County's assignment of Error No. 2 is to the admission of evidence and to the findings of fact Nos. 13, 14, 18 and 19 and part of 11. This assignment of error is overruled.

The defendant County's assignment of Error No. 7 is to the signing of the judgment. This assignment of error is sustained for the judgment must be modified in accordance with the opinion in this case.

The defendant City's Assignments of Errors Nos. 1 to 12, both inclusive, are not sustained. Even if evidence technically incompetent was admitted, it was not prejudicial error.

The defendant City's Assignments of Errors Nos. 13 and 14 are to failure of the court to allow its motions for judgment of nonsuit. These assignments of error are overruled for the same reasons set forth in overruling similar assignments of error by the defendant County.

The defendant City's Assignment of Error No. 15 is to the trial court's findings of fact Nos. 1 and 2. The defendant City's Assignment of Error No. 16 is to the trial court's findings of fact Nos. 5, 6 and 7. These findings of fact are supported by competent evidence. These assignments of error are overruled.

The defendant City's Assignment of Error No. 17 is to the trial court's findings of fact No. 8. This finding of fact is a summary of Ch. 66 Private Laws 1915 with the addition that since 1915 the said appropriations have been made by the City and County in equal amounts. It is not a finding of fact, nor a conclusion of law, nor an adjudication that the payments made to the Hospital by the City and County under this Act were either lawful, or constitutional, or required, or authorized. We have held in this opinion that this 1915 law does not require nor permit the City or County to make appropriations for the support of the Hospital. It would seem that this finding is not prejudicial error, and this assignment of error is overruled.

The defendant City's Assignment of Error No. 18 is to the trial court's finding of fact No. 20; and Assignment of Error No. 19 is to the finding of fact No. 21. These assignments of error are overruled.

The defendant City's Assignment of Error No. 24 is to the court's adjudication No. 5 taxing the costs against it and to the signing of the judgment. G.S. 1-263 provides that in a proceeding for a Declaratory Judgment the court may make such award of costs as may seem equitable and just. This proceeding is to declare rights, status and other legal relations of all the parties under a number of local Acts. All were vitally interested. It is equitable and just that the costs should be equally divided between the Hospital, the City and the County—each paying one-third, and it is so ordered The defendant City's assignment of error taxing it with the costs is sustained. The City's assignment of error as to the signing of the judgment is sustained, for the judgment must be modified in accord with this opinion.

The defendant City's Assignment of Error No. 25 is that the trial court erred in failing to find and conclude as a matter of law, and to adjudge that the obligation to pay the cost of medical care of the indigent sick and afflicted poor rested upon the County of New Hanover. Under Art. XI, Sec. 7, of the North Carolina Constitution that duty rests upon the State. The State has neither delegated all such of its duty to New Hanover County, nor authorized it to assume all such duty. This assignment of error is not sustained.

The defendant City's Assignment of Error No. 26 is that the trial court erred in not finding and concluding that the entire obligation of the taxpayers of the City is fully met when a county-wide tax levy is made for the purpose of providing funds for the medical care of the indigent

sick and afflicted poor. The assignment of error is overruled. We know of no law to support the contention of the defendant City.

The defendant City of Wilmington in its brief cites two cases in support of its assignments of Errors Nos. 25 and 26. *Martin v. Raleigh, supra,* and *Martin v. Comrs. of Wake, supra.* Neither case supports any such contention on the part of the defendant City.

The trial court should have concluded as matters of law, and adjudicated:

1. That the defendant City of Wilmington was not estopped to challenge the constitutionality of the laws alleged in the complaint, nor had it waived any right to do so.

2. That neither Ch. 8 Public-Local Laws 1937, nor Ch. 470 Public-Local and Private Laws 1939, nor Ch. 906 Session Laws 1951 repealed any prior Acts of the General Assembly.

3. That Ch. 23 and Ch. 181 Private Laws 1881 have no application to this proceeding.

4. That Ch. 66 Public-Local Laws 1915, Ch. 38 Private Laws 1907, and Ch. 12 Private Laws 1901 provide for the defendant City of Wilmington and the defendant County of New Hanover to pay money annually to the plaintiff for its support and maintenance; that the support and maintenance of the plaintiff is not a necessary expense for the defendant City nor the defendant County, even though the money contributed should be used principally for the care of the indigent sick and afflicted poor of the City and County.

5. That there is neither allegation nor proof that an election was ever held by either the City or County on the question of the City or County paying any money to the plaintiff, and that for either the City or County to pay any money for the support and maintenance of the plaintiff is prohibited by Art. VII, Sec. 7, of the North Carolina Constitution.

Art. XI, Sec. 7, of the North Carolina Constitution provides that beneficent provision for the poor, the unfortunate and orphan is one of the first duties of a civilized and Christian State. The General Assembly may by statute, provided it is not unconstitutional, delegate a portion of its sovereignty to the governing body of any town or city or county, separately or jointly, who, when they deem it for the best interest of the town or city or county, can contract with hospitals for the medical treatment and hospitalization of the sick and afflicted poor of the town or city or county within their territorial limits. The General Assembly has enacted such a law for towns and counties. G.S. 160-229. *Martin v. Raleigh, supra.* The City of Wilmington was exempted from this law when enacted. The General Assembly has enacted a similar law for counties. G.S. 153-152. *Martin v. Comrs. of Wake, supra.* The County of New Hanover was exempted from this law when enacted. If the City of Wil-

mington and the County of New Hanover desire to contract with the James Walker Memorial Hospital for the medical treatment and hospitalization of the sick and afflicted poor within their territorial limits, they can by appropriate legislation bring themselves within the provisions of G.S. 160-229 and G.S. 153-152 or by other appropriate Acts not in conflict with the North Carolina Constitution, can assume such an obligation. However, that is a matter of public policy for the people of the City of Wilmington and the people of the County of New Hanover to decide, and not for this Court.

It is ordered that the judgment of the trial court be modified in accordance with this decision, and as modified, it is affirmed.

Modified and affirmed.

DEVIN, C. J., concurring: I concur in the opinion written for the Court by *Justice Parker,* and I am in accord with the conclusion that in this case the support and maintenance of plaintiff's hospital is not a necessary municipal expense within the meaning of Art. VII, sec. 7, of the Constitution.

However, in view of the expanding need of hospital facilities and hospital care in this State, the issue here resolved against the power of municipal corporations to levy a tax or to expend funds derived from taxation for this purpose may in the future, in a proper case, require re-examination of this question. The growing concept of public health as a matter of prime importance, invoking the exercise of governmental power, is illustrated by the statutes creating hospital authorities and the fruitful results attending the activities of the Hospital Care Commission.

The issue is not foreclosed.

STATE v. MACK INGRAM.

(Filed 25 February, 1953.)

1. Assault § 8a—

In order to constitute a criminal assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

2. Assault § 13—Mere look from distance, without overt act or threat of violence, is insufficient to constitute assault.

Evidence tending to show that defendant, a man over eighteen years of age, drove his automobile slowly along a public highway and "leered" at

prosecutrix as she was walking along a dirt road some distance away, that as she was passing through a small wooded area, she heard his motor stop and, although defendant was not then in sight, she ran some 215 feet until she cleared the woods, and then resumed walking, that she then saw defendant walking fast across some cultivated ground 65 or 70 feet away, that defendant stopped and that she continued walking to her destination, *is held* insufficient to be submitted to the jury in a prosecution under G.S. 14-33, since there is no evidence of any overt act, threat of violence, or offer or attempt to do immediate bodily injury to prosecutrix.

3. Criminal Law § 52a (2)—

In order to sustain conviction of a criminal offense there must be legal evidence of the commission of the offense charged, and evidence which raises a mere suspicion or conjecture is insufficient.

4. Jury § 8—

Each board of county commissioners should carefully observe the statutory procedure for the selection of the jury rolls or lists from residents of the county who are of good moral character and of sufficient intelligence to serve on juries. G.S. 9-1.

APPEAL by defendant from *Armstrong, J.*, November Term, 1953, of CASWELL. Reversed.

The defendant was charged with assault upon a female, he being a man over 18 years of age. G.S. 14-33.

In support of the charge contained in the bill the State offered the testimony of the person alleged to have been assaulted, Mrs. Edward Webster, whose name before her marriage and at the time of the alleged offense was Willie Jean Boswell. She was then 17 years of age, living on a farm with her father and mother, two brothers and two sisters. She testified substantially as follows:

On the morning of 4 June, 1951, her father, two brothers and her grandfather were working in the tobacco field. About 8:45 she left home to go to the field to help them, carrying a hoe, and wearing dungarees, a plaid shirt somewhat like a blouse, and a terrapin-shaped hat. She walked down the driveway from her home, which fronted west, 235 feet to a sand-clay road, then along that road 100 feet to the paved State Highway #62; thence along the highway 126 feet to a plantation road. As she was turning into the plantation road she saw the defendant driving a 1936 Chevrolet automobile entering the highway from the sand-clay road. He was alone in the automobile and drove along the highway in her direction at about five miles per hour. She said: "He came on up the road real slow and kept watching me, and when he got about straight across from where I was he had his head out of the window leering at me a curious look." The defendant continued to drive on along the road until he went out of her sight about 100 feet down the highway. His having his head out of the window frightened her "because he never had done

that way before when he went by there." The plantation road the witness was on led to the field where her father and brothers were at work. About 70 or 75 feet from the highway this road led through a small body of woods, and a short distance beyond passed around a barn and on to the tobacco field. As she was passing through the woods she heard the motor of defendant's car go dead, and she started running and ran a distance of 215 feet along the plantation road. She did not see the defendant when she began to run. When she came out into the open she had stopped running and was walking fast, and then she saw the defendant walking rather fast across some soft cultivated ground 65 or 70 feet from her. He stopped at some plum bushes, watching her. After she saw the defendant she continued to walk. The defendant did not speak to her. She went on to the field where her brothers and grandfather were and started crying because she was frightened. She told them what had happened; said she did not know who the man was. She had intended going one way around the barn but took the other which was nearer the tobacco field. From where defendant stopped near the plum bushes he could not have seen the men in the field. The distance from where the automobile was stopped on the highway to the plum bushes was measured and found to be 236 feet. The tracks made by the defendant in the soft ground were counted and found to be 95 in number. Those coming from the highway were wider spaced than those returning. From the plum bushes to the field where the men were working was 200 or 250 yards.

On cross-examination the State's witness said she first saw the defendant when he stopped his automobile at the stop sign before entering the highway from the sand-clay road, and that at that time she was turning off the highway into the plantation road 126 feet away; that the defendant was 150 feet from her when she noticed him doing what she called "leering" at her. When asked if she had used the word "leer" in the Recorder's Court she said she didn't think so, but that just before the first trial in November, 1951, she looked up the word in the dictionary and as well as she remembered "it was a curious look." She testified the defendant traveled 150 to 160 feet along the highway from the sand-clay road intersection "before he reached a point on the highway that was parallel with the point she was on in the plantation road; that up until that time the defendant was constantly behind her; . . . that she did not testify that defendant had his head completely out of the car when he was looking at her." As she left home she noticed her father's trailer sitting in the yard.

Other evidence offered by the State showed that when the defendant was arrested later that morning he was at the home of a man named Simpson in the tobacco field with him and his daughter, and that defendant's automobile with a trailer attached loaded with hay was in the yard.

The defendant told the officers that after he had passed the Boswell place he remembered he had seen a trailer there, and as he needed a trailer to haul some hay he went back to see if he could borrow it, but not seeing anyone at home or not finding Mr. Boswell, he returned to his automobile, and later procured a trailer from a man named Lambeth and went to Mr. Simpson's where he loaded the trailer with hay. If he had returned home with the hay he would have had to pass the Boswell home.

A. B. Boswell, father of Willie Jean, testified he had seen the defendant a few times before this, and defendant had come to his house at one time two or three years previous; and that it was customary for defendant to travel over this road in going from defendant's home to Reidsville. It was in evidence that the defendant was a tenant farmer 44 years of age, married and the father of 9 children.

The defendant's motion for judgment of nonsuit was denied. Defendant offered no evidence. There was verdict of guilty as charged, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Love, and Robert L. Emanuel, Member of Staff, for the State.

E. F. Upchurch, Jr., Martin A. Martin, and C. O. Pearson for defendant, appellant.

DEVIN, C. J. After careful consideration of all the evidence offered by the State, as set out in the record, we reach the conclusion that it was insufficient to support the charge of assault upon the State's witness, and that the motion for judgment of nonsuit aptly interposed should have been allowed.

While the elements necessary to constitute the common law offense of assault have been many times stated in the decisions of this Court and in the courts in other jurisdictions as well as by textwriters, it is sometimes difficult to determine whether the particular facts under consideration are sufficient in law to establish the criminal offense of assault.

In *S. v. Davis,* 23 N.C. 125, an assault was defined as "An intentional attempt by violence to do an injury to the person of another." In amplification of the definition in that case *Justice Gaston* made this observation: "It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution of it is begun there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by any *act* which, if not stopped, or diverted, will be followed by personal injury, the execution of the purpose is then begun—the battery is *attempted.*"

From *S. v. Daniel,* 136 N.C. 571, 48 S.E. 544, we quote: "An assault is an intentional offer or attempt by violence to do any injury to the

person of another. There must be an offer or attempt. . . . There must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do a corporal injury—such an act as will carry to the mind of the other person a well grounded apprehension of personal injury." It is an offer or attempt by force or violence to do injury to the person of another. *S. v. Hefner,* 199 N.C. 778, 155 S.E. 879.

In the more recent case of *S. v. McIver,* 231 N.C. 313, 56 S.E. 2d 604, it was held that it was not essential to the definition of assault that there be a present ability to inflict injury but that the menace or threat must be sufficient in manner and character to cause the person menaced to forego some right he intended to exercise or to leave the place where he had a right to be.

So that it seems well settled that in order to constitute the criminal offense of assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another. *S. v. Davis,* 23 N.C. 125; *S. v. Hampton,* 63 N.C. 13; *S. v. Horne,* 92 N.C. 805; *S. v. Jeffreys,* 117 N.C. 743, 23 S.E. 175; *S. v. Daniel,* 136 N.C. 571, 48 S.E. 544; *Humphries v. Edwards,* 164 N.C. 154, 80 S.E. 165; *S. v. Williams,* 186 N.C. 627, 120 S.E. 224; *S. v. Gay,* 224 N.C. 141, 29 S.E. 2d 458; *S. v. Silver,* 227 N.C. 352, 42 S.E. 2d 208; *S. v. Sutton,* 228 N.C. 534, 46 S.E. 2d 310; *S. v. McIver,* 231 N.C. 313, 56 S.E. 2d 604; *People v. Doud,* 223 Mich. 120, 32 A.L.R. 1535; *Dahlin v. Fraser,* 206 Minn. 476; 4 A.J. 133; 6 C.J.S. 913.

It was said in *People v. Doud,* 223 Mich. 120, 32 A.L.R. 1535, "An assault, under practically all definitions, must carry on the face of its attendant circumstances an offer or attempt with force or violence to do a corporal hurt to another."

The display of force or menace of violence must be such as to cause the reasonable apprehension of immediate bodily harm. *Dahlin v. Fraser,* 206 Minn. 476.

The task before us here is to apply the pertinent principles of law to the facts of this case in order to determine whether the evidence offered comes within the definition of assault as laid down in the decided cases. A review of the facts underlying the decisions in several of the cited cases, where the facts there reported were in some respects similar to those in the case at bar, will serve to illustrate the line of distinction. In *S. v. Williams,* 186 N.C. 627, 120 S.E. 224, the evidence was held sufficient to go to the jury where it appeared the defendant, a man 23 years of age, met on the street the State's witness, a girl 15 years of age, and made an indecent proposal in vulgar language, as he had done on four previous occasions, which put her in fear and caused her to turn and run back. In

S. v. Sutton, 228 N.C. 534, 46 S.E. 2d 310, it was held the State's evidence made out a case of assault where the defendant's rude manner caused the witness to leave her office where she was employed in the courthouse at Plymouth and go out into the hall and stand on the first step leading to the courtroom above. The defendant followed and continued to stare at her. She stepped up two more steps and defendant stepped toward her still staring, and she became frightened, screamed and ran up the steps as the defendant ran up the steps behind her.

In *S. v. McIver,* 231 N.C. 313, 56 S.E. 2d 604, the prosecuting witness was on the sidewalk in an early morning dusk on way to her work when the defendant walked toward her from the opposite direction and made an indecent sexual proposal which so frightened her that she ran across the street to avoid him. He had met her at this same place with similar language and proposal on several previous occasions. It was held that this evidence was properly submitted to the jury on the charge of assault.

In *S. v. Gay,* 224 N.C. 141, 29 S.E. 2d 458, there was an overt act of unmistakable import which caused the prosecuting witness to scream and run. But in *S. v. Silver,* 227 N.C. 352, 42 S.E. 2d 208, the defendant, a Negro man, asked the State's witness, a white girl 16 years of age, an improper question while she was getting water at the pump. She became frightened and ran into the house, but there was no show of violence, no threats or display of force. The evidence was held insufficient to sustain a charge of assault. The distinction is obvious.

The facts in evidence in the case at bar are insufficient to make out a case of assault. It cannot be said that a pedestrian may be assaulted by a look, however frightening, from a person riding in an automobile some distance away.

The witness said he leered at her as he drove along the highway. This word "leer," according to the dictionary means a look askance, conveying the suggestion of something sly, malign or lustful (Webster), but the witness who used the word as descriptive of the defendant's appearance said only it meant "a curious look," without further definition, explanation or demonstration.

That she was frightened is unquestionable, but that fact alone is insufficient to constitute an assault in the absence of a menace of violence of such character, under the circumstances, as was calculated to put a person of ordinary firmness in fear of immediate injury and cause such person to refrain from doing an act he would otherwise have done, or to do something he would not have done except for the offer or threat of violence.

It is apparent that no assault was committed on her by the defendant as he drove along the highway.

True, the witness thereafter in passing through the small wooded area became frightened by the cessation of the sound of the motor and ran. But the defendant at that time was some distance away and nowhere in sight, and when she came into the open space she reduced her pace to a walk. And then when she saw the defendant walking fast across the cultivated ground and stopping at the cluster of plum bushes, 65 or 70 feet away, she did not accelerate her speed, and continued to walk to the destination she had in view. She said the defendant watched her, but he uttered no sound, made no gesture, did not again leer at her, and then turned and walked back the way he came. There was here no overt act, no threat of violence, no offer or attempt to injure.

It may have been that the defendant had a sinister purpose in stopping his automobile and walking or running the 95 steps across the field. Certainly his stated reason for doing so was rather lame. He may have looked with lustful eyes when he watched her walking along the road, but there was absence of any overt act constituting an offer or attempt to do injury to the person of the witness.

We cannot convict him of a criminal offense solely for what may have been in his mind. Human law does not reach that far.

Hence we may not predicate an assault upon the fact of his approach across the field as related by the witness. To extend by judicial fiat the outreach of the criminal law to embrace the incidents here unfolded would be to enlarge the definition of assault beyond that heretofore declared by this Court or such as would be thought necessary for the protection of the equal personal rights of all. To convict a person of a criminal offense there must be legal evidence of the commission of the offense charged, something more than is sufficient to raise a suspicion or conjecture. *S. v. Prince,* 182 N.C. 788, 108 S.E. 330.

In view of our conclusion that the motion for judgment of nonsuit should have been allowed, we do not reach the question raised by the defendant's appeal, whether there was any evidence to support the finding by the trial judge that there had been no intentional or systematic exclusion of Negroes from jury service in Caswell County. *Akins v. Texas,* 325 U.S. 398.

But we deem it proper to call attention to the testimony tending to show that the Board of County Commissioners of Caswell County had not observed the statute in making up the jury lists of the County. The Chairman of the Board testified that in selecting jurors to serve in the Superior Court the custom prevailed of getting from the election registration books the names of prospective jurors and putting them in the box, and that from the lists thus obtained the requisite number of names were drawn to serve as jurors at each term of court. The statute G.S. 9-1 provides that the Board of County Commissioners shall biennially cause

their Clerk to lay before them the tax returns of the preceding year from which they shall select the names of all such persons as have paid their taxes and are of good moral character and of sufficient intelligence to serve on juries. This statute was amended by Chap. 1007 Public Laws of 1947 to add the further provision that the commissioners shall cause their Clerk to lay before them also a list of names of persons resident and twenty-one years of age who do not appear on the tax returns from which the commissioners shall select the names of those of good moral character and sufficient intelligence. It is further provided in the Act that the Clerk, in making out the lists of names to be laid before the Commissioners, may secure said lists from such reliable sources of information as will provide the names of those qualified for jury duty.

In *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99, *Chief Justice Stacy* interpreted this statute as follows: "Prior to 1947, it was provided by G.S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source. To meet the constitutional change of the previous election making women eligible to serve on juries, the statute was amended in 1947 enlarging the source to include not only the tax returns of the preceding year but also 'a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age,' to be prepared in each county by the Clerk of the Board of Commissioners."

Said *Justice Walker* in *S. v. Mallard,* 184 N.C. 667 (674), 114 S.E. 17: "It is not for the commissioners, or others selected to perform public duties, to substitute for the methods chosen by the Legislature those of their own as being more desirable and better adapted to accomplish the end in view." And as expressed by *Justice Brogden* in *Hinton v. Hinton,* 196 N.C. 341, 145 S.E. 615: "It is clear, therefore, that the law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law."

In giving effect to the constitutional guarantee of trial by jury it was the manifest purpose of the Legislature that all those and only those citizens who possess the proper qualifications of character and intelligence should be selected to serve on the juries. A careful observance by County Commissioners of the provisions of the statute regulating the compilation of jury lists and prescribing the sources of information to aid in determining the qualifications of those listed would do much to improve the quality of juries. The due administration of justice depends in large measure upon the character and intelligence of the persons selected for jury service. No more important task devolves upon the boards of County Commissioners than the selection of those eligible to serve in this

capacity, those who may be called upon to decide issues of the weightiest character.

For the reasons hereinbefore set out we hold that judgment of nonsuit should have been entered at the close of the evidence, and that the ruling of the court below in denying this motion and proceeding to judgment must be

Reversed.

STATE v. WALTER NORMAN.

(Filed 25 February, 1953.)

1. Assault § 8a: Criminal Law § 11—

A simple assault is a misdemeanor punishable by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. G.S. 14-33.

2. Constitutional Law § 32—

A person charged with a misdemeanor may not be tried initially in the Superior Court except upon an indictment by a grand jury unless he waives indictment in accordance with regulations prescribed by the Legislature. Constitution of N. C., Art. I, sec. 12; G.S. 15-137.

3. Criminal Law § 12c: Courts § 3a—

Under the Constitution of N. C., Art. IV, sec. 12, the General Assembly has bestowed upon the Superior Court original jurisdiction of all criminal actions in which the punishment may exceed a fine of fifty dollars or imprisonment for thirty days, G.S. 7-63, and, since the jurisdiction of justices of the peace under Art. IV, sec. 27, is not exclusive, the General Assembly has the power to bestow upon the Superior Court original concurrent jurisdiction with justices of the peace of misdemeanors the punishment for which does not exceed a fine of fifty dollars or imprisonment for thirty days.

4. Courts §§ 8, 11: Statutes § 2—

The power of the General Assembly to establish courts inferior to the Superior Court, Art. IV, sec. 12, must be exercised by general laws, Art. II, sec. 29, but it may change the jurisdiction of an existing inferior court by local act.

5. Criminal Law § 12c: Courts § 11—

The General Assembly has the power to bestow upon any court inferior to the Superior Court other than a court of a justice of the peace either concurrent or exclusive jurisdiction of general misdemeanors, and may grant such inferior court concurrent original jurisdiction of misdemeanors the punishment for which does not exceed a fine of fifty dollars or imprisonment of thirty days, or even grant a municipal court exclusive jurisdiction of such petty misdemeanors committed within its corporate limits.

6. Same: Courts § 3c—

Even where the General Assembly has vested exclusive original jurisdiction of general misdemeanors in an inferior court, it has the power to divest such exclusive jurisdiction and grant the Superior Court concurrent original jurisdiction thereof with such inferior court.

7. Same—

Where an inferior court is given jurisdiction over petty misdemeanors concurrent with that of a justice of the peace, the General Assembly has the power to transfer such original concurrent jurisdiction of the inferior court either in whole or in part to the Superior Court.

8. Same—

Chap. 589 Session Laws 1951 has the effect of conferring upon the Superior Court concurrent original jurisdiction with the Recorder's Court of Washington County of misdemeanors punishable by a fine not exceeding fifty dollars or imprisonment of thirty days, and bestows upon the Superior Court exclusive original jurisdiction of general misdemeanors in cases where either the prosecuting attorney or the defendant makes a demand for a jury trial in the Recorder's Court, and the statute is a valid exercise of the power vested in the General Assembly by Art. IV, sec. 12, of the State Constitution.

9. Same—

Defendant, charged with simple assault, demanded jury trial in the Recorder's Court, and the cause was transferred to the Superior Court, where the grand jury returned a true bill for the same offense, Chap. 589 Session Laws 1951. *Held:* Defendant should be tried in the Superior Court upon the indictment.

10. Constitutional Law § 8a: Statutes § 12—

A statutory provision that no local act shall have the effect of repealing or altering any public law unless the caption of the local act refers to the public law *is held* ineffectual, since one General Assembly cannot restrict or limit the constitutional power of a succeeding Legislature.

APPEAL by State from *Joseph W. Parker, J.*, at January Term, 1953, of WASHINGTON.

Criminal action involving the constitutionality of a statute which requires a criminal case to be transferred from an inferior court to the Superior Court for trial when the prosecuting attorney or the accused demands a trial by jury.

The appeal is occasioned by the events and the statutes mentioned in the numbered paragraphs set forth below.

1. The Recorder's Court of Washington County was established under the general law known as the County Recorders' Courts Act, which was enacted in 1919 and is now embodied in Article 25 of Chapter 7 of the General Statutes.

2. The County Recorders' Courts Act vests this criminal jurisdiction in a county recorder's court: "The court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors." G.S. 7-222.

3. The County Recorders' Courts Act provides that a trial in a county recorder's court shall be by a jury of six men if either the prosecuting attorney or the defendant demands a jury trial. G.S. 7-228.

4. The General Assembly of 1951 enacted Chapter 589 of the 1951 Session Laws, which bears this caption: "An Act to provide for the transfer of criminal cases from the Recorder's Court of Washington County to the superior court when trial by jury is demanded."

5. Chapter 589 of the 1951 Session Laws provides that "in the trial of any criminal case in the Recorder's Court of Washington County, upon demand for a jury by the defendant or prosecuting attorney representing the State, the recorder shall transfer said case to the Superior Court of Washington County for trial, and the defendant shall execute a new bond in an amount fixed by the recorder for his appearance at the next term of Superior Court of Washington County."

6. The defendant Walter Norman was charged by warrant in the Recorder's Court of Washington County with committing an assault and battery upon Alton Baker in Washington County on 31 January, 1952, "by choking him."

7. The defendant demanded trial by jury in the Recorder's Court of Washington County, and the Recorder thereupon transferred the case to the Superior Court of Washington County for initial trial.

8. After the case was docketed in the Superior Court, the grand jury returned this indictment as a true bill: "The jurors for the State, upon their oath, present that Walter Norman, late of the County of Washington, on the 31 day of January, 1952, at and in the county aforesaid, did unlawfully and willfully assault Alton Baker against the form of the statute in such case made and provided and against the peace and dignity of the State." The warrant and the indictment charge the same offense.

9. Before pleading to the indictment, the defendant made the general assertion "that the Superior Court is without jurisdiction to try the defendant upon the bill of indictment," and moved that the case be remanded to the Recorder's Court of Washington County for trial. The presiding judge adjudged Chapter 589 of the 1951 Session Laws to be unconstitutional without specifying any particular ground for his adjudication, and entered an order quashing the indictment and remanding the

case to the Recorder's Court of Washington County for trial. The State appealed to the Supreme Court under G.S. 15-179 on the ground that the judge erred in declaring the statute unconstitutional and in quashing the indictment.

Attorney-General McMullan and Assistant Attorney-General Love for the State, appellant.

Bailey & Bailey for defendant, appellee.

ERVIN, J. It seems advisable to make certain observations at the outset. The defendant is charged with simple assault. *S. v. Myrick,* 202 N.C. 688, 163 S.E. 803. A simple assault is a misdemeanor punishable by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. G.S. 14-33. Under Section 12 of Article I of the North Carolina Constitution and G.S. 15-137, a person charged with the commission of a misdemeanor cannot be tried initially in the Superior Court except upon an indictment found by a grand jury, unless he waives indictment in accordance with regulations prescribed by the Legislature. *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

Chapter 589 of the 1951 Session Laws is certainly sufficient in phraseology to confer upon the Superior Court of Washington County plenary power to try this case on an indictment found by a grand jury. Hence the appeal presents for decision the question whether or not Chapter 589 of the 1951 Session Laws constitutes a valid exertion by the General Assembly of its constitutional authority to legislate.

The answer to this question is to be found in relevant provisions of the organic law specifying how the judicial power of the State may be exercised. These provisions and certain resultant rules are stated in summary fashion in the numbered paragraphs which immediately follow.

1. Under Sections 2 and 3 of Article IV of the State Constitution, the judicial power of North Carolina is vested in these tribunals: (1) The State Senate sitting as a court for the trial of impeachments; (2) the Supreme Court; (3) the Superior Courts; (4) the courts of justices of the peace; and (5) such other courts inferior to the Superior Courts as may be established by law. *Tate v. Commissioners,* 122 N.C. 661, 29 S.E. 60; *Rhyne v. Lipscombe,* 122 N.C. 650, 29 S.E. 57.

2. Section 12 of Article IV of the State Constitution reads as follows: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in

such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

3. Section 27 of Article IV of the State Constitution provides that "the several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, . . . of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days."

4. Under Section 12 of Article IV of the State Constitution, the General Assembly has power to define by statute the criminal jurisdiction of the Superior Court so long as it observes certain limitations inherent in other provisions of Article IV having no pertinency to the precise problem presented by this appeal. *Rhyne v. Lipscombe, supra.* The General Assembly has exercised this legislative power in express terms in the familiar statute now codified as G.S. 7-63, which stipulates that "the superior court has original jurisdiction . . . of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days." *S. v. Wilkes,* 233 N.C. 645, 65 S.E. 2d 129. Since the criminal jurisdiction conferred upon justices of the peace by Section 27 of Article IV of the State Constitution is not exclusive in character, the General Assembly is even empowered by Section 12 of Article IV of the State Constitution to bestow upon the Superior Court original concurrent jurisdiction with justices of the peace of criminal offenses whose punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. *Williams v. Williams,* 188 N.C. 728, 125 S.E. 482; *Sewing Machine Co. v. Burger,* 181 N.C. 241, 107 S.E. 14; *S. v. Anderson,* 80 N.C. 429.

5. Sections 2 and 14 of Article IV of the State Constitution authorize the General Assembly to provide for the establishment of courts inferior to the Superior Court. *Rhyne v. Lipscombe, supra.* This legislative power must be exercised by the General Assembly through general laws because Section 29 of Article II of the State Constitution, which was adopted in 1916, specifies that "the General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court."

6. Under Section 12 of Article IV of the State Constitution, the General Assembly may bestow upon any court inferior to the Superior Court other than the court of a justice of the peace either concurrent or exclusive original jurisdiction of general misdemeanors, *i.e.,* misdemeanors punishable by a fine exceeding fifty dollars or imprisonment exceeding thirty days. *S. v. Boykin,* 211 N.C. 407, 191 S.E. 18; *S. v. Mills,* 181

N.C. 530, 106 S.E. 677; *S. v. Brown,* 159 N.C. 467, 74 S.E. 580; *S. v. Lytle,* 138 N.C. 738, 51 S.E. 66; *S. v. Collins,* 151 N.C. 648, 65 S.E. 617; *S. v. Shine,* 149 N.C. 480, 62 S.E. 1080; *Rhyne v. Lipscombe, supra.* Under Sections 12 and 27 of Article IV of the State Constitution, the General Assembly may grant to such inferior courts concurrent original jurisdiction with justices of the peace of misdemeanors whose punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. *S. v. Doster,* 157 N.C. 634, 73 S.E. 111. And under Sections 12, 14 and 27 of Article IV of the State Constitution, the General Assembly may even grant to a municipal court exclusive original jurisdiction of misdemeanors committed within the corporate limits of the municipality and embraced within the jurisdiction of a justice of the peace. *S. v. Doster, supra; S. v. Baskerville,* 141 N.C. 811, 53 S.E. 742.

7. Where original jurisdiction of general misdemeanors has been taken from the Superior Court and vested exclusively in inferior courts, the General Assembly has power under Section 12 of Article IV of the State Constitution to divest the exclusive jurisdiction of the inferior courts, and grant the Superior Court concurrent original jurisdiction with the inferior courts of such general misdemeanors. The General Assembly has taken such action in Washington County and sixty-eight other counties by the statute embodied in G.S. 7-64.

8. Where an inferior court has been given concurrent original jurisdiction with justices of the peace of misdemeanors punishable by a fine not to exceed fifty dollars or imprisonment not to exceed thirty days, the General Assembly is empowered by Section 12 of Article IV of the State Constitution to enact appropriate legislation transferring such original concurrent jurisdiction, either in whole or in part, from the inferior court to the Superior Court.

We are now confronted by the task of applying these constitutional provisions and these rules to the case at bar. In performing this judicial labor, we note that G.S. 7-64 has no bearing on the present action. This statute operates only in cases where original jurisdiction of criminal actions has been taken from the Superior Court and vested exclusively in an inferior court. The defendant is being prosecuted for a misdemeanor originally cognizable by a justice of the peace and not by the Superior Court. Chapter 589 of the 1951 Session Laws does not undertake to establish a court inferior to the Superior Court. It merely changes the jurisdiction of an existing inferior court duly created on a former occasion. As a consequence, it does not fall under the ban of the provision of Section 29 of Article II of the State Constitution, which forbids the General Assembly to pass any local, private, or special act relating to the establishment of courts inferior to the Superior Court. *S. v. Horne,* 191 N.C. 375, 131 S.E. 753. It is a far cry from Chapter 435

of the 1951 Session Laws, which was adjudged unconstitutional in *S. v. Thomas, supra,* to Chapter 589 of the 1951 Session Laws. Chapter 435 of the 1951 Session Laws specifically stipulated that criminal cases transferred from the County Court of Greene County were to be tried by petit juries in the Superior Court of Greene County upon the original warrants rather than upon indictments in violation of Section 12 of Article I of the State Constitution; whereas Chapter 589 of the 1951 Session Laws clearly contemplates that criminal cases transferred from the Recorder's Court of Washington County are to be tried by petit juries in the Superior Court of Washington County upon indictments found by grand juries in conformity to Sections 12 and 13 of Article I of the State Constitution. There is, moreover, no sound basis for any suggestion that Chapter 589 of the 1951 Session Laws is invalid for disobedience to the 1929 statute codified as G.S. 12-1, which provides that "no act, which by its caption purports to be a public-local or private act, shall have the force and effect to repeal, alter, or change the provisions of any public law, unless the caption of said public-local or private act shall make specific reference to the public law it attempts to repeal, alter or change." This is true because one Legislature cannot restrict or limit by statute the right of a succeeding Legislature to exercise its constitutional power to legislate in its own way. 12 C.J., Constitutional Law, Section 238.

The Recorder's Court of Washington County is a court inferior to the Superior Court in a constitutional sense. It was duly established under a general law, *i.e.,* the County Recorders' Courts Act. This general law has conferred upon the Recorder's Court of Washington County this twofold criminal jurisdiction: (1) Concurrent original jurisdiction with justices of the peace of misdemeanors punishable by a fine not in excess of fifty dollars or imprisonment not in excess of thirty days; and (2) exclusive original jurisdiction of general misdemeanors. G.S. 7-222.

When all is said, Chapter 589 of the 1951 Session Laws merely does these two things: (1) It transfers from the Recorder's Court of Washington County to the Superior Court of Washington County concurrent original jurisdiction with justices of the peace of misdemeanors punishable by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days in cases where either the prosecuting attorney or the defendant makes a demand for a jury trial in the Recorder's Court; and (2) it transfers from the Recorder's Court of Washington County to the Superior Court of Washington County exclusive original jurisdiction of general misdemeanors in cases where either the prosecuting attorney or the defendant makes a demand for a jury trial in the Recorder's Court. This being true, Chapter 589 of the 1951 Session Laws represents a valid exercise by the General Assembly of the power vested in it by Section 12 of Article IV of the State Constitution "to allot and distribute that portion"

of the power and jurisdiction of the judicial department of the State "which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best."

In closing, we indulge the observation that the General Assembly has moved in a somewhat mysterious way to deprive defendants in criminal cases in the Recorder's Court of Washington County of their statutory right to be tried by a jury of six men. G.S. 7-228. Since an applicable statute, *i.e.,* G.S. 15-177, confers upon such defendants the right to appeal to the Superior Court and there obtain a trial *de novo* before a petit jury, the General Assembly could have abolished jury trials in the Recorder's Court of Washington County by a direct enactment to that effect without transgressing the declaration 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." *S. v. Pulliam,* 184 N.C. 681, 114 S.E. 394; *S. v. Pasley,* 180 N.C. 695, 104 N.C. 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, supra; S. v. Whitaker,* 114 N.C. 818, 19 S.E. 376; *S. v. Crook,* 91 N.C. 536. The General Assembly had the constitutional power, however, to select the round-about way rather than the direct road to accomplish its purpose, even though its action has a tendency to impair the object of the statutes authorizing the establishment of courts inferior to the Superior Court. This object was thus stated by *Chief Justice Clark* in *S. v. Lytle, supra:* "The object of the statute, creating the police court, is to relieve the Superior Courts of petty business, to relieve the tax-payers, and defendants also, of heavy costs, and to give a speedy trial, lightening jail expenses and dispensing often with long imprisonment on detention till a term of court comes around with its jury and judge. There is no harm done, since an appeal always lies open to a convicted defendant to the Superior Court where he has the right of trial by jury; whereas to the acquitted defendant or to one who takes no exception to his punishment, there is a relief from unnecessary delay and costs as well as diminution of court expenses to the public."

The order adjudging Chapter 589 of the 1951 Session Laws to be unconstitutional, quashing the indictment, and remanding the cause to the recorder's court is set aside, and the cause is remanded to the Superior Court to the end that it may put the defendant on trial before a petit jury upon the indictment returned by the grand jury according to its customary course and practice.

Reversed.

N. E. CHAPPELL v. ALONZA STALLINGS AND THE UNKNOWN HEIRS OF MATTIE KNIGHT AND JONAS REED AND ALL POSSIBLE ASSIGNEES OF SUCH PERSONS.

(Filed 25 February, 1953.)

1. Taxation § 41—

The owner of land has the right to redeem same from the lien of unpaid taxes by paying the taxes with accrued interest, penalties, costs, and court costs, at any time before the entry of a valid judgment in a tax foreclosure action confirming judicial sale of the land. G.S. 105-391.

2. Judgments § 19: Courts § 5—

Where it appears that a motion to show cause was heard out of the county without the consent of the parties, the determination of the motion is a nullity and does not preclude another Superior Court judge from entering a subsequent order in the cause at variance therewith.

3. Courts § 5: Judgments § 30—Judgment does not conclude matters not then properly presented for adjudication.

Where motion to vacate a judgment foreclosing a tax lien is made, and at the same time a temporary order restraining sale under the judgment is issued, *held* upon the hearing of the order to show cause the only matter before the court is whether the restraining order should be continued in force until the clerk passes on the motion to vacate the judgment of sale, and an adjudication dissolving the temporary order and authorizing the commissioner to proceed with the sale does not adjudicate the merits of the motion to vacate the decree of sale and does not preclude another Superior Court judge from deciding the merits of that motion upon appeal from the clerk.

4. Taxation § 40g—

The provisions of G.S. 105-391 (p) (q) (r) requiring the filing of exceptions to the report of sale in the foreclosure of a tax lien relate to exceptions addressed to the validity and regularity of the particular sale, and therefore the failure to file such exceptions does not preclude the prosecution of a motion in the cause attacking the validity of the judgment of sale.

5. Same—

The clerk should not undertake to confirm commissioner's sale of land under foreclosure of a tax lien before determining a motion in the cause challenging the validity of the judgment of sale, since such motion puts in issue the validity not only of the judgment of sale but all proceedings subsequently had thereunder.

6. Taxation § 40c—

A suit for the foreclosure of tax liens is a civil action and not a special proceeding. G.S. 105-391.

7. Same: Judgments §§ 9, 27d—

Where, in an action to foreclose tax liens by a private individual, service on defendants is had by publication, judgment of sale by default entered less than twenty days after defendants were served with summons in legal

contemplation, *is held* irregular and is properly set aside upon motion in the cause.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at October Term, 1952, of PERQUIMANS.

Civil action by private owner of certificates of sale to foreclose tax liens under G.S. 105-391.

The essential facts are summarized in ultimate terms in the numbered paragraphs which follow.

1. The plaintiff N. E. Chappell, as the private owner of certificates of sale, brought this action against the defendants Alonza Stallings "and the unknown heirs of Mattie Knight and Jonas Reed and all possible assignees of such persons" to foreclose tax liens on land in the Town of Hertford, Perquimans County, for unpaid taxes of the Town of Hertford and Perquimans County. Pursuant to G.S. 105-391, the plaintiff included in his complaint a cause of action for the foreclosure of the lien of a special benefit assessment allegedly assigned to him by the Town of Hertford.

2. Service of summons was made by publication on the defendants designated as "the heirs of Mattie Knight." The date of the last publication of the statutory notice was 5 October, 1951.

3. On 23 October, 1951, the Clerk of the Superior Court of Perquimans County entered a judgment of sale by default for want of an answer. The judgment ordered the land sold for the satisfaction of the tax and special benefit assessment liens, and appointed a commissioner to make the sale.

4. The commissioner offered the land for sale by public auction to the highest bidder on each of these five days: 23 November, 1951; 8 December, 1951; 29 December, 1951; 23 January, 1952; and 28 February, 1952. The second, third, fourth, and fifth sales were necessitated by the filing of increased bids. The highest bidder at the fifth sale was the plaintiff, who offered $1,366.55 for the land. No increased bid was made after 28 February, 1952, the date whereon the commissioner filed his report of the fifth sale with the Clerk of the Superior Court of Perquimans County. Moreover, no formal exception to this report was filed by any person.

5. Meanwhile, to wit, on 19 January, 1952, Alice Knight Butler, Susie Knight, and Ida Whidbee, as the heirs of Mattie Knight and the owners of the land, filed with the Clerk of the Superior Court of Perquimans County a verified motion in the cause wherein they alleged, in essence, that they had just learned of the attempt to serve them with summons in the cause by publication; that they desired to redeem their land from the tax and special benefit assessment liens; that the judgment of sale entered on 23 October, 1951, was invalid; and that such judgment and the pro-

ceedings being had by the plaintiff under it impeded their right to redeem their land and thus prejudiced them. They prayed that the judgment of sale be vacated, and that they be permitted to redeem the land from the tax and special benefit assessment liens.

6. On the same day, *i.e.*, 19 January, 1952, Judge J. Paul Frizzelle, acting on the *ex parte* application of Alice Knight Butler, Susie Knight, and Ida Whidbee, issued a temporary restraining order enjoining "the plaintiff, his attorney and agents . . . from selling the land" until the further order of the court, and requiring the plaintiff to show cause before Judge Clawson L. Williams at Elizabeth City, N. C., on 11 February, 1952, "why the restraining order should not be continued until the final hearing."

7. When he heard the show-cause order at Elizabeth City on 11 February, 1952, Judge Williams concluded that Alice Knight Butler, Susie Knight, and Ida Whidbee were "not entitled to the . . . restraining order," and entered this order: "It is now ordered that the restraining order granted in this action on the 19th day of January, 1952, be, and the same is hereby vacated and dissolved, and the commissioner heretofore appointed by the court in this cause is hereby authorized and permitted to proceed to the sale of said land upon the upset bid after due advertisement of said sale in the manner prescribed by law."

8. While the motion described in paragraph 5 was pending before him unheard and undetermined, to wit, on 13 March, 1952, the Clerk of the Superior Court of Perquimans County, acting without any notice to the movants or their attorney, entered an "order of confirmation," whereby he declared that the commissioner's sale of 28 February, 1952, "was . . . lawfully conducted . . . in all respects," and ordered the commissioner to convey the land in fee simple to the plaintiff as the highest bidder at such sale "upon the receipt of the purchase price."

9. Subsequent to the entry of the "order of confirmation" the Clerk of the Superior Court of Perquimans County entered an order denying the motion described in paragraph 5. The movants Alice Knight Butler, Susie Knight, and Ida Whidbee thereupon appealed from the clerk to the judge.

10. The appeal was heard at the October Term, 1952, of the Superior Court of Perquimans County. Judge Burgwyn, who presided, entered a judgment whereby he vacated "the judgment heretofore rendered," and adjudged that Alice Knight Butler, Susie Knight, and Ida Whidbee are entitled to redeem the land by paying the taxes and the special benefit assessment in suit, plus interest, penalties and costs thereon, and all court costs, including a designated fee for plaintiff's attorney. The plaintiff excepted and appealed, assigning errors.

Walter G. Edwards for plaintiff, appellant.
No counsel contra.

ERVIN, J. It is well settled that the owner has the right to redeem his land from the lien of unpaid taxes by paying the taxes with accrued interest, penalties and costs, and the court costs at any time before the entry of a valid judgment in a tax foreclosure action confirming the judicial sale of the land for the satisfaction of the lien. *Park, Inc., v. Brinn,* 223 N.C. 502, 27 S.E. 2d 548; *Beaufort County v. Bishop,* 216 N.C. 211, 4 S.E. 2d 525. His right of redemption is recognized in express terms three times in the statute now codified as G.S. 105-391, which authorizes and governs tax foreclosure actions, and affords the sole remedy available to private holders of unredeemed certificates of sale.

The plaintiff does not deny that an owner of land ordinarily possesses the right to redeem his property from the lien of unpaid taxes. He merely asserts that Alice Knight Butler, Susie Knight, and Ida Whidbee do not have any right of redemption in the case at bar, and that Judge Burgwyn's decision to the contrary constitutes reversible error.

The plaintiff advances two arguments to sustain his position. He asserts initially that the order made by Judge Williams at Elizabeth City on 11 February, 1951, was tantamount to an adjudication that Alice Knight Butler, Susie Knight and Ida Whidbee are not entitled to redeem the land involved in this cause; that this adjudication was at most a mere erroneous judgment, correctable only by an appeal from the order to the Supreme Court; that Alice Knight Butler, Susie Knight and Ida Whidbee forfeited their right to have the erroneous judgment of Judge Williams corrected by failing to take such appeal; and that Judge Burgwyn's judgment permitting Alice Knight Butler, Susie Knight, and Ida Whidbee to redeem contravenes the rule that one Superior Court judge cannot undo what another Superior Court judge has done, even though it may have been erroneous. *Twitty v. Logan,* 86 N.C. 712.

This argument is not maintainable. It is bottomed on a misconception as to both the legal effect and the verbal scope of the order.

We know judicially that Elizabeth City is the county seat of Pasquotank County. Judge Williams was precluded from passing on the merits of the motion in the cause at Elizabeth City under the procedural rule that except by consent or in those cases specially permitted by statute, the judge can make no orders in a cause outside of the county in which the action is pending. *Bisanar v. Settlemyre,* 193 N.C. 711, 138 S.E. 1; *Parker v. McPhail,* 112 N.C. 502, 16 S.E. 848; *Gatewood v. Leak,* 99 N.C. 363, 6 S.E. 706; *McNeill v. Hodges,* 99 N.C. 248, 6 S.E. 127; *Bynum v. Powe,* 97 N.C. 374, 2 S.E. 170. The motion in the cause was never before Judge Williams. When he conducted a hearing in Elizabeth

City on the return day of the show-cause order issued by Judge Frizzelle, the motion in the cause was pending in contemplation of law before the Clerk of the Superior Court of Perquimans County, who was required to pass upon it in the first instance by this statutory provision: "The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion *de novo.*" G.S. 1-220. The only question presented to Judge Williams for decision at Elizabeth City was whether or not the restraining order should be continued in force until the Clerk of the Superior Court of Perquimans County passed on the motion in the cause, and the only adjudication made by Judge Williams at Elizabeth City was that the restraining order should not be continued in force until the Clerk of the Superior Court of Perquimans County passed on the motion in the cause. *Branch v. Board of Education,* 230 N.C. 505, 53 S.E. 2d 455; *Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309; *Owen v. Board of Education,* 184 N.C. 267, 114 S.E. 390; *Sutton v. Sutton,* 183 N.C. 128, 110 S.E. 777. When the order under present scrutiny is read aright, it is obvious that Judge Williams did not undertake to make any other adjudication. His declaration that "the commissioner . . . is hereby authorized and permitted to proceed to the sale of said land upon the upset bid after due advertisement of said sale in the manner prescribed by law" was simply a judicial effort to elucidate the legal truth that the temporary restraining order had ceased to exist and in consequence no longer forbade the commissioner to carry out the prior order of the clerk. It had no bearing whatever on the question whether Alice Knight Butler, Susie Knight and Ida Whidbee have the right to redeem the land in suit.

The plaintiff asserts secondarily that he became the highest bidder at the fifth sale held on 28 February, 1952; that the commissioner reported such sale to the clerk of the Superior Court on the same day; that no exception or increased bid was filed by Alice Knight Butler, Susie Knight, or Ida Whidbee within the ten days next succeeding the filing of the report of the sale; that after the expiration of such ten days, to wit, on 13 March, 1952, the clerk of the Superior Court entered an order confirming the sale of 28 February, 1952, and directing the commissioner to convey the land to the plaintiff upon the payment of the sale price; that Alice Knight Butler, Susie Knight, and Ida Whidbee did not appeal from the order of confirmation to the judge; and that the order of confirmation terminated the right of Alice Knight Butler, Susie Knight, and Ida Whidbee to redeem the land.

The plaintiff bases this argument on subsections (p), (q) and (r) of G.S. 105-391, which are couched in this language: "Within three days

following said sale the commissioner shall report said sale to the court, giving full particulars thereof. At any time within ten days after the filing of said report any person having an interest in the property may file exceptions to said report, and at any time within said period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of section 45-28, or to the provisions (other than provisions in conflict herewith) of any law enacted in substitution for said section. At any time after the exporation of said ten days, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation; and in like manner he may apply for such judgment after the court has passed upon any exceptions filed, or after any necessary resales have been held and reported and ten days have elapsed: Provided that the court may, in its discretion, order resale of the property, in the absence of exceptions or increased bids, whenever it deems such resale necessary for the best interests of the parties. Said judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price. Said judgment may be rendered by the clerk of the Superior Court, subject to appeal in the same manner as appeals are taken from other judgments of said clerk."

It is manifest that these statutory provisions require a person having an interest in the property involved in a tax foreclosure action to file exceptions to the report of a particular sale and to appeal from an adverse ruling on such exceptions when, and only when, his exceptions challenge the validity of the steps taken by the commissioner in conducting the particular sale, or the fairness of the particular sale in respect to price or other factors to the parties concerned. They do not apply to objections which are addressed to the validity of the judgment of sale itself. In consequence, a person having an interest in the property involved in a tax foreclosure action does not lose the benefit of an aptly taken objection to the validity of the judgment of sale by failing to file exceptions to the report of a particular sale made under it, or by failing to take a specific appeal from an order confirming such particular sale. A proper legal objection to the validity of a judgment of sale in and of itself puts in issue the validity of all proceedings under it.

When he undertook to confirm the commissioner's fifth sale, the clerk of the Superior Court had before him an unheard and undetermined motion in the cause, which challenged the validity of the judgment of sale, and thus put at issue the validity of the attempted confirmation and all other proceedings taken under the judgment of sale. The clerk may have found a somewhat unhallowed precedent for his conduct in Lydford Law.

> **"I oft have heard of Lydford Law,**
> **How in the morn they hang and draw,**
> **And sit in judgment after."**

His action was certainly not in harmony with orderliness of procedure, or the rule which declares it to be improper for a court to take action in a cause while an undetermined motion is pending before it, unless the subsequent determination of the motion either way cannot affect the validity of the action taken. See, in this connection, *Phillips v. Manufacturing Trust Co.,* 101 F. 2d 723; *Johnson v. City of Sebring,* 104 Fla. 584, 140 So. 672; *Cobb v. Trammel,* 73 Fla. 574, 74 So. 697; *Central Deep Creek Orchard Co. v. C. C. Taft Co.,* 34 Idaho 458, 202 P. 1062; *People to use of Heidinger v. U. S. Fidelity & Guaranty Co.,* 289 Ill. App. 498, 7 N.E. 2d 472; *Rohr v. Jeffery,* 128 Kan. 541, 278 P. 725; *Cannon v. Nikles,* 235 Mo. App. 1094, 151 S.W. 2d 472; *Missoula Belt Line Ry. Co. v. Smith,* 58 Mont. 432, 193 P. 529; and *Felt City Township Co. v. Felt Ins. Co.,* 50 Utah 364, 167 P. 835.

When he vacated "the judgment heretofore rendered," Judge Burgwyn annulled the judgment of sale and all proceedings had under it, including the fifth sale and the order confirming such sale. It thus appears that the decision in this cause finally turns on whether or not the judgment of sale was valid.

We assume without so deciding for the purpose of this particular appeal that Alice Knight Butler, Susie Knight and Ida Whidbee were duly served with summons by publication under the designation of "the unknown heirs of Mattie Knight."

Their time for pleading was governed by the rule of practice established by G.S. 1-100, which is as follows: "In the cases in which service by publication is allowed, the summons is deemed served at the expiration of seven days from the date of the last publication and the party so served is then in court. Such party shall have twenty days thereafter in civil actions and ten days in special proceedings in which to answer or demur."

A suit for the foreclosure of tax liens is a civil action, and not a special proceeding. This is made plain by the specific declaration of G.S. 105-391 that "the foreclosure action shall be an action in superior court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage."

The date of the last publication of the requisite notice of the action was 5 October, 1951. As a consequence, the movants Alice Knight Butler, Susie Knight, and Ida Whidbee were served with summons in legal contemplation on 12 October, 1951, and had twenty days after that day in which to answer or demur. Despite this fact, the judgment of sale was taken against the movants by default for want of an answer on 23 October, 1951. This being true, the judgment of sale was entered against the movants contrary to the course and practice of the court before their time for pleading had expired.

It necessarily follows that the judgment of sale constituted an irregular judgment, and that Judge Burgwyn acted in conformity to law in annulling it and all proceedings had under it pursuant to the motion in the cause. Such motion was filed within a reasonable time, and disclosed that the judgment of sale injuriously affected the right of the movants to redeem the land. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 653.

Judge Burgwyn inadvertently incorporated in his judgment certain provisions placing a specified time limit on the exercise of the right of redemption of the movants. To forestall further controversy, we hereby modify his judgment by expunging these provisions to the end that the movants may redeem the land by making the payments prescribed by the judgment at any time before the entry of a valid judgment of confirmation confirming a valid judicial sale of the land for the satisfaction of the liens in suit. As thus modified, the judgment is affirmed.

Modified and affirmed.

VERONA D. RUSSELL, ADMINISTRATRIX OF HOYT JAMES RUSSELL, DECEASED, v. LUMBERMEN'S MUTUAL CASUALTY COMPANY.

(Filed 25 February, 1953.)

1. Insurance § 43b—

In the light of the provisions of the Motor Vehicle Safety and Responsibility Act, G.S. 20, Art. 9, policies obtained by the assigned risk plan are either (1) an owner's policy affording protection to the owner against liability for accidents involving motor vehicles owned by him while being driven by himself or any other person with his permission or (2) an operator's policy insuring the person named therein against loss from liability arising out of the use by him of any motor vehicle not owned by him.

2. Same—

An operator's policy issued in compliance with G.S. 20, Art. 9, does not cover such insured's liability arising out of an accident involving a vehicle owned by him but operated by another while he is not present or directing the operation of the vehicle.

APPEAL by plaintiff from *Rudisill, J.*, at 20 October, 1952, Term of FORSYTH.

Civil action to recover on automobile liability policy No. U 671 024 issued by defendant to Dallas Garland Carrich which carried with it a "Named Operator Endorsement," and on its face the words "N. C. Assigned Risk" and "Financial Responsibility."

The parties to this action waived trial by jury, and agreed upon statement of facts, arising upon the pleadings filed in the action, and, that, upon the basis thereof, the court might find the facts, make his conclusions of law thereon, and enter judgment thereon, subject to right of either party to except thereto and to appeal to Supreme Court for a review of judgment thus entered.

The following is the statement of facts agreed:

"1. That the plaintiff is a resident of Forsyth County, North Carolina, and is the duly appointed and acting Administratrix of the Estate of Hoyt J. Russell, deceased, having qualified before and been appointed by the Clerk of the Superior Court of Forsyth County, North Carolina.

"2. That the defendant is a mutual insurance company, organized and existing as a corporation with its principal office and place of business in Chicago, Illinois, and that it is engaged in the business of writing liability insurance and is duly licensed to engage in such business in the State of North Carolina.

"3. That at the times hereinafter mentioned, Dallas Garland Carrick, 24 years of age, was a resident of Davidson County, North Carolina, residing on Route No. 6, Box 332, Lexington, North Carolina; that under date of January 11, 1950, the said Dallas Garland Carrick made an application in writing for a policy of insurance to Charles M. Thompson, c/o Peoples Insurance Agency, Lexington, North Carolina, on Form No. W. C. 2802A, as required by the Assigned Risk Department of the Motor Vehicle Department of the State of North Carolina; that two copies of said application were forwarded by the said Charles M. Thompson to the Department of Motor Vehicles of the State of North Carolina; that a photostatic copy of said application, as signed by the said Dallas Garland Carrick, is attached hereto and made a part of this Agreed Statement to the same extent as if written out herein.

"4. That at the time Charles M. Thompson, Producer of Record, signed and mailed in the said application signed by Dallas Garland Carrick, he was the licensed representative of about ten different insurance companies licensed to do business in the State of North Carolina, and he did not know at that time whether this particular risk would be assigned to one of these particular companies or to some other company not represented by him, as members of the Assigned Risk Pool; that when the said Charles M. Thompson signed the application for insurance under the Assigned Risk Form W. C. 2802A for Dallas Garland Carrick, and as an accommodation to him he did not know that the said Dallas Garland Carrick was the owner of a truck or any other type of motor vehicle; when Dallas Garland Carrick came to the office of the Peoples Insurance Agency of Lexington, North Carolina, to secure an insurance policy under the Assigned Risk Plan, he was accompanied by one Richard L.

Morris who had been previously issued a Named Operator's Policy by Mr. Joseph H. Miller, an employee of the Peoples Insurance Agency of Lexington, who filled in the application for signing by Dallas Garland Carrick and by the said Chas. M. Thompson, and when Carrick and Morris went to the office to have Mr. Miller fill in Carrick's application, Dallas Garland Carrick asked for the same type of policy which had previously been issued to Morris, to wit: a Named Operator's Policy. At that time it was mentioned in the presence of Miller that he, Carrick, did own a truck and Miller knew this because Morris was the driver.

"5. That pursuant to the application for insurance signed by Dallas Garland Carrick as aforesaid and also signed by Charles M. Thompson, Producer of Record, the Assigned Risk Department of the Motor Vehicle Department of the State of North Carolina, as provided by law, assigned this particular risk to the defendant, Lumbermen's Mutual Casualty Company, and it was furnished with a copy of the application for insurance filed with the Motor Vehicle Department of the State of North Carolina by Charles M. Thompson, Producer of Record, for Dallas Garland Carrick, and upon the basis of this application the Lumbermen's Mutual Casualty Company issued and mailed to the said Dallas Garland Carrick, as an assigned risk and as the named insured, its 'Operator's Policy' No. U671 024, to which was attached and made a part thereof a 'Named Operator Endorsement'; that a copy of said policy, with all the endorsement thereto, is attached hereto and made a part of this Agreed Statement as fully and to the same extent as if written out herein; that the original of said policy was mailed to the said Dallas Garland Carrick within a few days after its effective date on January 25, 1950, and said policy remained in his possession thereafter, and same was in his possession on April 4, 1950, at the time of the collision hereinafter referred to.

"6. That at the time the Lumbermen's Mutual Casualty Company issued and delivered its policy No. U 671 024 to the said Dallas Garland Carrick, it executed and filed in the office of the Commissioner of Motor Vehicles of the State of North Carolina form SR 22, a copy of which is attached hereto and made a part hereof, to the same extent as if written out fully herein.

"7. That on the 4th day of April 1950 the plaintiff's intestate was involved in a collision with a tractor-trailer unit owned by said Dallas Garland Carrick and being driven at the time of said accident by one Richard L. Morris, and that at the time of said collision Dallas Garland Carrick was not a passenger in his tractor-trailer unit; that as a result of said collision the plaintiff's intestate suffered injuries which resulted in his death, and that thereafter the plaintiff instituted suit against both Carrick and Morris, and that the defendant declined to defend said suit upon the grounds, as contended by it, that the said collision and the

tractor-trailer unit involved therein were not covered by said policy of insurance, and there was no coverage under said policy with respect to said collision or any liability therefor, and that the defendant had no obligation whatsoever to defend said suit. In said action instituted by the plaintiff against Carrick and Morris the plaintiff obtained a verdict and judgment for damages in the Superior Court of Forsyth County in the sum of $10,000 for wrongful death and $500 for property damage against the said Morris and Carrick, said judgment being docketed in judgment book 113, at page 254, in the office of the Clerk of the Superior Court of Forsyth County, North Carolina; that the defendant in this action has declined to pay any part of said judgment for the same reasons that it declined to defend suit in which this judgment was obtained, as hereinbefore set out."

Upon inspection of the application for insurance, described and referred to in paragraph "3" of the statement of agreed facts, it affirmatively appears that Dallas Garland Carrick was convicted "1-49" in Denton Recorder's Court, Denton, N. C., of "an offense arising out of the operation of a motor vehicle," and that his operator's license was suspended. No motor vehicle is described in the application. To the contrary, the question calling for "description of automobile" is answered "None." And as to the "type of certificate required," the square following the word "Owner" is left blank, and a cross mark (x) is placed in the square following the word "Operator."

The "Financial Responsibility Endorsement" attached to, and forming a part of the policy, as shown in the 5th paragraph of agreed statement of facts, contains statement as to certificate of Financial Responsibility, indicating that operator's policy has been filed with the State of North Carolina on behalf of Dallas Garland Carrick, who is the named insured, and that "certificate is required because of two charges of reckless driving,—no accident."

Also attached to the policy and as a part thereof, as set forth in 5th paragraph of agreed statement of facts, is "Named Operator Endorsement" which contains these pertinent provisions: "It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and Property Damage Liability applies subject to the following provisions:

" '1. The insurance applies to the named insured with respect to his operation of or presence in any automobile.

" '2. The insurance applies to any person, as insured, with respect to his presence in such automobile with the named insured but not his operation of the automobile.

" '3. The insurance does not apply: (a) to any automobile owned in full or in part by or registered in the name of the named insured; (b) to any person or organization or to any agent or employee thereof, oper-

ating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof; (c) under paragraph 2: (1) To any automobile owned in full or in part by or registered in the name of the insured; (2) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.'"

Also, an inspection of form SR 22, referred to in paragraph "6" of the statement of agreed facts, discloses that Dallas Garland Carrick is referred to as "Named operator," and that "Operator's policy" is checked.

Upon these facts plaintiff prays judgment against defendant.

When the case came on for hearing in Superior Court, upon the agreed statement of facts, and, after being heard, the court being of opinion that plaintiff is not entitled to recover in this action, entered judgment that plaintiff recover nothing, and that the action be dismissed and that plaintiff be taxed with the costs.

Plaintiff excepted to the entry, and signing of the judgment, and appeals to Supreme Court, and assigns error.

Hayes, Hatfield & McClain for plaintiff, appellant.
Womble, Carlyle, Martin & Sandridge for defendant, appellee.

WINBORNE, J. The question for decision is this: Where an insurance carrier, pursuant to the assigned risk provisions, G.S. 20-276, of the Motor Vehicle Safety and Responsibility Act, Article 9 of Chapter 20 of the General Statutes of North Carolina, issues to a named person an operator's policy, as defined by, and in accordance with the provisions of said act, G.S. 20-227 (3), does such policy, within the meaning of said act, cover liability of such person for damages arising out of operation of a motor vehicle owned by him when being operated by another, and when he is not present and directing the operation of it? The wording of the act dictates a negative answer.

The General Assembly of North Carolina in enacting the "Motor Vehicle Safety and Responsibility Act," *supra,* expressly declared that "the purposes of this Article" are, among others, "to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles, and of operators and owners of motor vehicles involved in accidents," and that "it is the legislative intent that this Article shall be liberally construed so as to effectuate these purposes, as far as legally and practically possible." Thus it appears that financial responsibility is to be required of two classes: (1) "Of reckless, inefficient and irresponsible operators of motor vehicles," and (2) "of operators and owners

of motor vehicles involved in accidents." The provisions of the Article spell out the requirements for, and the ways and means of providing such financial responsibility.

The Article provides that unless a different meaning is clearly required by the context, " 'Operator' means every person, other than a chauffeur, who is in actual physical control of a motor vehicle," and " 'Owner' means a person who holds the legal title to a vehicle." G.S. 20-226.

Moreover, it is stated that " 'Motor Vehicle Liability Policy' when used in the article, means an owner's or an operator's policy of liability insurance certified, as provided by the article, by an insurance carrier licensed to do business in this State, or by an insurance carrier not licensed to do business in this State upon compliance with the provisions of this article, as proof of financial responsibility, or a policy issued under the provisions of the assigned risk plan described by this Article and issued by an insurance carrier authorized to transact business in this State, to or for the benefit of the named insured." G.S. 20-227 (1).

Then the article declares that "Every owner's policy shall (a) designate by explicit description, or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted; (b) Insure as insured the person named, and any other person using or responsible for the use of the motor vehicle with the permission, express or implied, of the named insured, or any other person in lawful possession, and (c) Insure the insured or other person against loss from any liability imposed by law for damages . . . because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation within this State . . . with respect to each motor vehicle" within certain liability limitations. G.S. 20-227 (2).

And in the third subsection of G.S. 20-227, it is declared that "Every operator's policy shall insure the person named therein as insured against loss from liability imposed upon him by law for damages . . . because of bodily injury to or death of any person, and injury to or destruction of property, arising out of the use by him of any motor vehicle not owned by him, within the territorial limits and subject to the limits of liability set forth with respect to an owner's policy." G.S. 20-227 (3).

Thus it clearly appears that the article provides for two separate and distinct types of motor vehicle liability policies,—an owner's policy, as proof of owner's financial responsibility on the one hand, and an operator's policy as proof of operator's financial responsibility on the other hand.

And it is declared in G.S. 20-230 that ". . . any person whose operator's or chauffeur's license has been revoked or suspended under the provisions of the Uniform Drivers' License Act, as amended, shall not be

entitled to have said license again issued or reinstated until such person shall have given and thereafter maintains proof of his financial responsibility, as provided in this article . . ."

It is further provided in G.S. 20-251 that "proof of financial responsibility means proof of ability to respond in damages for liability thereafter incurred arising out of the ownership, maintenance, use or operation of a motor vehicle, . . . because of bodily injury to or death of any one person, . . . and . . . because of injury to or destruction of property in any one accident . . ."

And in G.S. 20-252 the article sets forth that "(a) Proof of financial responsibility may be made," among others, "(1) by filing with the Commissioner written certificate of any insurance carrier, authorized to do business in this State, certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility," and that "this certificate shall give the effective date of the policy which must be the same as the effective date of the certificate and, unless the policy is issued to a person who is not the owner of a motor vehicle, must designate by explicit description or by appropriate reference all motor vehicles covered. . ."

Moreover, the Act also provides, G.S. 20-276, that "every person who has been unable to obtain a motor vehicle liability insurance policy through ordinary methods shall have the right to apply to the Commissioner of Insurance to have his risk assigned to an insurance carrier licensed to write, and writing motor vehicle liability insurance in this State, and the insurance carrier shall issue a motor vehicle liability policy which will meet at least the minimum requirements for establishing financial responsibility, as provided for in this article," and that "in each instance where application is made to the Commissioner of Insurance to have a risk assigned to an insurance carrier, it shall be deemed that the applicant has been denied the issuance of a liability insurance policy," etc.

In the light of these provisions of the article, it seems clear (1) that an owner's policy is intended to afford protection in the operation by the owner of a vehicle owned by him as designated and described in the policy; and (2) that an operator's policy only insures the person therein named against loss from liability imposed upon him by law for damages "arising out of the use by him of any motor vehicle not owned by him."

And, applying the provisions of the article to case in hand, it appears that Dallas Garland Carrick, whose operator's license had been suspended, because of two charges of reckless driving, desiring to have said license again issued or reinstated, applied for, and obtained by the assigned risk plan an operator's policy in compliance, and not in conflict with the provisions of the Motor Vehicle Safety and Responsibility Act. Article 9

of Chapter 20 of General Statutes. And at the time of the accident he was not operating, nor was he present in the motor vehicle involved therein. Under the unambiguous terms of the policy issued to him, there is no coverage and no liability on account of the accident.

The authorities relied upon by appellant have been carefully considered, and attention is directed to the case of *Howell v. Indemnity Co., post,* 227, where the provisions of the Motor Vehicle Safety and Responsibility Act are fully discussed by *Ervin, J.,* and applied to a case where owner's policy was involved.

The judgment below is

Affirmed.

EVELYN M. HOWELL v. THE TRAVELERS INDEMNITY COMPANY.

(Filed 25 February, 1953.)

1. Insurance § 13a—

The statutory provisions governing a policy of insurance control, and insurer may not escape liability by omitting from the policy a statutory provision favorable to insured, but if the limits of coverage are consistent with the statute, insurer may not be held liable beyond the coverage specified in the policy.

2. Same: Statutes § 5a—

Where a statute prescribes in plain terms the coverage of policies of insurance issued thereunder, additional coverage beyond such specifications may not be implied. *Expressum facit cessare tacitum.*

3. Insurance § 43b—

An owner's liability policy covering insured's liability arising out of the ownership, use or operation of a particularly described vehicle is in conformity with G.S. 20-227 (2), and therefore the policy cannot be held to cover insured's liability arising out of the operation by him of a vehicle other than that described in the policy. Whether liability could be invoked under the provisions of G.S. 20-227 (4) (b) is not presented or decided.

PARKER, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at May Term, 1952, of GASTON.

Civil action in which injured third person, whose claim against insured for negligent injury has been reduced to judgment in prior action, sues insurance company upon an owner's motor vehicle liability policy issued under the Motor Vehicle Safety and Financial Responsibility Act. Chapter 1006 of 1947 Session Laws and Amendatory Acts, as codified in Article 9 of Chapter 20 of the 1951 Cumulative Supplement to the General Statutes.

For ease of narration, Evelyn M. Howell is called the plaintiff, Fred Albert Lipscomb is designated as Lipscomb, and the Travelers Indemnity Company is referred to as the defendant.

The matters necessary to an understanding of the legal question arising on the appeal are stated in the numbered paragraphs set forth below.

1. Lipscomb, whose operator's license had been revoked under the provisions of the Uniform Driver's License Act, desired to give proof of his financial responsibility as required by the Motor Vehicle Safety and Financial Responsibility Act as a condition precedent to having an operator's license issued to him again. To this end, he applied to the defendant, an insurance carrier authorized to do business in North Carolina, for a motor vehicle liability policy conforming to the Act.

2. The defendant thereupon issued to Lipscomb an owner's motor vehicle liability policy, which insured Lipscomb against loss within specified limits from any liability imposed by law for damages because of bodily injury to any person, and damage to property caused by accident and arising out of the ownership, use or operation of an explicitly described motor vehicle, to wit, a 1933 Ford belonging to Lipscomb. The specified limits of liability were consistent with those prescribed by the Motor Vehicle Safety and Financial Responsibility Act. The written certificate of the defendant certifying to the issuance of the liability policy was forthwith filed with the Commissioner of Motor Vehicles. Lipscomb did not procure automobile license number plates legalizing the use of his 1933 Ford on the public highways.

3. While the liability policy was in force, Lipscomb undertook to drive another motor vehicle, to wit, a 1937 Ford car, along a public highway in Gaston County. In so doing, he negligently struck an automobile owned and operated by the plaintiff, thereby inflicting upon the plaintiff bodily injury and property damage. The transcript of the record does not disclose who owned the 1937 Ford, or for what reason it was being operated by Lipscomb.

4. Subsequent to the collision, the plaintiff recovered judgment against Lipscomb in an action in the Superior Court of Gaston County for $2,292.63 as damages for her bodily injury and property damage. Execution was issued on the judgment, and returned *nulla bona.*

5. The defendant refused to defend the plaintiff's suit against Lipscomb or to pay the judgment rendered in it on the ground that the liability policy did not cover the 1937 Ford, and in consequence did not obligate it to pay for injuries caused by the operation of that vehicle by Lipscomb.

6. Subsequent to these events, the plaintiff brought this action against the defendant under provisions of the liability policy and the Motor Vehicle Safety and Financial Responsibility Act specifying in substance

that any injured person who has secured a final judgment determining the amount of the insured's obligation to pay him for bodily injury or property damage "shall thereafter be entitled" to subject the insurance afforded by the policy to the satisfaction of the judgment.

7. This action came on to be heard before Judge Burgwyn and a jury at the May Term, 1952, of the Superior Court of Gaston County. The plaintiff produced evidence sufficient to establish the matters stated in the preceding paragraphs, and rested her case. The defendant thereupon moved for a compulsory nonsuit on the ground specified in paragraph 5. Judge Burgwyn allowed the motion and entered judgment accordingly. The plaintiff excepted and appealed, assigning the entry of the involuntary nonsuit as error.

Basil L. Whitener and Ernest R. Warren for plaintiff, appellant.

L. B. Hollowell for defendant, appellee.

ERVIN, J. The appeal presents for decision the solitary question whether the plaintiff's evidence suffices to show that her loss is covered by the policy in suit.

Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it. In case a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls. As a consequence, an insurance company cannot avoid liability on a policy of insurance issued pursuant to a statute by omitting from the policy provisions favorable to the insured, which are required by the statute. *Eckard v. Insurance Co.,* 210 N.C. 130, 185 S.E. 671; *Fuller v. Lockhart,* 209 N.C. 61, 182 S.E. 733; *Hood, Comr. of Banks, v. Simpson,* 206 N.C. 748, 175 S.E. 193; *Headen v. Insurance Co.,* 206 N.C. 270, 173 S.E. 349.

The reverse of these propositions is equally true. An insurance company cannot be held liable upon a policy of insurance beyond the limits of coverage specified in it, if the limits of coverage are consistent with the statute under which the policy is issued. *Keystone Mut. Cas. Co. of Pittsburgh, Pa., v. Hinds,* 180 Md. 676, 26 A. 2d 761.

Motor vehicle insurance carriers issue two general types of motor vehicle liability policies. One is an owner's policy, which insures the holder against legal liability for injuries to others arising out of the ownership, use or operation of a motor vehicle owned by him; and the other is an operator's policy, which insures the holder against legal liability for injuries to others arising out of the use by him of a motor vehicle not owned by him.

The trial judge construed the policy in suit to be an owner's motor vehicle liability policy, insuring Lipscomb against legal liability for injuries to others arising out of the ownership, use or operation of a particular motor vehicle explicitly described in it, *i.e.*, Lipscomb's 1933 Ford. He adjudged the plaintiff's evidence insufficient to carry the case to the jury because it showed that the automobile involved in the accident resulting in the plaintiff's bodily injury and property damage was not the automobile described by the policy.

Counsel for the plaintiff insist, however, that the trial judge erred in nonsuiting the case even if he read aright the language of the policy in suit. They advance these arguments to sustain this position: That the policy in question was issued pursuant to the Motor Vehicle Safety and Financial Responsibility Act, which stipulates that its purpose is "to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles involved in accidents" and that its provisions are to be liberally construed so as to effectuate this purpose "as far as legally and practically possible." G.S. 20-225. That the Motor Vehicle Safety and Financial Responsibility Act at least implies as something indispensable to the effectuation of its purpose "to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles involved in accidents" the broad legal requirement that every policy subject to its provisions must insure the insured against legal liability for bodily injury or property damage to another arising out of the actual operation by the insured of any motor vehicle, no matter who may own the vehicle and no matter what reason may occasion its use by the insured. That the general rule of the law of insurance set out in the second paragraph of this opinion and the specific provision of subdivision (4) (a) of G.S. 20-227 incorporated this broad legal requirement in the policy which the defendant issued to Lipscomb. That as the consequence of these considerations, the plaintiff is entitled to subject the insurance afforded by the policy in question to the satisfaction of the damages caused by Lipscomb's negligent operation of the 1937 Ford car, regardless of who may have owned the car or what reason may have prompted its use by Lipscomb.

It thus appears that the decision in this case must turn on whether the Motor Vehicle Safety and Financial Responsibility Act requires an insurance policy subject to its provisions to afford the insured protection against legal liability for bodily injury or property damage to another arising out of the actual operation by the insured of any motor vehicle, irrespective of who owns it or what reason occasions its use by the insured.

The Motor Vehicle Safety and Financial Responsibility Act does not make this requirement in express terms. For this reason, recourse must be had to the pertinent provisions of the act to ascertain whether the

requirement can be properly read into it by implication. These provisions are stated in the next paragraph.

Any person required by the Motor Vehicle Safety and Financial Responsibility Act to furnish proof of financial responsibility may do so by filing with the Commissioner of Motor Vehicles the written certificate of any insurance carrier, authorized to do business in this State, certifying that there is in effect a motor vehicle liability policy for his benefit. G.S. 20-252. The motor vehicle liability policy may be either an owner's policy of liability insurance conforming to subdivision (2) of G.S. 20-227, or an operator's policy of liability insurance satisfying subdivision (3) of G.S. 20-227. The policy "must designate by explicit description or by appropriate reference all motor vehicles covered," unless it "is issued to a person who is not the owner of a motor vehicle." G.S. 20-252. To conform to subdivision (2) of G.S. 20-227, an owner's policy must "designate by explicit description, or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted; insure as insured the person named, and any other person using or responsible for the use of the motor vehicle with the permission, expressed or implied, of the named insured, or any other person in lawful possession; and insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such motor vehicle or motor vehicles within this State, any other State of the United States, any territory, district or possession of the United States and under its exclusive control, the District of Columbia, the Dominion of Canada, Newfoundland, or any province or territorial subdivision of either subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of five thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to the limit for one person, to the limit of ten thousand dollars because of bodily injury to or death of two or more persons in any one accident, and a limit of one thousand dollars because of injury to or destruction of property of others in any one accident." To satisfy subdivision (3) of G.S. 20-227, an operator's policy must "insure the person named therein as insured against loss from liability imposed upon him by law for damages, including damages for care and loss of services because of bodily injury to or death of any person, and injury to or destruction of property, arising out of the use by him of any motor vehicle not owned by him, within the territorial limits and subject to the limits of liability set forth with respect to an owner's policy."

These provisions call into play the rule of statutory construction embodied in the maxim *expressum facit cessare tacitum,* meaning "that

which is expressed makes that which is implied to cease." They prescribe in plain language the exact coverage which must be afforded by a motor vehicle liability policy subject to the Motor Vehicle Safety and Financial Responsibility Act, and are inconsistent with any implication that such a policy must insure the insured against legal liability for bodily injury and property damage to another arising out of the actual operation by the insured of any motor vehicle, irrespective of who owns it or what reason occasions its use by the insured. 50 Am. Jur., Statutes, section 243.

What has been said makes it evident that the policy in suit meets the requirements of the Motor Vehicle Safety and Financial Responsibility Act for an owner's policy of liability insurance, and that the plaintiff's evidence does not suffice to show that her loss is covered by it. Blashfield's Cyclopedia of Automobile Law and Practice, sections 2961, 2962; *Sheeren v. Gulf Ins. Co. of Dallas, Tex.* (La. App.), 174 So. 380. It is observed, in passing, that the evidence would not suffice to make out a case for the plaintiff even if the policy in suit were an operator's policy because it fails to show that the 1937 Ford was not owned by Lipscomb.

These considerations render it manifest that the Motor Vehicle Safety and Financial Responsibility Act falls short of its avowed purpose "to require financial responsibility of reckless, inefficient and irresponsible operators of motor vehicles involved in accidents." Whether it ought to be brought more nearly into harmony with its declared object is a legislative and not a judicial matter.

G.S. 20-227 (4) (b) provides that any policy of insurance subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act may grant any lawful coverage in excess of or in addition to the coverage specified in the act, and that the excess or additional coverage shall not be subject to the provisions of the act, but shall be subject to other applicable laws of North Carolina. Pursuant to this statutory provision, Insuring Agreement IV of the policy in suit and an attached endorsement entitled "Use of Other Automobiles—Broad Form" extended the insurance afforded by the policy for bodily injury liability and for property damage liability to automobiles other than the 1933 Ford while such other automobiles were being operated by Lipscomb under the circumstances detailed in the insuring agreement and the endorsement. We have refrained from discussing these matters because the plaintiff has not attempted to bring her case by either allegation or proof within the additional coverage granted by the insuring agreement or the endorsement. Whether she can make out a case under the additional coverage is a matter for her counsel to ponder.

The involuntary judgment of nonsuit is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

STATE v. VIOLET RAWLEY.

(Filed 25 February, 1953.)

1. Homicide § 11—

Since the right of a defendant to kill in self-defense arises upon the necessity, real or apparent, to save himself from death or great bodily harm, the right of self-defense cannot arise when there is no evidence that defendant acted in apprehension of such danger, real or apparent.

2. Homicide § 27f—

Where defendant's evidence is to the effect that deceased's death was the result of his accidentally falling upon a knife defendant was holding in her hand while lying prone on the floor, and that she did not think she was in great enough danger to make it necessary for her to cut him, but to the contrary that she did not cut him at all, *held* the principle of self-defense does not arise, notwithstanding evidence of a fight between them, and an instruction of the court to that effect is not error.

3. Homicide § 17—

Where defendant does not contend she killed deceased in self-defense and the State does not rely upon circumstantial evidence, but to the contrary the evidence on both sides is direct, the exclusion of testimony as to the dangerous character of the deceased is without error.

4. Homicide §§ 8a, 27h—

Since involuntary manslaughter is based upon negligence or culpability of defendant, where defendant's evidence is to the effect that the death was the result of deceased's accidentally falling on a knife which defendant was holding in her hand while lying prone on the floor, and not from any act or neglect on the part of defendant, *held* the question of involuntary manslaughter does not arise and an instruction of the court to this effect is not error.

APPEAL by defendant from *Armstrong, J.*, at 22 September, 1952, Term, of SURRY.

Criminal prosecution upon bill of indictment charging that on 21 April, 1952, at and in Surry County, North Carolina, with force and arms, defendant, feloniously, willfully, and of her malice aforethought, did kill and murder Thomas Cox contrary to the form of the statute, etc.

Defendant pleaded not guilty. And at the call of the case the Solicitor for the State announced in open court that the State would place defendant on trial for murder in the second degree or manslaughter, as the evidence may warrant.

These facts appear from the record to be uncontroverted: Thomas Cox, for whose death defendant Violet Rawley stands indicted, died on the late night of 21 April, 1952, in her home, a four-room house, located about a mile from the town of Mt. Airy, North Carolina. He had a stab wound in the center of his neck between the collar bones. The front

entrance to this house was into a hallway extending about "half-way of the house." On the left of this hall there was a door leading into a sitting room. On the rear of the sitting room there was a door connecting it with the kitchen. There was in the kitchen a Kelvinator, six feet high, sitting beside a door leading to the back porch. The bedroom of defendant was in the back to the right. There was a stairway up to the second floor. And there was a cot at the head of the stairway. Thomas Cox had a room in this house.

Upon the trial in Superior Court, the State offered the testimony of witnesses tending to show: That officers called to the scene found the dead body of Thomas Cox lying right in the door between the hall and the sitting room; that blood was all over the floor; that defendant was sitting on the inside of the door, beside the body, and James Stockton, another colored person, was standing in the hall; that she was "drinking right much . . . wasn't drunk"; that she said to Officer R. D. Smith, in presence of Stockton, that she "killed him, stabbed him with a knife . . . a butcher knife"; that they were fighting "at the time she killed him"; that "they had been quarreling and fighting all day"; that "he struck her there in the kitchen and knocked her down" . . . and "that he was cut while she was down on the floor"; that he "was up over her, choking her, and she down on the floor when the cutting took place"; that the front of the Kelvinator was covered with blood, and there was blood leading into the sitting room; and that Stockton made no statement.

And the State offered testimony of the coroner that at police headquarters he asked defendant if she stabbed this boy, and she said "Yes." And on being asked why she did it, she, in a kind of stupor, said, "I don't know." That he repeated the question and she gave same answer.

And the captain of police in Mt. Airy testified that the next morning defendant made statement to him, in pertinent part, as follows: "On Sunday, April 20, 1952 . . . in the afternoon I went for a ride with Maxine Gwyn, Leonard Moore, Fred Stockton, Irene and Howard Shuff. We got back to my home about 11 P. M. I was drinking very heavily. I do not know if Thomas Cox was drinking or not. When I started in the house, Thomas opened the door for me. I stepped inside the hall. Thomas and I started arguing because he thought I was stepping out on him. We got into a fight and Thomas struck me several times during the fight. I grabbed a butcher knife that was on the table. Thomas knocked me down. He must have stabbed himself as he reached down to pull me up . . ."

On the other hand, defendant offered as a witness one Jonas Taylor, who testified, in pertinent part, that he was in defendant's house, with Thomas Cox, when she came home; that he, Cox, opened the door, and she walked in and went into her room and he followed her,—closing the

door behind him,—the witness saying "I heard them fighting in there"; that she ran through the room and up the stairs—he behind her, and got her down on the bed, beating her; that Stockton went upstairs and pulled him (Cox) off of her, and she ran down the stairs, followed by him, and "just as she grabbed the butcher knife he hit her in the kitchen on the head and knocked her in the corner, kicked her two or three times, and he reached down and he fell down on her and when he backed up he was cut"; that it looked to the witness that he hurt himself when he fell on that knife blade; that "she never did strike a lick herself with the knife as I saw"; that she had the knife in her hand, kind of against the Kelvinator and kind of against the floor; and that he fell down on her and when he got up he was cut,—"I didn't see her cut him."

And the defendant, testifying as witness in her own behalf, said in pertinent part: That Thomas Cox had been living at her house, quoting her, "We had been going together and were sweethearts. I refused to go with him that night and he seemed to be mad with me. He drank a great deal, and when he was drinking I was afraid of him . . . When I went in the hallway Thomas began to argue, so I go on back through to my bedroom and as I go through the kitchen Jonas Taylor was sitting there . . . Thomas follows me there and that is where we begin fighting . . . finally I did get out of there and I went upstairs. He followed me . . . and began fighting me and choking me up there; so I finally kicked him off of me and I come back down the steps and as I come in the kitchen he was following me and I passed by the kitchen table and I saw a knife and I just picked up the knife, as if to keep him off of me and by the time I turned around he hit me and knocked me down again. I fell on this side and he was reaching me, reaching down to pick me up and that is when the knife cut him . . . I didn't strike at him. I was on my right side with the knife in my hand."

Then, to these questions, defendant answered: "Q. Why did you say you picked up the knife? A. I picked it up in order to try to keep him off of me again, just as I was trying to keep him from hitting me again. Q. Did you use it in any way to keep him off of you? You mean you wanted to use it to keep him off you, or what? A. Just use it as it might would keep him from hitting me again, or doing anything."

Then on cross-examination, defendant testified: "My memory is clear about everything that happened. I knew what I was doing. I was not too drunk to realize what I was doing. I was drinking some . . . I had a lot of trouble with Thomas. We had fights all along. That had been going on for three years. Yes, I had threatened him and he had threatened me . . . I let him continue to live in my home and have a room there for that period of time when I was afraid of him because I loved him, that is all; . . . that night Thomas and I fought for about a half

hour. It was one continuous fight, upstairs and downstairs. He had been drinking . . . Neither of us were what you would call drunk. He didn't hit me with anything more than his fist. Yes, I imagine I did hit him. He was a big man, about 33 years old, and weighed about 165 or 170. I weigh 130. We did not fight in the living room. We fought in the bedroom, in the kitchen, up the steps, and upstairs. Fred . . ., Shuff . . ., Jones Taylor . . . stood there and let Thomas fight me for about 30 minutes. I didn't ask for any help. I didn't figure I needed any help . . . I didn't stick him at all . . . I did not strike at him with a knife . . . and did not intend to cut him." Then, to these questions she answered as shown: "Q. In other words you did not consider yourself in that great danger that you felt it necessary to cut him yourself, is that right? A. I didn't intend to cut him. I only wanted to protect myself. I didn't think I was in great enough danger so it was necessary for me to cut him. It was an accident. Q. You don't claim you cut him in self-defense or anything of that kind? A. I didn't strike at him with the knife. Q. You did not cut him in self-defense? A. No, sir. Q. You claim then that it was an accident? A. Yes . . . He got down far enough so that he just fell on the knife."

Defendant offered other evidence tending to corroborate her testimony. And some evidence offered by her was, upon objection, excluded.

And the State offered testimony in rebuttal.

Verdict: Guilty of manslaughter.

Judgment: Confinement in the Central Prison at Raleigh for a term of not less than seven nor more than fifteen years.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Folger & Folger and Woltz & Barber for defendant, appellant.

WINBORNE, J. Among the numerous assignments of error brought up on this appeal, the first requiring express consideration is that based upon exception to this portion of the charge: "Now, gentlemen of the jury, the court in this case will not explain to you the law of self-defense which sometime arises in homicide cases because it has no application in this case for the defendant in this case claims, and it has been the theory of this trial upon which the case has been tried, that the defendant did not stab the deceased, that is did not consider herself in any danger and that the cutting or the stabbing or the falling upon this knife was an accident; so, gentlemen of the jury, the principle of self-defense has no application in this case and will not be explained to you."

The plea of self-defense or excusable homicide rests upon necessity, real or apparent. In *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427, the principle is clearly stated. "The decisions are to this effect:

"1. That one may kill in defense of himself or his family when necessary to prevent death or great bodily harm. *S. v. Bryson,* 200 N.C. 50, 156 S.E. 143; *S. v. Bost,* 192 N.C. 1, 133 S.E. 176; *S. v. Johnson,* 166 N.C. 392, 81 S.E. 941; *S. v. Gray,* 162 N.C. 608, 77 S.E. 833.

"2. That one may kill in defense of himself or his family when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. *S. v. Barrett,* 132 N.C. 1005, 43 S.E. 832.

"3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. *S. v. Blackwell,* 162 N.C. 672, 78 S.E. 316.

"4. That the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted." *S. v. Nash,* 88 N.C. 618. See also *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; *S. v. Mosley,* 213 N.C. 304, 195 S.E. 830.

In *S. v. Johnson, supra,* the Court added to the four propositions above set forth a fifth—"That if there is any evidence that the party charged has killed under a reasonable belief that he is about to suffer death or great bodily harm, and to prevent it, the plea of self-defense must be submitted to the jury."

In other words, there must be evidence from which the jury may find that the party assailed believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm, before he may seek refuge in the principle of self-defense, and have the jury pass upon the reasonableness of such belief.

In the light of these principles, the testimony of defendant to the effect (1) that, at the time, she did not think she was in great enough danger to make it necessary for her to cut deceased; (2) that not only she did not cut him in self-defense, but did not cut him at all; and (3) that she claims he was cut accidentally, refutes the idea that she believed she was in danger of losing her life or of suffering great bodily harm.

Hence, in withholding from the consideration of the jury the principle of self-defense, error is not made to appear.

Assignments of error 3 and 4, based upon exceptions of same numbers, are to the ruling of the trial judge in excluding, upon objection by the State, evidence as to the general reputation of Thomas Cox, the deceased, for being a dangerous and vicious character while drinking. These exceptions are untenable.

In *S. v. Turpin,* 77 N.C. 473 (1877), where the prisoner offered to prove the general character of the deceased as a violent and dangerous fighting man, this Court said: "The general rule prevailing in most of the American States is that such evidence is not admissible, and in this State such a general rule is well established," citing *S. v. Barfield,* 30 N.C. 344; *Bottoms v. Kent,* 48 N.C. 154; *S. v. Floyd,* 51 N.C. 392; *S. v. Hogue,* 51 N.C. 381. However, the Court continued by saying: "But these cases which are cited as establishing a general rule excluding such evidence admit that there may be exceptions to it, depending upon the peculiar circumstances of each case. And these exceptions themselves are now so well defined and established by the current of the more recent decisions that they have assumed a *formula* and have become a general rule subordinate to the principal rule. It is this: Evidence of the general character of the deceased as a violent and dangerous man is admissible where there is evidence tending to show that the killing may have been done from a principle of self preservation, and also where the eivdence is wholly circumstantial and the character of the transaction is in doubt . . ." And such is the law in North Carolina today. The cases are too numerous to cite. See Shepard's North Carolina Citations under first syllabus to the *Turpin case.* Among these are: *S. v. Hodgin,* 210 N.C. 371, 186 S.E. 495; *S. v. LeFevers,* 221 N.C. 184, 19 S.E. 2d 488. See also Stansbury's North Carolina Evidence, Section 106.

Hence, in the light of the holding in the present case that the principle of self-defense is not applicable, and the evidence is not circumstantial, the testimony offered was properly excluded.

The 6th assignment of error based upon exception No. 6, is to a portion of the charge relating to manslaughter in which, among other things, the court gave this instruction to the jury: "It has not been the theory of this trial in any aspect that there might have been an involuntary killing, that is, by reason of any culpable negligence, so involuntary manslaughter is not involved . . ."

In *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564, it is stated that "Involuntary manslaughter has been defined to be 'where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done.'" 1 Wharton Cr. Law, Sec. 305; *S. v. Williams,* 231 N.C. 214, 56 S.E. 2d 574; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Turnage,* 138 N.C. 566, 49 S.E. 913.

In the light of this principle applied to the evidence shown in the record, and of the theory of the trial below, error is not made to appear in the instruction here considered.

All other assignments of error have been given due consideration, and fail to show error.

Hence in the judgment from which appeal is here taken, we find No error.

S. O. JONES v. FAY DELLA TUCKER PERCY AND HUSBAND, ROBERT JAMES PERCY.

(Filed 25 February, 1953.)

1. **Ejectment § 15—**

In an ejectment action in which the parties claim through a common source, the burden rests upon plaintiff to connect his title to the common source by an unbroken chain and show that the land in controversy is embraced within the bounds of the instruments upon which he relies and that the title thus acquired is superior to that of defendant.

2. **Same: Ejectment § 16—**

In an action in ejectment the defendant, under a general denial, may attack any link in the chain of title relied on by plaintiff without having alleged its invalidity.

3. **Same—**

When plaintiff in ejectment offers in evidence a foreclosure deed as constituting a link in his chain of title, defendant may attack it for failure of the trustee to advertise the foreclosure sale as required by law, without having pleaded such invalidity, and certainly where plaintiff alleges that the foreclosure sale was invalid and an issue as to due advertisement is submitted to the jury without exception, plaintiff may not successfully contend that the question is not raised for decision.

4. **Same: Mortgages § 39e (3)—**

Where defendant in ejectment attacks the validity of a deed of foreclosure under which plaintiff asserts title, the attack is in the nature of an affirmative defense, and the burden of proof rests upon defendant to show the want of due advertisement asserted by him to overcome the presumption of regularity in the foreclosure which arises when the deed of trust is regular upon its face, was duly executed, and contains recitals which show compliance with the statutory requirements of foreclosure. *Insurance Co. v. Boogher*, 224 N.C. 563, overruled.

5. **Mortgages § 32c—**

G.S. 1-597 requires that notice of foreclosure under a mortgage or deed of trust must be published in a newspaper published in the county having a general circulation of paid subscribers, and therefore an instruction to the effect that in order to constitute due advertisement the newspaper in which the advertisement appeared must have been published and distributed generally in the county, but omitting the requirement of paid subscribers, must be held for error.

6. **Ejectment § 12—**

In this action in ejectment one of plaintiff's muniments of title is a deed of trust executed by the male defendant after the execution of a

deed of separation by himself and the *feme* defendant, and the foreclosure of such deed of trust. *Held:* Defendants' defense that the deed of separation was rendered void by reason of the subsequent reconciliation between the parties is not presented for decision in the absence of supporting allegation in the answer or tender of issue directed to this question or exception.

7. Mortgages § 43—

Technically, a foreclosure deed is sufficient to convey the legal title even though the sale was not advertised as required by law, and the purchaser is entitled to possession.

APPEAL by defendants from *Parker (Joseph W.), J.,* December Term, 1952, BEAUFORT.

Civil action in ejectment.

Defendants are husband and wife. On 12 February 1951 they executed a separation agreement in which they made a division of their property. Under the agreement the parcel of land plaintiff seeks to recover was conveyed or released to defendant Robert James Percy, free and clear of any and all rights of dower or other claim of *feme* defendant. Thereafter he executed a deed of trust to D. D. Topping, trustee, conveying said land as security for the debt therein recited. The deed of trust was foreclosed and plaintiff became the purchaser at the foreclosure sale. Thereupon the trustee conveyed the property to plaintiff by foreclosure deed which is admittedly of record in the office of the register of deeds of Beaufort County. This deed contains the usual recitals, including the recital that the sale was had "after due and proper advertisement as under the terms of said deed of trust therein set out . . ." Upon receipt thereof plaintiff demanded possession of the premises from the *feme* defendant who was then in possession, claiming under a lease from her husband. Said defendant having refused to vacate the premises, plaintiff instituted this action for a writ of possession.

In their answer to the complaint defendants admit there is a foreclosure deed of record as alleged but deny that there has ever been any valid foreclosure sale or that "any title or interest of either of the defendants passed as a result of such instrument or the attempted foreclosure . . . for the reason that such sale was invalid and not made in accordance with the directions and provisions of the law of the State of North Carolina."

At the trial defendants offered evidence tending to show that the *Washington Progress* in which the advertisement of the foreclosure sale was published was not at the time a newspaper with a general circulation to actual paid subscribers. The court submitted to the jury appropriate issues on plaintiff's primary cause of action and in addition on the testimony offered by defendants submitted a further issue as follows:

"1. Was the Washington Progress, a newspaper of general circulation to paid subscribers, as required by the laws of North Carolina concerning publication of notices of mortgage sales during the months of March, 1952, and April, 1952?"

The jury answered all the issues in favor of plaintiff. From judgment on the verdict, the defendants appealed.

Carter & Ross for plaintiff appellee.

J. D. Paul and John A. Wilkinson for defendant appellants.

BARNHILL, J. The defendants here properly gave notice of their intention to assert that the foreclosure deed relied on by plaintiff was insufficient to pass title to him by alleging that "such sale was invalid and not made in accordance with the directions and provisions of the law . . ." There was no motion to require defendants to particularize or make their general allegation more specific. In the trial defendants confined their attack on this deed to evidence of want of proper advertisement. An issue directed to this defense was submitted to the jury without exception. Hence plaintiff is not now in a position to contend that the primary questions defendants seek to present for decision on this appeal are not properly before the court for consideration.

In its charge on the first issue the court instructed the jury as follows:

"The Court instructs you in relation to this particular issue, the burden of which is upon the defendant, to convince you that the WASHINGTON PROGRESS was or is not a newspaper of general circulation as required and contemplated by the Statutes of North Carolina, the Court instructs you that if you believe the testimony of Mr. Ashley Futrell that the newspaper is entered as second class matter with the U. S. Post Office Department, that it is a newspaper published once each week, that it is listed as an approved newspaper by the North Carolina Press Association, that it is distributed generally in Beaufort County, that it carries general news, advertisements, editorials, although these editorials were lifted from the WASHINGTON DAILY NEWS or some other newspaper, then the Court instructs you it would be your duty to answer that issue YES; if you are not satisfied, not beyond a reasonable doubt, not by the weight of the evidence, or not by the preponderance of the evidence, but if you are not satisfied as to these facts, then you will answer that issue No."

Upon which party, under this instruction, did the court place the burden of proof on the first issue? In the beginning it stated that the burden rested upon the defendants to offer evidence which would entitle them to a negative answer thereto. Yet, at the end the jury was instructed that if it was not satisfied as to the existence of certain detailed facts tending to show that the *Washington Progress* was a newspaper within

the contemplation of the statute, it should answer the issue "no." This would seem to place the burden of proof on the plaintiff.

If the charge is to be construed to place the burden of proof on the defendants, then they have no cause to complain on that ground.

In an ejectment action in which the parties claim through a common source, the burden on the issue of title rests upon the plaintiff or other party asserting title and right of possession to connect his title to the common source of title by an unbroken chain of conveyances and show that (1) the land in controversy is embraced within the bounds of the deeds or other instruments upon which he relies, and (2) the title thus acquired is superior to that claimed by his adversary. Thereupon the defendant, or party in possession, may attack any link in the chain of title relied on by the party seeking to oust him without prior supporting allegation. *Ownbey v. Parkway Properties, Inc.*, 221 N.C. 27, 18 S.E. 2d 710, and cases cited; *Toler v. French*, 213 N.C. 360, 196 S.E. 312; *Keen v. Parker*, 217 N.C. 378, 8 S.E. 2d 209; *Powell v. Turpin*, 224 N.C. 67, 29 S.E. 2d 26.

Under this rule when plaintiff offered the foreclosure deed upon which he relies, the defendants were privileged to attack it as invalid in law without first having pleaded the failure of the trustee to advertise the foreclosure sale as required by law. *Ownbey v. Parkway Properties, supra; Powell v. Turpin, supra.*

But the attack is in the nature of an affirmative defense, and the burden rests upon him who makes it to carry the burden of proof. This rule, which this Court, with one exception, has consistently followed, is stated by *Brogden, J.*, speaking for the Court, in *Biggs v. Oxendine*, 207 N.C. 601, 178 S.E. 216, as follows:

"The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face; and if there is any failure to advertise properly, the burden is on the attacking party to show it." *Cawfield v. Owens*, 129 N.C. 286; *Norwood v. Lassiter*, 132 N.C. 52; *Troxler v. Gant*, 173 N.C. 422, 92 S.E. 152; *Jenkins v. Griffin*, 175 N.C. 184, 95 S.E. 166; *Brewington v. Hargrove*, 178 N.C. 143, 100 S.E. 308; *Berry v. Boomer*, 180 N.C. 67, 103 S.E. 914; *Jessup v. Nixon*, 186 N.C. 100, 118 S.E. 908; *Douglas v. Rhodes*, 188 N.C. 580, 125 S.E. 261; *Brown v. Sheets*, 197 N.C. 268, 148 S.E. 233; *Lumber Co. v. Waggoner*, 198 N.C. 221, 151 S.E. 193; *Phipps v. Wyatt*, 199 N.C. 727, 155 S.E. 721; *Higgins v. Higgins*, 212 N.C. 219, 193 S.E. 159; *Gibbs v. Higgins*, 215 N.C. 201, 1 S.E. 2d 554; *Elkes v. Trustee Corp.*, 209 N.C. 832, 184 S.E. 826; *Dillingham v. Gardner*, 219 N.C. 227, 13 S.E. 2d 478.

But defendants cite and rely on *Insurance Co. v. Boogher*, 224 N.C. 563, 31 S.E. 2d 771, which we must concede is in conflict with the decisions above cited and others of like import. It is the one case in our

reports in which we have held that in an ejectment action in which the defendant attacks a foreclosure deed relied on by plaintiff on the ground that the foreclosure sale was not properly advertised, the burden of showing compliance with the requirements of the statute rests upon the plaintiff. In so holding, the opinion in that case cites no supporting authority. Furthermore, our many decisions *contra* were inadvertently overlooked.

Even there it is stated that the recitals in a foreclosure deed "are *prima facie* evidence of the correctness of the facts therein set forth, and the burden of proving otherwise is on the person attacking the sale, in this case the defendants, *Dillingham v. Gardner,* 219 N.C. 227, 13 S.E. 2d 478 . . ." And in the *Dillingham case* the Court says: ". . . the burden is upon the trustor attacking a foreclosure to prove his grounds for attack, since the execution of the power of sale contained in the deed of foreclosure is presumed regular."

Since this decision is clearly out of line with the rule long established in this jurisdiction, it is expressly overruled on the question of the burden of proof on an issue directed to an attack upon the validity of the advertisement of a foreclosure sale under which a party claims title. And we reassert the rule that when in an ejectment action a party attacks a foreclosure deed relied on by his adversary on the grounds of irregularity in the foreclosure sale, the burden of proof on the issue thus raised rests upon him who asserts the irregularity. To invoke this rule, however, it must appear that the deed (1) is regular upon its face, (2) was duly executed, and (3) contains recitals which show compliance with the statute regulating the foreclosure of a deed of trust or mortgage.

But there is error in the excerpt from the charge to which defendants except. Our statute, G.S. 1-597, requires publication of notice of a foreclosure sale under a mortgage or deed of trust in some newspaper published in the County. It further provides that the newspaper in which such notice is published must be a newspaper having "a general circulation to *actual paid subscribers.*" And if not published in a newspaper as defined in the statute, such notice "shall be of no force or effect."

Under these provisions of the statute, the publication of the notice of sale under the power contained in a deed of trust is wholly ineffective unless it is published in a newspaper having a general circulation, within the County where the land to be sold is located, to subscribers who have actually paid the subscription price therefor. Yet in detailing the facts the jury must find in order to answer the first issue in the affirmative, the court made no reference to this essential requirement of the law. A careful examination of the charge as a whole fails to disclose that this oversight was later corrected. Since the defendants offered substantial evidence from which the jury might well have found that the newspaper

in which the notice was published failed to meet the requirements of the law, it is apparent that the error was prejudicial to them.

The defendants offered evidence tending to show that after the execution of the separation agreement, there was a reconciliation and they reassumed their marital status. They contend that this rendered the deed of separation void; that the *locus* was originally owned by them as tenants by entirety; and that the invalidation of the separation agreement rendered the conveyance of the *locus* to the male defendant void; and that therefore plaintiff has failed to establish title to the premises described in the complaint.

On this record their contentions in this respect are untenable for that (1) there is no exception in the record which properly presents the question; (2) this is not an attack which may be made on one of plaintiff's muniments of title without supporting allegation in the answer, *Alley v. Howell,* 141 N.C. 113; *Gibbs v. Higgins, supra,* and (3) in any event defendants tendered no issue directed to this phase of their testimony.

Since the question may arise on the rehearing, we make no comment on the legal effect of the reassumption of the marital relations upon a deed executed pursuant to the terms of the separation agreement.

Technically the foreclosure deed is sufficient to convey the legal title even though the sale was not advertised as required by law and the person holding the legal title to land is entitled to the possession thereof. *Ownbey v. Parkway Properties, Inc., supra.* Therefore, we could conclude that plaintiff is, in any event, entitled to judgment. However, this would not settle the real question at issue but would merely invite more litigation. For that reason we have discussed and decided the questions which are essential to a final determination of the cause.

For the reasons stated there must be a

New trial.

WALLACE GOODWIN v. RICHARD GREENE, F. V. WHITE, AND J. W. GRIFFIN.

(Filed 25 February, 1953.)

1. Boundaries § 6: Trespass to Try Title § 1—

Where the parties admit that each is the owner of the land covered by his respective deed, and the only controversy is as to the dividing line between the two adjoining tracts, the action in so far as it relates to the location of the dividing line is in effect a processioning proceeding notwithstanding plaintiff's claim for damages on the theory of trespass.

2. Boundaries § 11—

In a processioning proceeding, the issue should be as to the location of the true dividing line between the lands of the parties, and an issue as to whether plaintiff is the owner and entitled to possession of the lands as alleged, in connection with the court's instruction that defendant admitted plaintiff's ownership of the land, does not determine the controversy, and in the absence of a determination as to the location of the true dividing line, the subsequent issues of trespass and damage are speculative and the verdict thereon may not stand.

3. Boundaries § 12—

In a processioning proceeding it is the duty of the court to instruct the jury as to what constitutes the dividing line between the lands of plaintiff and defendant and to explain the law and apply it to the evidence in the case in order that the jury may correctly evaluate the evidence in locating the true dividing line. G.S. 1-180.

4. Boundaries § 3c—

Where the junior deed calls for a corner or line in a prior deed as the dividing line between the adjoining tracts, the dividing line must be located from the description in the prior deed, even to the extent of reversing a call in such prior deed when necessary, before resort may be had to any call in the junior deed, and in such circumstance the question of lappage cannot arise.

5. Boundaries § 4—

In running a magnetic course, allowance should be made for variations in magnetic north.

APPEAL by defendants from *Halstead, Special Judge,* November Term, 1952, of CHOWAN.

Civil action to recover damages for alleged trespass.

It appears from the record that among the uncontroverted facts adduced in the trial below, are these:

(1) The plaintiff is the owner of lot No. 15, as shown on plat made by P. Matthews, Civil Engineer, of the C. R. Goodwin land, and bounded as follows:

"Beginning at an elm in the branch and corner of the Farrabault land; thence North 53 degrees East 6.25 chains to Paul Cooper's line; thence North 14½ degrees East 24 chains to the road near a chopped pine on a ditch; thence southwardly along said ditch to the run of the branch; thence Eastwardly along the run of said branch to the elm, place of beginning, and containing 16 acres."

(2) That the defendants are the owners of lots Nos. 13 and 14, as shown on the above plat, and bounded as follows:

"BEGINNING on the Monticello Road at a stake the foot of the new road; thence South 53 degrees West 40.15 chains with the Farrabault

line; thence North 14½ degrees East 24 chains to a pine; thence North 88 degrees East 26.55 chains with the said new road to the BEGINNING, containing 30 acres, more or less . . ., and being the same real estate conveyed by C. R. Goodwin and wife, Amanda M. Goodwin, to Paul Cooper by deed recorded in Book H, page 261, Chowan Register's office."

(3) The second call in the plaintiff's deed, to wit: "North 14½ degrees East 24 chains to the road near a chopped pine on a ditch," and the second call in the defendants' deed, to wit: "North 14½ degrees East 24 chains to a pine," constitutes the boundary line between the parties. This call constitutes the eastern boundary of the plaintiff's tract of land and the western boundary of the defendants' land, and this line is shown on the map referred to above as the line which divides lots Nos. 14 and 15.

(4) It is admitted that the plaintiff owns lot No. 15 as described in his complaint and hereinabove.

(5) The plaintiff claims no part of lots Nos. 13 and 14, described by metes and bounds in the defendants' deed as set forth above.

(6) No question of title is at issue.

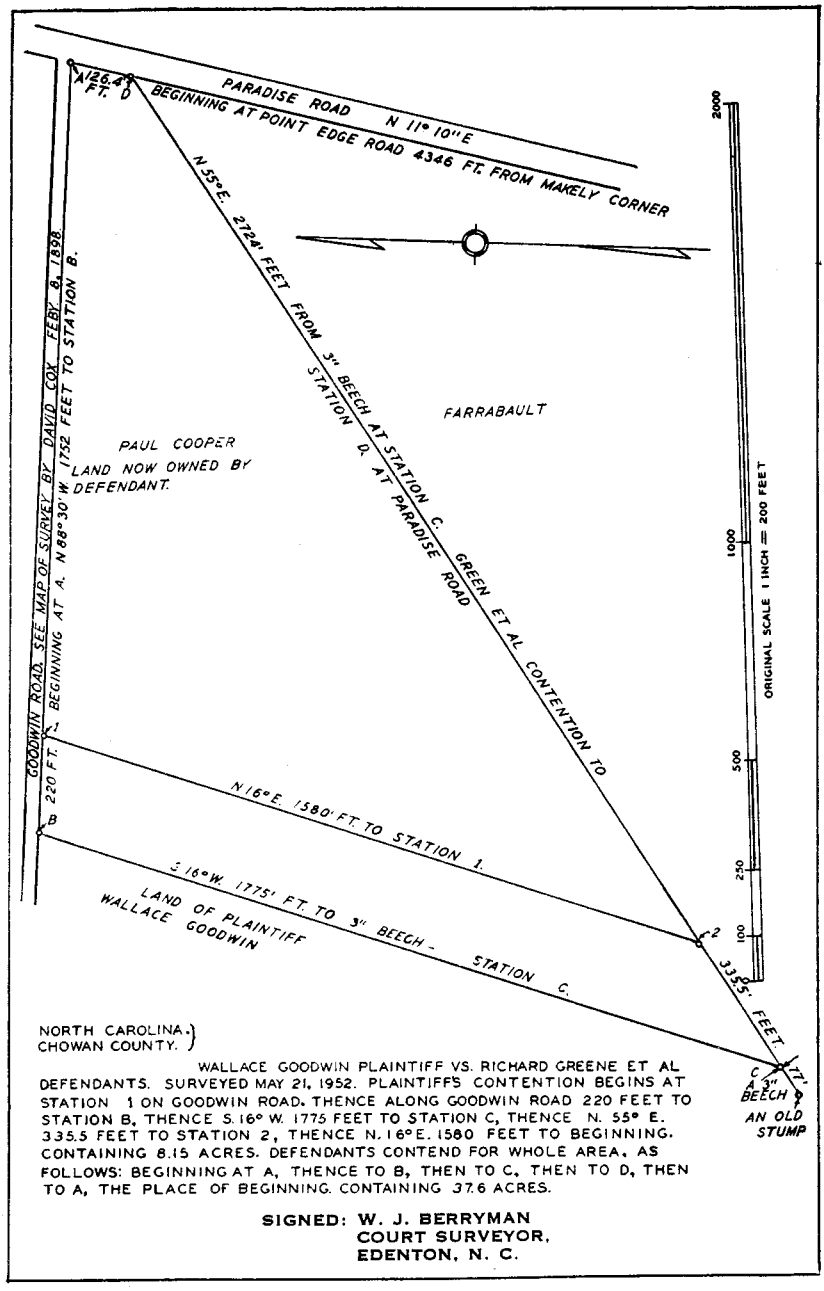
The plaintiff alleges that the defendants have wrongfully and unlawfully entered upon his tract of land and trespassed thereon by cutting and removing therefrom valuable trees and that he has been damaged thereby in a sum not less than $500.00.

The defendants in their answer admit plaintiff owns the land described in his complaint but deny that they or either of them or their agents have trespassed upon or injured any property belonging to the plaintiff.

Prior to the trial below, a court survey of the property showing the contentions of the parties was ordered. The map or plat of lots Nos. 13, 14 and 15, referred to above; the court map; a map of the Farrabault tract of land which adjoins the lands of the plaintiff and the defendants on the south; and a map of the Paul Cooper land, now the land of the defendants, made by P. Matthews, Civil Engineer, dated 16 March, 1914, were introduced in evidence in the trial below and constitute a part of the record on this appeal.

The court map shows a line from 2 to 1, which line runs North 16 degrees East 1,580 feet, and another line from B to C which runs South 16 degrees West 1,775 feet. The line designated from 2 to 1 runs parallel with the line from B to C, and 220 feet to the East of the latter line.

It was agreed in open court "that the plaintiff's contention is that his eastern boundary is from 1 to 2, and that the defendants' contentions are that their western boundary is from B to C."



NORTH CAROLINA.
CHOWAN COUNTY.

WALLACE GOODWIN PLAINTIFF VS. RICHARD GREENE ET AL DEFENDANTS. SURVEYED MAY 21, 1952. PLAINTIFF'S CONTENTION BEGINS AT STATION 1 ON GOODWIN ROAD. THENCE ALONG GOODWIN ROAD 220 FEET TO STATION B, THENCE S. 16° W. 1775 FEET TO STATION C, THENCE N. 55° E. 335.5 FEET TO STATION 2, THENCE N. 16° E. 1580 FEET TO BEGINNING. CONTAINING 8.15 ACRES. DEFENDANTS CONTEND FOR WHOLE AREA, AS FOLLOWS: BEGINNING AT A, THENCE TO B, THEN TO C, THEN TO D, THEN TO A, THE PLACE OF BEGINNING. CONTAINING 37.6 ACRES.

SIGNED: W. J. BERRYMAN
COURT SURVEYOR,
EDENTON, N. C.

Both plaintiff and defendants offered oral and documentary evidence in support of their respective contentions. Issues were submitted and answered by the jury as follows:

"1. Is the plaintiff the owner, and entitled to the possession of the lands as alleged?

"Answer: Yes.

"2. Did the defendants wrongfully and unlawfully trespass on said lands, and cut and remove timber therefrom as alleged?

"Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover of the defendants?

"Answer: $500.00."

From the judgment entered on the verdict, the defendants appeal and assign error.

Weldon A. Hollowell and Pritchett & Cooke for plaintiff, appellee.
John F. White and LeRoy & Goodwin for defendants, appellants.

DENNY, J. Since the plaintiff and the defendants are contiguous landowners, and having stipulated that the controversy between them is bottomed on a dispute as to the location of the true dividing line between their adjoining tracts of land, the action in so far as it relates to the location of such line is in effect a processioning proceeding. *Clegg v. Canady,* 217 N.C. 433, 8 S.E. 2d 246; *Cody v. England,* 216 N.C. 604, 5 S.E. 2d 833.

The defendants except to the following portions of his Honor's charge: (1) "The defendants in their allegations, in their answer, admit that the plaintiff is the owner of that tract of land described in that section of their complaint, and you will not be troubled, gentlemen of the jury, by answering the first issue in this case, that first issue being: 'Is plaintiff the owner and entitled to the possession of the lands, as alleged?' . . . that allegation having been admitted by the defendants, the Court instructs you that you will answer that first issue YES. They are the owners of that land." (Exception No. 5.) (2) "That certain tract of land that I read you a description of in the complaint, is admitted to be the property of the plaintiff, so you will have no trouble with that issue, which reads like this—Is the plaintiff the owner and entitled to the possession of the land, as alleged?—that is the description of the tract of land alleged in the complaint, and the defendants come along and filed their answer and said that is true. They admit that." (Exception No. 14.) (3) "The defendants admit in their answer that the plaintiff is the owner of the land known as the land allotted to Amanda Twine by the Commissioners in Deed Book J, page 78, and by deed in Book M, page 474, and being

the same tract described in the section two of the complaint, and the defendants are estopped to assert and show that the lands conveyed to the defendants overlap according to the map, Pat Matthews Plat, which is included in the allegations of the complaint, and if you believe all of the evidence in this cause, and by a preponderance thereof, you will answer the first issue YES. I have already gone over that with you, gentlemen, for, upon the admission by the defendants in their answer, the defendants admit title of the plaintiff to these particular lands as described in the complaint." (Exception No. 16.)

The defendants also except and assign as error the failure of the court to comply with G.S. 1-180, (a) for that the court failed to instruct the jury as to "what is the line," and placed no restrictions upon the oral testimony bearing on the location of the line (Exception No. 19); and (b) for that "the court failed to instruct the jury as to the application of the law and the effect respecting the true dividing line between the lands involved, the comparative importance which the law attaches to the different elements of description in deeds, their interrelation and the effect of the references in the deeds to the maps introduced in evidence." (Exception No. 21.)

We will discuss exceptions Nos. 5 and 14 together. There has never been any dispute between the parties about the validity of the title to their respective tracts of land. Furthermore, the plaintiff having alleged ownership of the land described in his complaint and the defendants having admitted such ownership in their answer, no issue involving plaintiff's title was raised. Therefore, the first issue should have been in substance as follows: What is the true dividing line between the lands of the plaintiff and the lands of the defendants? *Greer v. Hayes,* 216 N.C. 396, 5 S.E. 2d 169. The first issue, however, in the form submitted and the affirmative answer thereto, in light of the court's instruction on the issue, did not determine any question or controversy between the parties. *Cody v. England, supra; Plotkin v. Bond Co.,* 200 N.C. 590, 157 S.E. 870; *Chapman-Hunt Co. v. Board of Education,* 198 N.C. 111, 150 S.E. 713.

In an action in which it is necessary to locate a disputed boundary line, the verdict and judgment should establish the line with such definiteness that it can be run in accordance therewith. "Otherwise, the judgment would not sustain a plea of *res judicata* in a subsequent suit between the same parties, involving the same subject matter, but would only necessitate another suit to settle the same case." *Cody v. England, supra.* See also 11 C.J.S., Boundaries, section 120, page 733.

The evidence and judgment below leaves the parties in this case in the identical situation pointed out by *Winborne, J.,* in the last cited case. No issue was submitted or instruction given that required the jury in the

trial below to locate the true dividing line between the lands of the plaintiff and the defendants. The crucial question as to whether the plaintiff or the defendants own the land between the lines from 1 to 2 and from B to C as shown on the court map, still remains unanswered. And this question will remain unanswered unless the parties themselves agree upon and locate the true dividing line, or until a jury in a subsequent trial locates such line under proper instructions based upon competent evidence. Moreover, until the location of the true dividing line between the lands of the plaintiff and the defendants is determined in a legal manner, any verdict on the second issue with respect to trespass upon the land which lies in the disputed area between the lines shown on the court map from 1 to 2 and from B to C, will be meaningless and constitute no more than a mere guess on the part of the jury. *Cody v. England, supra.*

As to exception No. 16, the question of lappage does not arise in this case. The Paul Cooper land, now owned by the defendants, consisting of lots Nos. 13 and 14, as shown on the original plat of the division of the C. R. Goodwin land in 1898, and platted by P. Matthews, Civil Engineer, from the original plat, in February, 1918, was conveyed prior to the conveyance of lot No. 15 of that division now owned by the plaintiff. It will be noted that the first call in the plaintiff's deed is "North 53 degrees East 6.25 chains to Paul Cooper's line," and the second call is identical in course and distance with the eastern boundary line of Paul Cooper's land. The Paul Cooper line, whether more or less than 6.25 chains North 53 degrees East from the beginning corner of plaintiff's line, constitutes the eastern terminus of that call. *Tice v. Winchester,* 225 N.C. 673, 36 S.E. 2d 257; *Clegg v. Canady, supra; Waters v. Lumber Co.,* 154 N.C. 232, 70 S.E. 284; *Whitaker v. Cover,* 140 N.C. 280, 52 S.E. 581; *Cowles v. Reavis,* 109 N.C. 417, 13 S.E. 930; 11 C.J.S., Boundaries, Section 53, page 622.

As contended by the defendants in exceptions Nos. 19 and 20, it was the duty of the court to tell the jury what constituted the line between the lands of the plaintiff and the defendants, and to explain the law and apply it to the evidence in this case in order that the jury might be instructed how to evaluate the evidence in locating the true dividing line. This the court failed to do. *Greer v. Hayes, supra.*

Where a junior deed calls for a corner or line in a prior deed, if the corner or line can be ascertained and established from the description in the prior deed, it is not permissible to resort to a call in the junior deed for the purpose of establishing the call or line in the prior deed. *Bostic v. Blanton,* 232 N.C. 441, 61 S.E. 2d 443; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326; *Thomas v. Hipp,* 223 N.C. 515, 27 S.E. 2d 528; *Euliss v. McAdams,*

108 N.C. 507, 13 S.E. 162; *Corn v. McCrary,* 48 N.C. 496; *Dula v. McGhee,* 34 N.C. 332; *Sasser v. Herring,* 14 N.C. 340.

In *Corn v. McCrary, supra, Pearson, J.,* said: "The line of another tract which is called for, controls the course and distance, being considered the more certain description, and it makes no difference whether it is a marked or unmarked, or mathematical line . . . *provided it be the line which is called for.*" Likewise, in *Dula v. McGhee, supra, Nash, J.,* said: "Where a grant calls for the line of the older grant, the rule is that it must go to it unless a natural object or a marked tree is called for, and before the calls of the junior grant can be ascertained, those of the elder must be located."

Applying the above principles of law to the present case, since it is clear that the western boundary of the defendants' land is the eastern boundary of the plaintiff's land, this line must be located if possible from the description of the Paul Cooper tract of land, before it will be permissible to resort to any call in the plaintiff's deed for the purpose of establishing a corner or line in the boundary of the Paul Cooper tract, now owned by the defendants. And if any corner of the Paul Cooper land can be definitely located, the line may be reversed from that point if necessary in order to locate the lines and corners called for in that tract. *Jarvis v. Swain,* 173 N.C. 9, 91 S.E. 358; *Thomas v. Hipp, supra; Belhaven v. Hodges, supra.* In determining the location of the disputed line between the lands of the parties involved herein, proper magnetic variations since 1898 should be allowed. *Thomas v. Hipp, supra; Greer v. Hayes, supra.*

The defendants, for the reasons stated, are entitled to a new trial, and it is so ordered.

New trial.

ROY W. ALEXANDER, O. M. ALEXANDER AND ELIZABETH A. BRITTAIN v. GROVE STONE & SAND COMPANY, A CORPORATION.

(Filed 25 February, 1953.)

1. Landlord and Tenant § 17—Lease held not subject to cancellation under its terms if quarrying operation were pursued on any part of land.

Lessor leased to a corporation the right to quarry sand and gravel on ten tracts of land for a period of fifty years in consideration of stock in lessee corporation, with provision that lessor or his assigns might terminate the lease upon surrender of the stock if lessee should fail to start quarrying operations on the premises within a reasonable time or should discontinue quarrying operations for a period of three years. Quarrying operations were started on several of the tracts of land included in the premises, but plaintiff purchased a tract upon which no quarrying operations had ever been carried on. *Held:* Under the terms of the lease, the ten tracts should be considered as a whole and the requirement of user is

not applicable to each tract separately, and therefore plaintiff is not entitled to terminate the lease for nonuser, and further, the surrender of the stock is a condition precedent to the right to terminate the lease.

2. Abandonment § 2—

Mere failure to list and pay taxes on an interest in realty does not alone constitute conclusive evidence of abandonment of such interest.

APPEAL by plaintiffs from *Patton, Special Judge,* November Term, 1952, of BUNCOMBE. Affirmed.

George W. Craig and E. L. Loftin for plaintiffs, appellants.
Lee & Lee for defendant, appellee.

DEVIN, C. J. The plaintiffs instituted this action to remove cloud on their title to described land resulting from a long term lease on certain mineral rights therein executed by a former owner.

On the issues raised by the pleadings jury trial was waived and the cause submitted to the court for the determination of the rights of the parties upon an agreed statement of facts. From this agreed statement and the exhibits thereto attached the following material facts are made to appear.

In 1924 E. W. Grove and others organized the defendant Corporation for the purpose of developing commercially certain deposits of sand, stone and gravel on the land owned by E. W. Grove on the waters of Swannanoa River in Buncombe County, and in consideration of the leasing by him to the defendant the right to remove these materials therefrom for a period of 50 years, there were issued to E. W. Grove 618 shares of the capital stock of the corporation of the par value of $100 per share. Other individuals subscribed for an equal number of shares of stock, and it was provided that the contract should be effective when $50,000 had been raised.

By the terms of the lease the defendant Corporation was given the "right of entering in and upon the land hereinafter described for the purpose of searching for and locating sand, stone and gravel, and the quarrying, removing and preparing for market all such sand, stone, gravel or rock which may be found on said premises and to manufacture therefrom such products as it may desire," and to the defendant Corporation was granted "all such sand, gravel, stone and rock on said premises which it may desire during the period of 50 years from the date hereof, and to mine, quarry, manufacture, remove, sell and dispose of the same." The defendant was further given "the right, during the continuance of this contract, to construct, erect and maintain on said premises such building,

machinery and other structures incident or necessary to the conduct of said business."

The lease or contract also contained the following agreement:

The said party of the second part (defendant) agrees to commence its operations hereunder within a reasonable time from the date hereof, and in the event said party of the second part shall fail to so commence operations hereunder, or shall, at any time during the continuance hereof discontinue its operations on said premises for a period of three (3) years, then in that event, the said party of the first part, or his assigns, shall have the right to declare this contract null and void and of no effect, and upon the return and delivery to the party of the second part of all capital stock held by the party of the first part in said Company, the said party of the second part agrees and binds itself to release any and all claim, interest and demand it may have in and to the lands hereinafter described, by virtue of this contract."

The lands embraced in the lease were described generally as those certain tracts or parcels of land situate on the waters of Swannanoa River in Buncombe County and more particularly described in the deeds to the lessor, and there followed a list of deeds numbered 1 to 10 identified only by the name of the grantor and the book and page of registration.

The lessor E. W. Grove reserved to himself and his assigns the right to use the premises for any purpose desired which did not interfere with the operations of the defendant pursuant to the contract. The lease agreement was duly registered 7 May, 1924.

On 12 January, 1937, the trustees of the E. W. Grove Estate conveyed to the plaintiffs' predecessor in title for a valuable consideration the parcel of land containing 14 acres referred to in the list set out in the lease as No. 1, subject to the lease executed by E. W. Grove to the defendant Corporation in 1924.

Further facts agreed to by the parties to this action and set out in the agreed statement were substantially as follows:

1. That the defendant has not listed or paid taxes on the mineral rights secured to it by the lease contract.

2. That since the date of the lease and up to the present time the defendant has not carried on any crushing, mining or quarrying operations on the lands conveyed to the plaintiffs' predecessor in title, herein referred to as tract No. 1, and has not constructed thereon any buildings, roads or other structures incident to the conduct of its business.

3. That in 1924 the defendant constructed on tract No. 4 a large crusher plant, offices, other structures and a railway spur track and commenced its operations which thereafter have continued without interruption or abandonment.

4. That during the years 1924 to 1927 inclusive, defendant went upon tracts 7, 8 and 10 for the purpose of searching for and locating sand, stone and gravel, and excavated and removed sand, stone and gravel, and hauled these products to the crusher plant by means of a narrow gauge railroad on and over said tracts.

5. That in 1938 defendant removed the crusher on tract No. 4 and relocated a new crusher plant on lands north of Highway 70, and on account of the long haul from the lands of plaintiffs and others to the new crusher the defendant did not after 1938 extract or mine sand or gravel therefrom, and since said removal has procured raw materials from other lands.

6. That although defendant removed its plant in 1938 from tract No. 4, operations on said tract were not discontinued, there having been constructed thereon about the same time loading platforms serviced by railroad spur track; that in order to use the large quantities of sand stored on tract No. 4 the Asheville Paving Company constructed thereon, with defendant's permission, a plant for the manufacture of asphalt.

7. That the location and construction of a new crusher plant were in the interest of more economical operations of the defendant in that the same, together with the defendant's offices, scales and storage bins, were and are now located on tract No. 7.

Upon these facts the court below was of opinion, and so held that the 10 tracts of land described in the lease should be considered and dealt with as a unit, and that therefore the defendant was not bound to commence or continue its operations on each separate tract on pain of forfeiture, and that the defendant has complied with the terms of the lease by beginning operations within the time specified and continuing to excavate sand, stone, and gravel from one or more of the tracts, other than that of plaintiffs; that the return by E. W. Grove or his assigns of the shares of stock issued to him in consideration of the leasing of the 10 tracts of land was a condition precedent to the exercise of the option to declare the lease void; and that the defendant has not abandoned or forfeited its right to go upon the land of the plaintiffs for the purposes set out in the lease. Thereupon the court adjudged that the lease or contract of January, 1924, was and still is binding on the plaintiffs and constituted a right or charge in favor of the defendant against the described lands of the plaintiffs.

To this judgment the plaintiffs in apt time excepted, and their appeal brings up for review the ruling below as it affects the rights of the parties herein.

An examination of the terms of the lease, in connection with the statement of facts agreed, leads us to the conclusion that the court below has

properly determined the rights of the parties and that the judgment appealed from should be affirmed.

It is apparent, we think, from the language in which the lease was expressed that the parties contemplated that the 10 tracts should be considered and dealt with as a whole, and that the requirements of user should not be applicable to each tract separately. The lease refers to the land as "premises" and grants to the defendant the right to enter in and upon "the land" thereinafter described for the purposes therein set out, and provides that in consideration of 618 shares of the capital stock of the corporation the lessor conveys to the defendant lessee substantial rights for continued and extended operations thereon for 50 years. The conclusion seems inescapable that this was intended to be an entire transaction whereby in consideration of the shares of stock the lease was given on a body of land considered as a unit, though compiled by the aggregation of 10 contiguous tracts which had been acquired by E. W. Grove from the enumerated sources.

It follows that it was correctly held that the use of one or more tracts for the purposes of the lease was a compliance with the requirements of the lease, and that on the facts agreed the issue was binding on the plaintiffs, with consequent right of defendant to make such use of plaintiffs' land and under such conditions as are specified in the lease.

The plaintiffs argue that the lease is in effect a conveyance of mineral rights and interests, constituting a severance of the mineral and surface rights in the land, and that the defendant's failure to list and pay taxes on such mineral interests (G.S. 105-306 (7)) affords evidence of an abandonment of the right to enter upon plaintiffs' land to take minerals therefrom.

While the facts upon which this argument is based might be considered as evidence of an abandonment of rights under the lease, in view of all the facts agreed and in absence of other evidence of voluntary relinquishment, the failure to list for taxation may not be regarded as conclusive on the question of the right of the defendant to enter upon the land of the plaintiffs or as determinative of the rights of the parties under the lease. 1 A.J. 12. The court properly held the defendant had not abandoned or forfeited its rights.

We conclude that the judgment denying the plaintiffs the relief prayed for should be affirmed.

Affirmed.

JAMES A. PARRISH v. DAVID C. BRYANT AND GIBSONVILLE DEVELOPMENT COMPANY, A CORPORATION, T/A ROCK CREEK DAIRY.

(Filed 25 February, 1953.)

1. Evidence § 29—

Where plaintiff fails to show the identity of the issues in his case with those of a former criminal prosecution against the same defendant, transcript of the testimony in the criminal proceeding is properly excluded, the question of the identity of the issues being a preliminary question to be decided by the court before any evidence at a former trial is competent.

2. Automobiles §§ 8d, 18i—Evidence held not to invoke proviso of G.S. 20-161.

Plaintiff was sitting in his vehicle, which defendants' evidence tended to show was parked some eighteen inches on the hard surface on its right side of the highway. Defendant driver, while traveling in the opposite direction, turned to his left and struck the parked vehicle in an attempt to avoid hitting a pedestrian who darted across the highway from back of plaintiff's car. The issue of contributory negligence was submitted to the jury on defendants' contention that plaintiff's car was parked on the highway in violation of G.S. 20-161. *Held:* Upon evidence tending to show that at least twenty-four feet of the hard surface was unobstructed to the left of plaintiff's car and that a clear view of plaintiff's car was obtainable for more than two hundred feet, the court was not required to charge upon the proviso of G.S. 20-161, and failure to charge on the proviso could not have been hurtful to plaintiff.

3. Same—

Where defendants' evidence tends to show that plaintiff's vehicle was standing partly on the hard surface, and plaintiff's own evidence tends to show that it was "parked," plaintiff may not object to the failure of the court to charge on the distinction between parking and a momentary stop, there being no evidence raising the question upon the theory of trial.

4. Appeal and Error § 8—

An appeal will be determined in accordance with the theory of trial in the lower court.

PARKER, J., having presided in the court below, took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Parker, J.*, and a jury, March Term, 1952, of ALAMANCE. No error.

Civil action to recover damages for personal injuries resulting from a collision of two motor vehicles.

The collision occurred at about 2:00 o'clock in the afternoon of 22 February, 1949. The defendant David C. Bryant was driving a milk truck of the corporate defendant in an easterly direction on U. S. Highway No. 70 near Burlington, North Carolina. At that time the plaintiff was driving a Studebaker automobile on the same highway in the oppo-

site direction; but before meeting the defendant Bryant, the plaintiff parked the Studebaker on his right hand side of the highway, at a point just west of a much traveled intersection. The plaintiff then got out of the Studebaker and climbed into the back seat. His companion, a man named Shepherd, got out of the Studebaker on the right side and moved back toward its rear end. The hard-surfaced portion of the highway at that point was about 26 feet wide, slightly down hill, but straight for some considerable distance each way. When the truck driven by the defendant Bryant was about 200 yards away, he saw the Studebaker parked on his left side of the highway, facing him. When the truck was within some 20 or 30 feet of the Studebaker, a man suddenly darted from behind it across the highway toward the path of the truck. Bryant, in an effort to avoid hitting the man, swerved his truck to the left, across the center line of the highway to near the edge of the pavement, and ran into the Studebaker, injuring the plaintiff, who was seated therein.

The defendants offered evidence tending to show that the Studebaker was parked from 18 inches to 2 feet on the paved, main-traveled portion of the highway; whereas, the plaintiff's evidence indicates that the car was parked several feet off the pavement in a driveway.

The case was tried upon issues of negligence and contributory negligence, both of which were answered by the jury in the affirmative. The issue of contributory negligence was grounded on the theory that the plaintiff in parking his car on the main-traveled portion of the highway in violation of G.S. 20-161 thereby proximately contributed to his own injury.

From judgment entered on the verdict, denying the plaintiff recovery, he appeals, assigning errors which relate (1) to the exclusion of evidence and (2) to the charge of the court.

H. Clay Hemric and Long & Long for plaintiff, appellant.
Sanders & Holt and Cooper & Cooper for defendants, appellees.

JOHNSON, J. The plaintiff stresses his exception to the refusal of the court to permit him to offer in evidence a transcript of the sworn testimony of S. T. Mullen, a State Highway patrolman, as given in the trial of the criminal case of State *v.* David C. Bryant in the Burlington Municipal Recorder's Court on 20 December, 1950. This testimony was taken at the trial of the criminal case by a court reporter, and in the instant trial below it was stipulated by the defendants that the transcript of the evidence was authentic and correct, and that if the court reporter were present she would so identify the transcript. Also, it had previously been testified by Lt. C. L. Willard, of the State Highway Patrol, that witness Mullen was no longer with the Highway Patrol, but at the time

of the trial was in Atlanta, Georgia. It was further shown that one of the defendants in the present case was the identical defendant in the previous criminal case, and that the other defendant in the present case was the employer of the individual defendant, and further that in the trial of the criminal case the witness Mullen was cross-examined on behalf of the defendant Bryant by his attorney, who represents both defendants in the present case. The plaintiff, on the basis of these circumstances, insists that the transcript of Mullen's former testimony should have been received in evidence.

This evidence was properly excluded. It is subject to challenge on a number of grounds, one of which is failure to show identity of issues.

One of the cardinal rules governing the admissibility of testimony given at a former trial is that it must be made to appear that the issues in the former action were substantially the same as in the pending action, the theory being that unless the issues were the same, the cross-examination would not have been directed to the same material points of investigation, and necessarily could not have been an adequate test for exposing testimonial inaccuracies. Wigmore on Evidence, Third Ed., Vol. 5, Sections 1386 and 1387; 31 C.J.S., Evidence, Sec. 385. See also *Bank v. Motor Co.,* 216 N.C. 432, 5 S.E. 2d 318; *McLean v. Scheiber,* 212 N.C. 544, 193 S.E. 708; Stansbury, North Carolina Law of Evidence, Sec. 145; 20 Am. Jur., Evidence, Sec. 694; Annotation: 46 A.L.R. 463; Wigmore on Evidence, Third Ed., Vol. 5, Sec. 1404; *Smith v. Moore,* 149 N.C. 185, 62 S.E. 892; *Cf. Settee v. R. R.,* 171 N.C. 440, 88 S.E. 734; *Dupree v. Va. Home Ins. Co.,* 92 N.C. 417.

This question of identity of issues is a preliminary one to be decided by the court from the record of the former trial. 20 Am. Jur., Evidence, Sec. 691.

The record here reflects no such preliminary determination. The question whether as against the defendant Bryant, who is presently charged with the negligent violation of several highway safety statutes, the issues in the criminal case were the same as in the present civil action, rests entirely in conjecture. Whereas, it is noted that one of the crucial issues involved in the present civil action is the issue of contributory negligence, based on allegations that the plaintiff violated G.S. 20-161 by parking on the main-traveled portion of the highway. Certainly, this question was not directly in issue in the former criminal action against Bryant.

For this failure to show identity of issues, the proffered evidence was properly excluded.

Next, the plaintiff assigns as error the charge of the court in reference to G.S. 20-161, which prohibits the parking of an automobile "upon a pavement or improved or main-traveled portion of any highway outside

of a business or residential district when it is practicable to park . . . off . . . the pavement. . . ."

Here the plaintiff insists that the court erred in failing to charge the jury in reference to the proviso contained in the statute which provides in effect that in no event shall a vehicle be left unattended on the main-traveled portion of a highway unless a clear width of at least 15 feet be left open for travel opposite the vehicle, nor unless a clear view of the vehicle may be obtained from a distance of 200 feet in both directions.

As to this contention, it is enough to say that no phase of the evidence brought into operation the provisions of the proviso of this statute; and the case was not tried on that theory. All the evidence tends to show that the highway at the place of collision was 26 feet wide and a clear view at that point was obtainable from the west for more than 200 feet. The testimony to the effect that the Studebaker car was parked on the pavement placed it thereon for distances varying from 18 inches to 2 feet, thus leaving at least 24 feet of the main-traveled portion of the highway open for the passage of other vehicles. Besides, if it should be conceded that the proviso was applicable, on this record it is not perceived how a failure to charge thereon would have been hurtful to the plaintiff. The omission, it would seem, would have been helpful to him. At any rate, the exception is without merit. It is overruled.

We come now to the exceptive assignments of error based on the failure of the trial court to point out and explain to the jury the difference between a momentary stop and the "parking and leaving standing" of a vehicle.

Here, again, the plaintiff's contention runs contrary to the theory of the trial. The record discloses that the case was tried wholly on the theory of whether the Studebaker car was parked on or off the main-traveled portion of the highway. The plaintiff alleged and contended that his car was entirely off the pavement and in a driveway leading to a service station; whereas, the defendants contended the car was left on the pavement. The record reflects nothing tending to show that the plaintiff claimed exemption from the statute (G.S. 20-161) under the doctrine of momentary stoppage, as explained by *Barnhill, J.*, in *Peoples v. Fulk*, 220 N.C. 635, 18 S.E. 2d 147.

To the contrary, the record discloses that the plaintiff several times in his pleadings refers to his car as having been parked; and his witnesses made numerous similar references.

The theory upon which a case is tried in the lower court must prevail in considering the appeal and 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. As stated by *Brogden, J.*, in *Weil v. Herring*, 207 N.C. 6, p. 10, 175 S.E.

836, ". . . the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court."

The rest of plaintiff's exceptive assignments have been examined. They are without merit. Error has not been made to appear. The verdict and judgment will be upheld.

No error.

PARKER, J., having presided in the court below, took no part in the consideration or decision of this case.

REBECCA SIMPSON, ADMINISTRATRIX OF G. B. SIMPSON, v. FRANCIS H. CURRY.

(Filed 25 February, 1953.)

Automobiles §§ 16, 18h—

The failure of a pedestrian to yield the right of way to vehicular traffic as required by G.S. 20-174 (a) or (d) is not negligence or contributory negligence *per se*, but is only evidence to be considered with other evidence upon the issue, and therefore an instruction to the effect that if plaintiff's intestate violated the provisions of the statute, such violation in itself would constitute contributory negligence *per se* must be held for reversible error. G.S. 20-174 (e).

APPEAL by plaintiff from *Burgwyn, Special Judge,* October Term, 1952, of PASQUOTANK.

This is a civil action to recover for the wrongful death of the plaintiff's intestate which it is alleged resulted from the negligence of the defendant.

Plaintiff's intestate was injured on the night of 24 December, 1951, in a collision with an automobile driven by the defendant, and died as a result thereof on the following day. The collision occurred on what is known as Hughes Boulevard which is a part of U. S. Highway 17. This part of the highway is substantially the western boundary of the City of Elizabeth City. It is a two-lane highway running north and south with an additional concrete portion to the east which is used both for travel and for parking by cars headed north. The highway has a traffic line at the point in question, consisting of two yellow lines, with a broken white line in between them. From the eastern curb to the traffic line the distance is approximately 21 feet, and from the traffic line to the western edge of the hard surface the distance is approximately 11 feet. There was no other traffic involved in the accident. Parsonage Street in Elizabeth City crosses Hughes Boulevard at right angles, and the collision com-

plained of occurred at a point approximately 50 feet north of this intersection. Traffic at the intersections in this area is not controlled by any lights or other traffic signals. There are no marked cross-walks at the intersection of Parsonage Street and Hughes Boulevard. Neither was there any cross-walk where plaintiff's intestate was crossing the highway. There was a street light at the intersection, and the area was further lighted by the lights in and outside of a nearby confectionary store located on the east side of the street and opposite the point where the collision occurred.

The plaintiff's evidence tends to show that at the time of the collision the plaintiff's intestate was standing about two or more feet to the west of the traffic line, waiting for defendant's car to pass so that he could cross to the east; that the defendant's car went to the left of the traffic line, two or more feet, striking plaintiff's intestate; that the defendant gave no warning by horn or otherwise, and that he was traveling at a high rate of speed, approximately 60 miles per hour in a 35 miles per hour speed zone.

The defendant testified that at the time of the collision complained of he was en route from Greenville, N. C., to Norfolk, Virginia, and was driving his automobile at a speed of approximately 35 miles per hour; that he did not see anyone crossing the highway but felt something hit the side of his car; that he was every bit of 18 inches or two feet from the yellow line when this object ran into him.

An examination of the defendant's car disclosed, according to the testimony of a local police officer, that the left-hand front fender back of the headlight came in contact with plaintiff's intestate and also the left-hand corner post above the windshield.

The jury answered the issues of negligence and contributory negligence in the affirmative, and the plaintiff appealed.

Robert B. Lowry and John H. Hall for plaintiff, appellant.
LeRoy & Goodwin for defendant, appellee.

DENNY, J. The plaintiff assigns as error the following portion of his Honor's charge to the jury: "Now we have certain laws or rules, as they are called, in our State, for the guidance of people operating motor vehicles upon the public highway, any number of them, and a violation of any one of them by either party would be considered negligence *per se,* and if such violation, if you find there was any such violation on the part of the plaintiff, becomes the proximate cause of the injury and death complained of, then you would consider that as a bar to the plaintiff's right to recover, if you find that his negligence was solely the cause of his death."

The court thereafter read to the jury the following subsections 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.

"(d) It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand side thereof, and such pedestrians shall yield the right of way to approaching traffic.

"(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, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

In light of the above instruction, we think the jury was warranted in assuming it to be its duty to find that the plaintiff's intestate was guilty of negligence if it found that he had violated any of the provisions of the above statute. But we have held that a violation of this statute is not negligence *per se* but only evidence thereof which may be considered with other facts in the case in determining whether the party was guilty of negligence or contributory negligence as charged. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696. See also *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Groome v. Davis,* 215 N.C. 510, 2 S.E. 2d 771; *Sebastian v. Motor Lines,* 213 N.C. 770, 197 S.E. 539. "There is really no distinction, or essential difference, between negligence in the plaintiff and negligence in the defendant, except that in an action like the present, the negligence of the plaintiff is called contributory negligence. *Liske v. Walton,* 198 N.C. 741, 153 S.E. 318. The criterion for establishing both is the same." *Sebastian v. Motor Lines, supra.*

In *Bank v. Phillips, supra,* which case involved questions similar to those raised on the present record, *Johnson, J.,* in speaking for the Court, said: "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. . . . Nor may the evidence tending to show that the 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 . . . 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."

It is true the plaintiff is not entitled to recover if her intestate is found to have been guilty of negligence and that such negligence was the proximate cause or one of the proximate causes of his death. However, such negligence, by reason of the reciprocal or correlative duties imposed by G.S. 20-174 on plaintiff's intestate and the defendant, under the facts and circumstances disclosed on this record, may not be established as a matter of law by merely showing a violation of some provision of the above statute.

For the reasons stated, the plaintiff is entitled to a new trial, and it is so ordered.

New trial.

STATE v. FRED LEE.

(Filed 25 February, 1953.)

1. Automobiles § 30d—

In a prosecution for driving an automobile on the highways of the State while under the influence of intoxicants, an instruction that a person is under the influence of intoxicants when he has drunk a sufficient quantity thereof to "perceptibly" impair his bodily or mental faculties will not be held for prejudicial error.

2. Criminal Law § 53b—

Where the court correctly charges on the presumption of innocence and correctly places the burden on the State to prove defendant's guilt to a moral certainty or beyond a reasonable doubt, the charge is sufficient on the question of the burden of proof in the absence of request for special instructions, and will not be held for error in failing to charge the jury that reasonable doubt might arise either on the evidence or from the insufficiency of the evidence in the case.

APPEAL by defendant from *Grady, Emergency Judge,* at September Term, 1952, of BEAUFORT.

Criminal prosecution upon a warrant issued out of Recorder's Court for Washington, Long Acre, Chocowinity and part of Bath Township, charging defendant with (1) operating a motor vehicle upon the public streets of Washington, N. C., while under the influence of some form of alcohol or some form of narcotic drug, and (2) carrying a deadly weapon, to wit, a pistol, tried in Superior Court, on appeal thereto from judgment of said Recorder's Court, on the charge first above stated.

Upon the trial in Superior Court the State offered evidence tending to support the charge so first above stated. On the other hand, defendant, as witness for himself, denied that he had had anything to drink at the time charged, and offered testimony of other witnesses tending to show that he was not intoxicated.

Verdict: Guilty.

Judgment: Confinement in jail to work the roads for a period of eighteen months.

Defendant appeals to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

LeRoy Scott and Albion Dunn for defendant, appellant.

WINBORNE, J. Four assignments of error: (1) Two predicated upon exceptions to portions of the charge as given by the court to the jury, and (2) two upon exceptions to alleged failure of the court to properly charge the jury, are presented upon this appeal. However, error is not made to appear.

In connection with the first two assignments of error it is appropriate to direct attention to the case *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688, where defendant was charged with operating a motor vehicle while under the influence of narcotic drugs in violation of G.S. 20-138, and where, in opinion by *Denny, J.,* this Court, discussing the subject of "Under the influence of liquor," laid down this simple rule: "Before the State is entitled to a conviction under G.S. 20-138, under which the defendant has been indicted, it must be shown beyond a reasonable doubt that the defendant was driving a motor vehicle on a public highway of this State, while under the influence of intoxicating liquor or narcotic drugs. And a person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties."

And in the case of *S. v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740, involving a like charge, a portion of the charge was under scrutiny. There the Court pointed out that the chief difference in the charge given and the rule stated in *S. v. Carroll, supra,* was that in the former the court used the clause "to be materially impaired," whereas in the *Carroll case* the words were "appreciable impairment." Then attention was called to the fact that the word "appreciable" as defined by Webster means "large or material enough to be recognized or estimated; perceptible; as an appreciable quantity," and that the word "materially" means "in an important regard or degree; substantially." Then this Court said that while the language of the rule in the *Carroll case* is preferred, yet the Court fails to see in that used in the instant case sufficient difference in meaning for the rule given in the *Carroll case* to have been misunderstood by the jury.

Now, in the case in hand, appellant contends that the use of the word "perceptibly" instead of the word "appreciably" without explanation of what it means, is prejudicial error. As stated in *S. v. Bowen, supra,* "appreciable" means "perceptible." And Webster says "perceptible" means "able to perceive; perceptive; capable of being perceived; cognizable; discernible; perceivable." Again, this Court says that while the language of the rule in the *Carroll case, supra,* is preferred, we fail to see in the word "perceptible" sufficient difference in meaning and common understanding for the rule given in the *Carroll case, supra,* to have been misunderstood by the jury.

And, in passing on, it is worthy of note and emphasis that the *Bowen case,* and the present one, were brought up on appeals mainly upon exceptions to language paraphrasing the rule of law laid down in *S. v. Carroll, supra.* And it is not plagiarism to use the exact language of a rule of law.

The third and fourth assignments of error relate to failure of the trial court, in charging the jury, to define "reasonable doubt," and "to charge the jury that it could find reasonable doubt, either from the evidence itself, or from the insufficiency of the evidence in the case."

Recurring to the record, it appears that, at the outset, the trial judge charged the jury as follows: "The defendant, Fred Lee, has entered a plea of not guilty. Under the law he is presumed to be innocent, and that presumption continues with and protects him throughout the trial and would entitle him to a verdict of not guilty, unless and until the State has offered evidence which satisfies you beyond a reasonable doubt of his guilt, and the burden rests upon the State to satisfy you before you can return an adverse verdict against the defendant. The question then arises, has the State offered such evidence? Does the evidence offered satisfy you to a moral certainty, or as we sometimes say, beyond a reasonable doubt that the defendant is guilty of the charge in the warrant? If it has so satisfied you it would be your duty to return a verdict of guilty. If it has not so satisfied you, then it would be your duty to acquit the defendant." And in closing the trial court repeated in substance the same instruction to the jury. These instructions seem clear and understandable, and, in the absence of request for more specific instruction in the respects indicated by these assignments of error, the instruction given appears sufficient. *S. v. Whitson,* 111 N.C. 695, 16 S.E. 332; *S. v. Lane,* 166 N.C. 333, 81 S.E. 620; *S. v. Johnson,* 193 N.C. 701, 138 S.E. 19; *S. v. Ammons,* 204 N.C. 753, 169 S.E. 631.

In the *Lane case, supra,* the Court declared: "There is no particular formula prescribed by the law for defining or stating what is meant by reasonable doubt."

The case appears to have been fairly presented to the jury; hence defendant must abide the judgment on verdict rendered.

No error.

T. G. WILSON AND WIFE, HARRIETT WILSON, v. MRS. W. A. (RELLIE) WILSON; ROY WILSON AND WIFE, MRS. ROY WILSON; MYRTLE WILDER AND HUSBAND, AVERIS WILDER; MARY CODY WALLIN AND HUSBAND, ELL WALLIN; N. A. CODY AND WIFE, CALLIE CODY; REVEL CODY AND WIFE, BIDDIE ANNE CODY; LOLA CODY SPRINKLE AND HUSBAND, ... SPRINKLE; MRS. DAISY CODY SAMS; CLOTA SAMS ET VIR HOWARD SAMS; MELLIE CODY BATES; BLANCHE WILSON CLARK AND HUSBAND, ERNEST CLARK; SALLIE W. PLEMMONS AND HUSBAND, HORACE PLEMMONS; KITTIE WILSON HALL AND HUSBAND, ... HALL; CON WILSON AND WIFE, MRS. CON WILSON; JESSIE WILSON (DECEASED) HEIRS; ADDIE WILSON (DECEASED) HEIRS; ORA WILSON (DECEASED) HEIRS; ALL UNKNOWN HEIRS-AT-LAW OF MARTHA CAROLINE (PATTY) WILSON, IF ANY, AND ANY AND ALL PERSONS CLAIMING AN INTEREST IN THE LANDS OF MARTHA CAROLINE (PATTY) WILSON, DECEASED.

(Filed 25 February, 1953.)

1. Adverse Possession § 4g—

An instruction to the effect that if the jury should find that the lands were conveyed to the common ancestor, who held record title to her death, nothing else appearing, the record title would be in her heirs subject to be divested by showing a conveyance from her or by proof of adverse possession for the statutory period, *is held* without error.

2. Same—

Where one of the heirs goes into adverse possession of a tract of land, but the ancestor dies before such possession has been held for twenty years, such possession prior to the ancestor's death may not be tacked to the heir's possession subsequent to the ancestor's death, and such heir's possession for less than twenty years subsequent to the ancestor's death does not ripen title in him.

APPEAL by defendants Blanche Clark and Ernest Clark from *Patton, Special Judge,* October Term, 1952, of MADISON. No error.

The plaintiffs instituted this proceeding for partition of a described tract of 23 acres of land, upon allegation that the plaintiffs and the defendants were tenants in common therein.

The plaintiffs alleged the title to the land descended to the parties as heirs of Martha C. Wilson (hereinafter referred to as M. C. Wilson) who died intestate and without issue in 1936. The parties are the brothers and sisters of M. C. Wilson, and the representatives of those who have died.

The defendant Blanche Clark (who is a daughter of J. K. Wilson, brother of M. C. Wilson) and her husband Ernest Clark denied the tenancy in common and pleaded sole seizin. They admitted that M. C. Wilson formerly owned the land, but alleged that J. K. Wilson had purchased the land from her, and that he and the answering defendants as his heirs, since his death, had been in exclusive possession of the land holding it adversely for more than twenty years.

Consequent upon the plea of sole seizin the cause was transferred to the Superior Court for trial. At the hearing plaintiffs offered deed from W. H. Sams and wife, dated 1899, conveying the land in question to M. C. Wilson, and evidence of possession thereunder by her until her death in 1936. There was also evidence that M. C. Wilson died intestate and without issue, and that the plaintiffs and the defendants were her only heirs at law.

The answering defendants, though unable to show a conveyance from M. C. Wilson to J. K. Wilson, offered evidence tending to show adverse possession of the land by J. K. Wilson, who died in 1941, and since his death by his heirs extending over a continuous period of more than 20 years. Plaintiffs' evidence in rebuttal tended to show that whatever possession defendants had was permissive and not adverse.

The verdict established that the record title to the land was in the plaintiffs and defendants as heirs of M. C. Wilson, and that the defendants Clark had failed to show adverse possession of the land sufficient to vest title thereto in themselves.

From judgment on the verdict the defendants Blanche Clark and Ernest Clark appealed, assigning errors.

Clyde R. Roberts for petitioners, appellees.
Calvin R. Edney for defendants, appellants.

DEVIN, C. J. The appellants attack the validity of the verdict and judgment below chiefly on the ground that the trial judge erred in his charge to the jury. Exceptions were noted to several portions of the charge but upon examination of the instructions complained of, when considered in connection with and in relation to the evidence offered, we perceive no error which would warrant the award of a new trial.

We think the court's charge on the evidence and the law arising thereon fairly and fully presented the case to the jury. In effect, the jurors were instructed if they found that there had been a conveyance of the land by deed in 1899 to M. C. Wilson followed by possession thereunder until her death in 1936, then, nothing else appearing, the record title would be in her heirs, subject to be divested by showing a conveyance from her, or by adverse possession of the land for the statutory period by J. K. Wilson

and his heirs. In this connection we note that the defendants in their answer admitted that the land was formerly owned by M. C. Wilson. Notwithstanding the appellants' criticism of the form of the first issue and the charge thereon, we think the jury understood the case and the court's instruction as applicable to the facts in evidence.

On the question of the court's instructions to the jury as to the adverse possession of J. K. Wilson during the lifetime of M. C. Wilson and the effect of her death in the event title by adverse possession had not then vested in him, we think the court properly applied the principle of law laid down in *Battle v. Battle*, 235 N.C. 499, 70 S.E. 2d 492. In that case the Court said: "But the plaintiffs in making out their case were unable to show adverse possession for a sufficient length of time to ripen before the death of Arcenia Hopkins in 1925, and could not in law under the circumstances of this case, tack that inadequate period to their subsequently continued possession after her death, for the reason that their title to the house and lot not having ripened, upon the death of Arcenia Hopkins, in whom the title still remained, Arcenia and Julius Boddie became tenants in common with the other children of Arcenia Hopkins. *Brite v. Lynch, ante,* 182, 69 S.E. 2d 169. Thereupon the possession of lot No. 817 by Arcenia and Julius Boddie and their successors by descent (*Boyce v. White,* 227 N.C. 640, 44 S.E. 2d 49) became in law the possession also of their cotenants, and it required 20 years adverse possession thereafter to constitute an ouster. *Crews v. Crews,* 192 N.C. 679 (686), 135 S.E. 784; *Bailey v. Howell,* 209 N.C. 712, 184 S.E. 476; *Winstead v. Woolard,* 223 N.C. 814 (817), 28 S.E. 2d 507."

If the jury found that M. C. Wilson had acquired title to the land, and that J. K. Wilson had taken possession and was holding adversely to her in her lifetime, unless such possession had continued for 20 years (*Chambers v. Chambers,* 235 N.C. 749, 71 S.E. 2d 57), upon her death the title still remained in her, and J. K. Wilson, one of her brothers, then became by operation of law one of her heirs and tenant in common with the other heirs; and it would require 20 years adverse possession thereafter to vest title in him and his heirs as against their cotenants. As we interpret the record the appellants did not offer evidence of adverse possession on the part of J. K. Wilson prior to 1922, and it was uncontradicted that M. C. Wilson died in 1936, and this proceeding was instituted in 1950. In any event, the jury has found upon consideration of all the evidence that the defendants Clark have not held the land adversely for 20 years under the rule laid down by the court.

We have examined the appellants' assignments of error based on exceptions to the court's ruling on matters of testimony and find them without merit. The motion to nonsuit was properly denied.

The jury declined to sustain defendants' plea of sole seizin by adverse possession and has found the facts in accord with the plaintiffs' contentions. On the record we find no sufficient ground upon which to disturb the result.

No error.

IN RE THE MATTER OF DENNIS DE FEBIO, THEODORE THOMAS DE FEBIO, AND DOMINICK DE FEBIO, MINORS.

(Filed 25 February, 1953.)

1. Appeal and Error § 16—

An appeal from a judgment rendered in the Superior Court prior to the beginning of the Fall Term of the Supreme Court must be taken to the Fall Term of the Supreme Court, and the cause docketed twenty-one days prior to the call of the district to which it belongs, and failure to docket within the time prescribed necessitates dismissal, since the rule is mandatory. Rule of Practice in the Supreme Court No. 5.

2. Courts § 7½—

The denial of motion by respondent parents for modification of order committing the custody of their minor children to the State Board of Public Welfare does not preclude the parents from later moving for modification of the judgment on the ground of changed conditions. G.S. 110-36.

APPEAL by respondents from *Williams, J.*, May Term, 1952, of DARE.

This proceeding, originally instituted in the Juvenile Court of Dare County, involves the custody of these minor children: Theodore Thomas De Febio, age ten; Dominick De Febio, age six; and Dennis De Febio, age ten, the first two being the natural children of the respondents, Frank J. De Febio and wife, Theo. T. De Febio, and the latter purportedly being the adoptive child of the respondents. The children came to Dare County with the respondent Frank J. De Febio from his former abode in or near Washington, D. C., during the month of January, 1950, and thereafter lived with him in a portion of the property formerly known as the Paul Gamiel Hill Coast Guard Station near Duck, North Carolina, north of Nags Head.

On 17 April, 1951, Goldie H. Meekins, Superintendent of Public Welfare of Dare County, filed petition in the Juvenile Court alleging in effect that within the meaning of the law the children were neglected children (G.S. 110-21), and praying that they be declared wards of the State and committed to the custody of the North Carolina State Board of Public Welfare for suitable care and supervision.

After due notice to the respondents, the proceeding was heard before the Judge of the Juvenile Court on 22 May, 1951, with both respondents

being present. Both sides offered evidence. At the conclusion of the hearing the court found facts and entered judgment finding and adjudging that the children were neglected (G.S. 110-29), and ordered them committed to the custody of the North Carolina State Board of Public Welfare, to be placed in a suitable institution or family home for care and supervision. The children were placed in a boarding house in Hertford, North Carolina, under the immediate supervision of the Dare County Welfare Department.

Thereafter the respondent parents moved the Judge of the Juvenile Court for modification of the judgment, and on 24 August, 1951, judgment was entered denying the motion.

From this judgment the respondents appealed to the Superior Court of Dare County.

The appeal came on for hearing and was heard before Judge Williams at the May Term, 1952. By consent it was agreed that Judge Williams might take the case under advisement and render judgment out of term and out of the county at the June Term, 1952, of the Superior Court of Pasquotank, and this was done. The judgment so entered by Judge Williams affirms the former judgments of the Juvenile Court.

To the judgment so entered the respondents excepted and appealed therefrom to this Court.

W. Dennis Hollowell for respondents, appellants.
No counsel contra.

JOHNSON, J. The judgment appealed from was entered, by consent, at the June Term, 1952, of Pasquotank, as of the May Term, 1952, of Dare.

The transcript of the record was not docketed here until 6 December, 1952. It was the duty of the appellants to docket the appeal at the Fall Term, 1952, of this Court, twenty-one days before the call of the docket of the First District, to which the case belongs. Rule 5, Rules of Practice in the Supreme Court, 221 N.C. 546, as amended. See 233 N.C. 749.

This is a mandatory rule of procedure with us. It may not be abrogated by consent or otherwise. *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. Failure to docket within the time prescribed works a loss of the right of appeal and necessitates dismissal. *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335; *S. v. Presnell,* 226 N.C. 160, 36 S.E. 2d 927; *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *Pruitt v. Wood, supra.*

It follows that the appeal must be dismissed, and it is so ordered. This, of course, without prejudice to respondents' rights to move, if so advised, in the Juvenile Court of Dare County for modification of the judgment on the ground of changed conditions. G.S. 110-36.

Appeal dismissed.

T. J. MERRITT v. JESSIE B. MERRITT.

(Filed 25 February, 1953.)

1. Divorce and Alimony § 11—

Whether a wife is entitled to payments for her support in accordance with a separation agreement and is entitled to enforce such payments under statutory provisions, is a question of law for the court, and the finding of the jury upon such issue constitutes no proper basis for a judgment requiring the husband to continue to pay alimony after the dissolution of the marital status.

2. Same—

The judge entering a decree of divorce *a vinculo* is without jurisdiction to enter an order requiring the husband to continue to support his divorced wife.

APPEAL by defendant from *Burgwyn, Special Judge,* November Term, 1952, PASQUOTANK. Affirmed.

Civil action for divorce, heard on motion to attach plaintiff as for contempt for failure to pay alimony.

On 4 October 1944 plaintiff and defendant entered into a separation agreement in which plaintiff agreed to pay defendant $50 per month to be allotted through the U. S. Coast Guard. The agreement provided for a reduction in the amount of monthly payments to $35 upon the retirement of the plaintiff.

On 30 March 1945 plaintiff instituted this action for divorce. The defendant filed an answer to the complaint in which she pleaded the separation agreement and prayed that alimony be allotted her in accord with the terms thereof.

In the trial at the May Term 1945, Dixon, Special Judge, presiding, the Judge submitted an issue (No. 5), the answer to which in effect constitutes a finding by the jury that defendant, by virtue of such agreement, was entitled to alimony and "to the benefit of the statutes and laws of North Carolina, relating to husband and wife, for the enforcement of said maintenance and support under said agreement." A final decree of divorce was entered at said May Term which judgment contains the following:

"It is FURTHER ORDERED, ADJUDGED AND DECREED, upon the answer to the fifth issue, and by consent, that the plaintiff continue in full force and effect his allotment through the U. S. Coast Guard made in accordance with his agreement of October 4, 1944, and that, should the defendant no longer receive an income from the said U. S. Coast Guard, that plaintiff pay to defendant the amount provided in said agreement as support and maintenance."

At the November Term 1952 defendant, after due notice, appeared and moved for a writ attaching plaintiff as for contempt for his willful failure to make the payments required by said judgment. Upon hearing the motion, the court below, "being of the opinion . . . as a matter of law, that a wilful violation of said provision of the judgment is not a proper subject for contempt proceedings," entered judgment denying the motion and dismissing the contempt proceeding. Defendant excepted and appealed.

John H. Hall for plaintiff appellee.
LeRoy & Goodwin for defendant appellant.

BARNHILL, J. The fifth issue submitted to the jury in the original trial involves a question of law. The answer thereto was for the judge and not for the jury. It constitutes no proper basis for a judgment requiring plaintiff to continue to pay defendant alimony after the dissolution of the marital status.

G.S. 50-11 expressly provides that "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine . . .". The judge entering a decree of divorce *a vinculo* is without jurisdiction to enter an order requiring the husband to continue to support his divorced wife. *Feldman v. Feldman,* 236 N.C. 731, and cases cited; *Livingston v. Livingston,* 235 N.C. 515, 70 S.E. 2d 480. And it is axiomatic that jurisdiction cannot be conferred by consent. *Feldman v. Feldman, supra; McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27, and cases cited.

What we have heretofore said on this question requires no amplification. Further discussion would serve no useful purpose. Suffice it to say that the judgment entered by the court below was in accord with our decisions.

We do not mean to say that defendant is wholly without a remedy. The courts are still open to her for the enforcement of the contractual rights created by the separation agreement.

The judgment entered is

Affirmed.

STATE v. HERBERT BAILEY.

(Filed 25 February, 1953.)

Constitutional Law § 32: Criminal Law § 56—

Where, upon defendant's demand for a jury trial, the prosecution is transferred from the recorder's court to the Superior Court in accordance with statute, Chap. 482, Session Laws of 1951, and the defendant is tried in the Superior Court on the original warrant without an indictment, the judgment must be arrested.

APPEAL by defendant from *Williams, J.*, November Term, 1952, of EDGECOMBE.

This is a criminal action commenced by the issuance of a warrant in the Recorder's Court of Edgecombe County, North Carolina, under date of 26 May, 1952, charging the defendant with the unlawful and willful operation of a motor vehicle upon the public highways of the State while under the influence of intoxicating beverages or narcotic drugs. The warrant was returnable to the Recorder's Court, and upon the call of the case therein on 16 June, 1952, the defendant appeared and made a motion for a jury trial. Thereupon, the case was transferred to the Superior Court of Edgecombe County as directed in such cases by Chapter 482 of the 1951 Session Laws of North Carolina. No bill of indictment was returned against the defendant by a grand jury in the Superior Court, but the defendant was tried by a jury upon the warrant issued in the Recorder's Court.

The jury returned a verdict of guilty and the defendant in apt time moved to set aside the verdict and in arrest of judgment. The motion was denied and from the judgment imposed, the defendant appeals and assigns error.

Attorney-General McMullan and Robert L. Emanuel, Member of Staff, for the State.

Fountain & Fountain & Bridgers for defendant, appellant.

DENNY, J. The Recorder's Court of Edgecombe County is an inferior court of civil and criminal jurisdiction which was created by Chapter 560, Public Laws of North Carolina, Session of 1909, as amended by Chapter 472, Public-Local Laws of North Carolina, Session of 1911. Section 4 of this latter act provides: "Said court shall have, concurrently with justices of the peace of Edgecombe County, jurisdiction in all criminal cases arising in said county which are now or may hereafter be given to justices of the peace, and, in addition to the jurisdiction conferred by this section, shall have exclusive original jurisdiction of all other criminal

offenses committed within the county, below the grade of felony, as now defined by law, and of the crimes of larceny and receiving stolen goods, knowing them to be stolen, wherein the value of the property does not exceed twenty ($20) dollars, and the same are hereby declared to be petty misdemeanors."

The act also provides that criminal actions originating in said court shall be tried upon warrants; and grants to persons convicted and sentenced in such court, the right to appeal to the Superior Court in the same manner as now provided for appeals from courts of justices of the peace.

Chapter 482 of the 1951 Session Laws, provides: "In the trial of any criminal case in the Recorder's Court of Edgecombe County, upon demand for a jury trial by the defendant, the judge of the recorder's court shall transfer said case to the Superior Court of Edgecombe County for trial . . ."

In light of the above statutory provisions, and the able and exhaustive opinions of this Court, speaking through *Ervin, J.*, in *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283, and *S. v. Norman, ante,* 205, we hold that since the defendant was not tried in the inferior court on the warrant issued therein, a mere transfer to the Superior Court upon a demand for a trial by jury, as provided in Chapter 482 of the 1951 Session Laws, did not give the Superior Court jurisdiction to try him on the warrant. *S. v. Thomas, supra.* However, since Chapter 482 of the 1951 Session Laws authorizes the transfer from the Recorder's Court of Edgecombe County to the Superior Court of Edgecombe County, any case within its jurisdiction, upon demand by the defendant for a trial by jury, the Superior Court may put the defendant on trial for the offense charged in the warrant before a petit jury upon the procurement of an indictment duly returned by a grand jury. *S. v. Norman, supra.*

Judgment arrested.

STATE v. ARTHUR PITT.

(Filed 25 February, 1953.)

APPEAL by defendant from *Halstead, Special Judge,* September Term, 1952, of EDGECOMBE.

This is a criminal action commenced by two warrants in the Recorder's Court of Edgecombe County sworn to and subscribed 4 October, 1951, charging the defendant with operating a motor vehicle upon the public highways without a driver's license, and operating a motor vehicle upon

the public highways in a careless and reckless manner so as to endanger the lives and property of others, and leaving the scene of an accident without giving aid and reporting same to the proper authorities.

Upon the call of the case in Recorder's Court on 22 October, 1951, the defendant appeared and made a motion for a trial by jury. Thereupon, the case was transferred to the Superior Court of Edgecombe County as directed in such cases by Chapter 482 of the 1951 Session Laws of North Carolina. No bill of indictment was returned against the defendant by a grand jury in the Superior Court, but the defendant was tried by a jury upon the warrants issued in the Recorder's Court.

The jury returned a verdict of guilty as to both charges set out in the warrants. The defendant made a motion in arrest of judgment. The motion was denied and from the judgment imposed, the defendant appeals and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Cameron S. Weeks and T. Chandler Muse for defendant, appellant.

PER CURIAM. The identical questions raised on this appeal were raised and disposed of in the case of *S. v. Bailey, ante,* 273, on authority of *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283, and *S. v. Norman, ante,* 205.

For the reasons stated in the above opinions, the judgment herein is arrested and the cause remanded for disposition as the law provides.

Judgment arrested.

MRS. F. M. DOBSON, PLAINTIFF, v. FOSTER JOHNSON, INDIVIDUALLY, MRS. RUTH WINSTON AND MRS. BERTHA JOHNSON, INDIVIDUALLY, AND AS CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF JOHNSON'S FOOD STORE, DEFENDANTS.

(Filed 25 February, 1953.)

Appeal and Error § 12—

The requirements of G.S. 1-288 relating to appeal *in forma pauperis* are mandatory and jurisdictional, and failure to comply with the statutory requirements necessitates dismissal.

APPEAL by plaintiff from *Gwyn, J.,* at August Term, 1952, of BUNCOMBE.

Civil action for damages for slander brought by the plaintiff against the defendants.

Prior to the impaneling of the jury the plaintiff took a voluntary nonsuit as to the defendants Mrs. Ruth Winston and Mrs. Bertha Johnson.

Upon denial of the allegations of the complaint, and issues joined, the jury returned a verdict in favor of the defendant. From judgment thereon, the plaintiff attempted to appeal *in forma pauperis,* assigning errors.

Geo. M. Pritchard and Glen R. Penland for plaintiff, appellant.

Sale, Pennell & Pennell for defendant, Foster Johnson, appellee.

PER CURIAM. There is nothing in the record to show that the plaintiff has ever made a request for the appeal to be passed on and granted by the Clerk of Superior Court. Neither the Judge of the Superior Court, nor the Clerk of the Superior Court has signed an order allowing the plaintiff to appeal as a pauper. There is no deposit nor giving of security for cost, no cost bond, no printed record, nor any printed brief in behalf of the plaintiff. The plaintiff has filed in this Court typewritten copies of the agreed case on appeal and of his brief.

The requirements of G.S. 1-288 relating to appeals *in forma pauperis* to the Supreme Court from the Superior Court in a civil action are mandatory and jurisdictional, and " 'unless the statute is complied with, the appeal is not in this Court, and we take no cognizance of the case, except to dismiss it from our docket.' " *Clark v. Clark,* 225 N.C. 687, 36 S.E. 2d 261. "The requirements of the statute allowing appeals *in forma pauperis* are mandatory, not directory, and a failure to comply with the requirements deprives this Court of any appellate jurisdiction. G.S. 1-288." *Williams v. Tillman,* 229 N.C. 434, 50 S.E. 2d 33.

Even though we have no appellate jurisdiction, we have carefully examined the typewritten copy of the agreed statement of the case on the purported appeal, the exceptions filed thereto, and the typewritten brief of the plaintiff. The case seems to have been tried substantially according to law. No prejudicial error appears as would justify a new trial.

Appeal dismissed.

H. A. COLLINS AND WIFE, PARALEE COLLINS, AND RUTH C. BROOKSHIRE, PETITIONERS, v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 4 March, 1953.)

1. Constitutional Law § 21: Notice § 3—

The constitutional right of a party to notice of judicial proceedings affecting his rights relates to original process whereby the court acquires jurisdiction, and not to procedural matters after the court has acquired jurisdiction. Constitution of North Carolina, Art. I, sec. 17. XIVth Amendment to the Federal Constitution.

2. Notice § 3—

Where a cause is regularly docketed for hearing at a term of court, no notice of any motion in the cause is necessary unless required by statute.

3. Same—

Notice must be given of all motions made before the clerk, since they are perforce made out of term, except those grantable as a matter of course. G.S. 1-581.

4. Notice § 4—

When notice of a motion is necessary, such notice must be in writing, disclose the nature of the motion, and the time and place set for hearing, and such notice must be served on the adverse party ten days before the time appointed for the hearing unless the court prescribes a shorter time by an order made without notice, and must be served by an officer unless some other mode of service is particularly prescribed or service is accepted by the adverse party or his attorney, subject to the exception that notice may be served by publication when the adverse party cannot be found after due diligence or is a nonresident. G.S. 1-581, G.S. 1-585, G.S. 1-588.

5. Same—

A party entitled to notice of a motion may waive notice, and attendance at the hearing of a motion and participation in it constitutes waiver.

6. Eminent Domain § 14—

Except where specific provision is made in the statutes governing condemnation, the general rules respecting civil procedure and notice are applicable to a special proceeding in condemnation. G.S. 40-11.

7. Same—

When the answer in a condemnation proceeding challenges the right of petitioner to maintain the proceeding, the clerk must hear the matter and pass upon the validity of the challenge before appointing commissioners, and such hearing by the clerk may be had only after notice to the parties. G.S. 40-16, G.S. 40-17.

8. Same—

Since G.S. 40-17 provides that the commissioners give the parties ten days notice of their meetings except when meeting under the appointment of the court or in an adjourned meeting, and G.S. 40-19 prescribes that

within twenty days after the filing of the commissioners' report any party to the condemnation proceeding may file exceptions, and implies that the clerk must hear and determine the exceptions only after notice to the parties, G.S. 1-404, is not applicable to condemnation proceedings.

9. Same: Judgments § 27d—

An irregular judgment is one rendered contrary to the method of practice and procedure established by law for the action or proceeding in which it is entered, and an order made without notice when notice should have been given is irregular, G.S. 1-582. A judgment in condemnation proceedings confirming the commissioners' report entered without notice to a party who has filed timely exceptions to the report, or a judgment confirming the report which is rendered before the expiration of the twenty days allowed by statute for the filing of exceptions to the report, is irregular.

10. Judgments § 27d—

An irregular judgment is not void but stands until set aside.

11. Same—

The proper procedure to set aside an irregular judgment is by motion in the cause, which, while not limited to one year after the judgment is rendered, must be made within a reasonable time, and movant must show that his rights had been injuriously affected by the judgment.

12. Eminent Domain § 17—

An order of the clerk confirming the report of the commissioners in condemnation proceedings is irregular if it is entered without notice to the parties or if it is entered prior to the expiration of the twenty days allowed by statute for the filing of exceptions to the commissioners' report, but such irregular order may not be attacked by appeal but may be set aside only upon motion in the cause.

APPEAL by respondent from *Gwyn, J.*, at December Term, 1952, of BUNCOMBE.

Special proceeding by owners to recover compensation for land actually taken by the State Highway and Public Works Commission for public use for highway purposes without bringing condemnation proceeding.

For convenience of narration, H. A. Collins, Paralee Collins, and Ruth C. Brookshire are called the petitioners, and the State Highway and Public Works Commission is designated as the respondent.

The only matter before us on this appeal is the record proper, which is susceptible of the construction put upon it in the numbered paragraphs set out below.

1. The petitioners brought this special proceeding against the respondent before the Clerk of the Superior Court of Buncombe County on 8 September, 1951, to recover compensation for a piece of land located in Asheville, which was taken by the respondent for public use in the exercise of its power of eminent domain. The petition alleged in detail that the petitioners owned the land at the time of its taking, and that the

respondent seized the property and devoted it to public highway purposes without bringing any proceeding for its condemnation. The petition prayed the appointment of commissioners to determine what compensation the respondent ought to make to the petitioners.

2. The respondent, which was served with summons on 14 September, 1951, filed an answer, admitting the taking. The answer pleaded in detail, however, that the petitioners were not entitled to maintain the proceeding for these reasons: (1) That the petitioners did not own the land at the time of the taking; and (2) that the petitioners did not bring the proceeding within six months from the date the project was completed as specified in a notice posted at the courthouse door of Buncombe County in strict compliance with the provisions of G.S. 136-19 as set out in Volume 3B of the General Statutes.

3. The Clerk of the Superior Court of Buncombe County did not conduct any preliminary hearing to determine whether or not the respondent's challenge of the petitioners' right to maintain the proceeding was valid.

4. The clerk nevertheless made an order on 2 February, 1952, whereby he appointed H. B. Posey, E. B. Roberts, and W. Z. Penland to serve as commissioners in the proceeding, and directed them to hold their first meeting "on the premises not later than 10 o'clock A. M. on the 9th day of February, 1952." This order was entered upon the motion of the petitioners. No prior notice in writing of the motion was served on the respondent or its attorneys. The judgment mentioned in paragraph 8 of this statement recites that the clerk conferred with "counsel for petitioners and respondent with respect to the appointment of commissioners to assess damages and benefits to the petitioners on account of the . . . taking of said lands" and that they "agreed to the appointment of H. B. Posey, E. B. Roberts, and W. Z. Penland, Commissioners, to act as jurors to assess damages and benefits in this cause."

5. The commissioners met on the premises described in the petition at 10 o'clock a.m. on 9 February, 1952, viewed the premises, and determined that the petitioners were entitled to recover $1,000.00 from the respondent as compensation for the taking of the land. No prior notice in writing of this meeting of the commissioners was given to the respondent or its attorneys.

6. Three days subsequent to the meeting of the commissioners, to wit, on 12 February, 1952, the respondent filed a paper writing in the cause, bearing the caption "Exceptions to Order Appointing Commission of Appraisal" and containing these recitals: "Now comes the North Carolina State Highway and Public Works Commission, respondent herein, through its counsel, and objects to the order appointing commissioners of appraisal . . . for the reason that . . . commissioners should not have

been appointed in this case for the reason that the answering respondent raised the question of the proceeding having been instituted within the statutory time allowed for . . . proceedings of this kind and pleaded the statute of limitations in bar of petitioners' right to prosecute the action." The paper writing closed in this fashion: "Wherefore, *the respondent respectfully files this exception to the report and award of the commissioners relating to the land embraced in this proceeding and prays that the report not be approved,* and appeals therefrom and demands a trial by jury of the issues of fact involved in these exceptions."

7. Six days later, *i.e.,* on 18 February, 1952, the commissioners filed their report with the clerk. The report bore the date "the 9th day of February, 1952," and contained this recitation: "We . . . do hereby certify that we met on the 9th day of February, 1952, at 10 o'clock A. M., and having first been duly sworn, we visited the premises of the owners, and on the 9th day of February, 1952, met at the courthouse with counsel, and after taking into full consideration the quality and quantity of the land aforesaid, we have appraised the value of the land appropriated and the actual damages and do assess the same at the sum of $1,000.00. We have estimated the special benefits at: None. We have estimated the general benefits at: None." No notice in writing of the filing of the report of the commissioners was given the respondent or its attorneys.

8. Nine days after the filing of the report of the commissioners, to wit, on 27 February, 1952, the clerk entered a judgment confirming the report of the commissioners. This action was taken without any prior or subsequent notice being given to the respondent or its attorneys by either the clerk or the petitioner.

9. More than four months later, to wit, on 2 July, 1952, the respondent noted an exception to the judgment entered by the clerk on 27 February, 1952, and undertook to appeal from such judgment to the judge at term. The respondent asserted in its notice of appeal that it was entitled to relief against such judgment because it had no notice of its rendition until July 1, 1952.

10. The petitioners thereupon moved to strike out the respondent's exception to the clerk's judgment and its notice of appeal on the ground that respondent had not taken an appeal from the clerk's judgment within the time allowed by law, *i.e.,* within ten days after its entry. G.S. 1-272. The petitioners' motion was heard by Judge Gwyn at the December Term, 1952, of the Superior Court of Buncombe County. Judge Gwyn entered an order sustaining the petitioners' motion, dismissing the respondent's appeal, and remanding the cause to the clerk. The respondent excepted and appealed, assigning Judge Gwyn's order as error.

Don C. Young for petitioners, appellees.

R. Brookes Peters and Gudger, Elmore & Martin for the respondent, appellant.

ERVIN, J. The rules respecting notice in civil actions and special proceedings in general and in condemnation proceedings in particular are stated in the numbered paragraphs which immediately follow.

1. Notice to a party whose rights are to be affected by judicial proceedings in a North Carolina court is an essential element of the law of the land under Article I, Section 17, of the State Constitution, and due process of law under the Fourteenth Amendment to the Federal Constitution. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717; *Surety Corp. v. Sharpe,* 232 N.C. 98, 59 S.E. 2d 593. The notice required by these constitutional provisions in such proceedings is the notice inherent in the original process whereby the court acquires original jurisdiction, and not notice of the time when the jurisdiction vested in the court by the service of the original process will be exercised. 12 Am. Jur., Constitutional Law, Section 594. After the court has once obtained jurisdiction in a cause through the service of original process, a party has no constitutional right to demand notice of further proceedings in the cause. 16 C.J.S., Constitutional Law, section 619. Where there is no service of process, the court has no jurisdiction, and its judgment is void. *Stancill and Gay v. Gay,* 92 N.C. 455; *First Nat. Bank v. Wilson,* 80 N.C. 200. "A void judgment is a nullity, and no rights can be based thereon; it can be disregarded, or set aside on motion, or the court may of its own motion set it aside, or it may be attacked collaterally." McIntosh: North Carolina Practice and Procedure in Civil Cases, section 651.

2. The law does not require parties to abandon their ordinary callings, and dance "continuous or perpetual attendance" on a court simply because they are served with original process in a judicial proceeding pending in it. *Blue v. Blue,* 79 N.C. 69. The law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice. For this reason, the law establishes rules of procedure admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to resist such steps and principles of natural justice demand that his rights be not affected without an opportunity to be heard. *Bank v. Hotel Co.,* 147 N.C. 594, 61 S.E. 570; 60 C.J.S., Motions and Orders, section 15. These rules of procedure require proper notice of a motion for a judgment or an order affecting the rights of such party to be given to him "when notice of a motion is

necessary." G.S. 1-581; *Bank v. Hotel Co., supra;* 66 C.J.S., Notice, section 14. The notice required by these rules of procedure is hereinafter called procedural notice to distinguish it from the constitutional notice required by the law of the land and due process of law.

3. The law manifests its practicality in determining "when notice of a motion is necessary." When a civil action or special proceeding is regularly docketed for hearing at a term of court, notice of a motion need not be given to an adversary party, unless actual notice is required in the particular cause by some statute. This rule is bottomed on the proposition that all parties to a civil action or special proceeding are bound to take notice of all motions made and proceedings had in the action or special proceeding in open court during the term. *Harris v. Board of Education,* 217 N.C. 281, 7 S.E. 2d 538; *Burns v. Laundry,* 204 N.C. 145, 167 S.E. 573; *Hardware Co. v. Banking Co.,* 169 N.C. 744, 86 S.E. 706; *Hemphill v. Moore,* 104 N.C. 379, 10 S.E. 313; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 990; 60 C.J.S., Motions and Orders, section 15.

4. Parties to civil actions or special proceedings are not bound to take notice of motions which are made out of term; and hence, except as to a motion grantable as a matter of course or a motion otherwise specially provided for by statute, notice of a motion made out of term must be given to an adversary party. *Jones v. Jones,* 173 N.C. 279, 91 S.E. 960; *Harper v. Sugg,* 111 N.C. 324, 16 S.E. 173; *Allison v. Whittier,* 101 N.C. 490, 8 S.E. 338; *Branch v. Walker,* 92 N.C. 87; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 990; 60 C.J.S., Motions and Orders, section 15. The clerk of the Superior Court holds no terms of court. In consequence, all motions made before the clerk other than those grantable as a matter of course or those otherwise specially provided for by law must be on notice. *Bank v. Hotel Co., supra; Blue v. Blue, supra.* The rules mentioned in this and the preceding paragraph are thus epitomized in *S. v. Johnson,* 109 N.C. 852, 13 S.E. 843: "A party in court is fixed with notice of all orders and decrees taken at term, for it is his duty to be there in person or by attorney; but he is not held to have notice of orders out of term; nor of orders before the clerk."

5. A practical criterion for determining when an adverse party is entitled to notice of a motion made out of term is furnished by a New York court. "The true test as to necessity of notice of motion in a case not specially provided for, is . . . as follows: 'If upon the particular facts presented the applicant is entitled to the precise order applied for as a matter of strict right, and the adversary party is powerless to oppose, the order may be granted *ex parte,* even though it might be better practice to require notice to be given. But if the adverse party appears for any reason to be entitled to be heard in opposition to the whole or any part of

the relief sought, the application must be made on notice to such adverse party.'" *Shaw v. Coleman,* 54 N. Y. Super. 3, 3 N. Y. St. 534.

6. When notice of a motion is necessary, it must be in writing; it must disclose the nature of the motion, and the time and place set for its hearing; it must be served on the adversary party or his attorney ten days before the time appointed for the hearing, unless the court prescribes a shorter time by an order made without notice; and it must be served by an officer, unless some other mode of service is particularly prescribed, or service is accepted by the adverse party or his attorney. G.S. 1-581, 1-585; *Utilities Commission v. Mills Corp.,* 232 N.C. 690, 62 S.E. 2d 80; McIntosh: North Carolina Practice and Procedure in Civil Cases, section 990. Notice may be served by publication, however, in case the adversary party cannot be found after due diligence, or is not a resident of the State. G.S. 1-588. We know judicially that it is customary in practice for an attorney to accept service of notice in behalf of his client, and in that way waive service by an officer.

7. A party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it. *White, Ex Parte,* 82 N.C. 377.

8. A condemnation proceeding is a special proceeding (G.S. 40-11), and hence, "except as otherwise provided," the rules respecting procedural notice and the other provisions of the chapter on civil procedure are applicable to a condemnation proceeding. G.S. 1-393; *Light Co. v. Manufacturing Co.,* 209 N.C. 560, 184 S.E. 48. The provisions of G.S. 1-404 are not applicable to a condemnation proceeding because the statutes bearing directly upon such proceeding prescribe different periods of time for the performance of the several acts enumerated in G.S. 1-404. See: G.S. 40-17, 40-19.

9. Some additional rules respecting procedural notice apply to condemnation proceedings. G.S. 40-16 provides that when the answer in a condemnation proceeding challenges the right of the petitioner to maintain the proceeding, the clerk of the Superior Court must "hear the proofs and allegations of the parties" and pass on the validity of the challenge before he makes any order for the appointment of commissioners. *Abernathy v. Railroad,* 150 N.C. 97, 63 S.E. 180; *Railroad v. Railroad,* 148 N.C. 59, 61 S.E. 683. The implication is plain that the clerk is to hold the hearing on the challenge only after notice to the parties. *Bank v. Hotel Co., supra.* G.S. 40-17 specifies that the commissioners in a condemnation proceeding are to give the parties or their attorneys ten days notice of their meetings, except when meeting under the appointment of the court or in an adjourned meeting. When this statutory provision is obeyed by the commissioners, the parties to the proceeding receive notice of the filing of their report. This is necessarily so because the statute

requires the commissioners to give the parties or their attorneys notice of the meeting at which the report is adopted and ordered filed. G.S. 40-19 stipulates that within twenty days after the filing of the commissioners' report, any party to the condemnation proceeding "may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court." The implication is indisputable that the clerk is to make his determination on the exceptions only after notice and an opportunity to be heard thereon is given the parties. *Bank v. Hotel Co., supra.*

10. An irregular judgment is one rendered contrary to the method of practice and procedure established by law for the action or proceeding in which it is entered. *Hood, Comr. of Banks, v. Stewart,* 209 N.C. 424, 184 S.E. 36; *Moore v. Packer,* 174 N.C. 665, 94 S.E. 449; *Glisson v. Glisson,* 153 N.C. 185, 69 S.E. 55; *Vass v. Building Association,* 91 N.C. 55. A judgment rendered in violation of the rules respecting procedural notice is irregular. In consequence, a judgment confirming the report of the commissioners in a condemnation proceeding is irregular if it is entered by the clerk without notice to a party who has filed exceptions to the report within twenty days after its filing. A judgment confirming the report of the commissioners in a condemnation proceeding is likewise irregular if it is rendered by the clerk before the expiration of the twenty days allowed by statute for the filing of exceptions to the report.

11. An irregular judgment is not void. It stands as the judgment of the court unless and until it is set aside by a proper proceeding. *Moore v. Packer, supra; Hopkins v. Crisp,* 166 N.C. 97, 81 S.E. 1069. "To set aside a judgment for irregularity it is necessary to make a motion in the cause before the court which rendered the judgment, with notice to the other party; the objection cannot be made by appeal, or an independent action, or by collateral attack. The time for such motion is not limited to one year after the judgment is rendered, but it must be made by the party affected and within a reasonable time to show that he has been diligent to protect his rights. The application should also show that the judgment affects injuriously the rights of the party and that he has a meritorious defense; otherwise, it would be useless to set aside the judgment." McIntosh: North Carolina Practice and Procedure in Civil Cases, section 653. These rules are based on sound reason. They furnish an expeditious and inexpensive method by which courts of first instance may correct their own lapses from procedural regularity. Moreover, they are well designed to place all relevant circumstances before an appellate court in the event it is called on to review the matter upon a subsequent appeal from an order granting or refusing the motion to vacate the irregular judgment.

12. An order made without notice when notice should have been given is irregular. 60 C.J.S., Motions and Orders, section 15. It may be set aside under G.S. 1-582, which is couched in these words: "An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made." A court may refuse to entertain a motion to vacate an order entered without notice if it is not made within a reasonable time after entry of the order. 60 C.J.S., Motions and Orders, section 62.

Since it was served with summons and entered a general appearance, the respondent has been accorded its constitutional right to notice under the law of the land and due process of law.

But the rules respecting procedural notice were "more honour'd in the breach than the observance." They were, indeed, totally ignored.

The record indicates, however, in somewhat inconclusive fashion that the respondent may have waived procedural notice up to and including the meeting of 9 February, 1952, when the commissioners apparently signed their report and authorized its filing in the clerk's office; that the respondent may have filed the equivocal paper of 12 February, 1952, in the clerk's office because it believed the report of the commissioners had already been filed therein; and that the paper may have been intended to operate as an exception to the commissioners' report, as the respondent contends, rather than as an exception to the order appointing the commissioners, as the petitioners insist.

We express no opinion as to these matters because they are not before us for decision. When all is said, the respondent attacks the judgment of confirmation rendered by the clerk on 27 February, 1952, for irregularity. The judgment is clearly irregular, no matter what construction is put on the paper of 12 February, 1952. It is irregular for want of procedural notice to the respondent, if the paper constitutes an exception to the report of the commissioners. It is irregular because it was entered at an improper time, *i.e.*, before the expiration of the twenty days allowed by statute for filing exceptions to the commissioners' report, if the paper is an exception to the order appointing the commissioners.

Whether an irregular judgment should be set aside is a question which must be presented by a motion in the cause, and not by an appeal. Hence, Judge Gwyn's order dismissing the respondent's appeal must be

Affirmed.

HOME FINANCE COMPANY OF GEORGETOWN, INC., v. W. H. (BILL) O'DANIEL AND H. W. KENNEDY.

(Filed 4 March, 1953.)

1. Chattel Mortgages and Conditional Sales § 8b—Whether mortgaged vehicle acquired situs in this State within meaning of G.S. 44-38.1 (a) held question for jury upon the evidence and agreed facts.

An automobile subject to a chattel mortgage, executed in another state and duly registered in such other state in accordance with its laws, was brought into this State after the effective date of G.S. 44-38.1. The evidence and facts agreed disclose that the mortgagor sold it to a used car dealer in this State who, after keeping the truck some eight weeks, sold it to an innocent purchaser for value without notice, and that mortgagee repossessed it some fifteen days later. *Held:* Under the provisions of G.S. 44-38.1 (a) the vehicle acquired a *prima facie situs* in this State, but such *prima facie* case does not compel a finding by the jury to this effect, and therefore defendant purchaser is not entitled to a nonsuit, the burden being upon him to prove a change of *situs* alleged by him, but a directed verdict in the mortgagee's favor is error, the issue being for the determination of the jury upon the evidence and facts agreed.

2. Trial § 23b—

Prima facie evidence simply carries the case to the jury for its determination, and justifies but does not compel a finding by the jury in accordance therewith.

3. Trial § 29—

A peremptory instruction in favor of plaintiff is proper only when the facts, admitted and established, are susceptible only to one inference, and when different inferences can be drawn therefrom a peremptory instruction is error.

APPEAL by defendant H. W. Kennedy from *Pless, J.*, and a jury, at April Civil Term, 1952, of GUILFORD (Greensboro Division).

Civil action in claim and delivery for the possession of an automobile, claimed under a conditional sales agreement executed in the State of South Carolina.

The plaintiff and the defendant Kennedy entered into a stipulation, which was introduced in evidence during the trial, and may be summarized as follows: 1. The plaintiff is a corporation duly organized and existing under the laws of the State of South Carolina with its principal office in Georgetown, South Carolina, with associate offices in Greensboro, North Carolina. 2. Kennedy is a resident of Guilford County, North Carolina. 3. On 11 June, 1951, W. F. Blake executed and delivered a conditional sales agreement, or chattel mortgage, to Harrelson Motors, Inc., Georgetown, South Carolina, conveying to the motor company one 1951 GMC pick-up automobile truck, as described in the com-

plaint, as security for a promissory note of even date in the sum of $1,405.08 executed and delivered by Blake on the same date to the motor company. The note was payable in 18 monthly installments—the first installment being due on 11 July, 1951. At the time of the execution and delivery of the note and conditional sales contract, Blake gave his residence as Little River, Horry County, South Carolina. 4. On 11 June, 1951, for a valuable consideration, the motor company sold and assigned the contract and note of Blake to the plaintiff. 5. The plaintiff duly recorded the conditional sales contract in the office of the Clerk of the Court of Horry County, South Carolina, on 12 June, 1951, as provided by the laws of the State of South Carolina. Blake has failed to comply with the terms of the conditional sale contract and promissory note, and has failed to make payments in accordance with the terms of said contract and note. There is now due plaintiff on said note and contract $1,232.19 after credit for rebate on insurance and interest. 6. The truck had a reasonable market value of $1,400.00 on 11 June, 1951. 7. Blake subsequent to the recordation of the sales contract brought the truck into North Carolina, and on or about 10 July, 1951, sold the truck for a valuable consideration to the defendant Kennedy, a used car dealer, in Guilford County, North Carolina; at the time of the sale Blake transferred to Kennedy a South Carolina registration card showing registration of the truck in the name of Blake with the State Highway Department, Motor Vehicle Division, Columbia, South Carolina; that the registration of the truck still remains in the name of Blake according to the records of the State of South Carolina. 8. On 3 September, 1951, Kennedy sold the truck to the defendant O'Daniel, who was an innocent purchaser for valuable consideration; the truck has remained in North Carolina since 10 July, 1951. The plaintiff first had knowledge that the truck was brought into North Carolina on 4 September, 1951. Upon receipt of this information that the truck was in Guilford County, North Carolina, the plaintiff contacted its associate company in Greensboro, and gave it this information. On 5 September, 1951, one Paschal, agent of the plaintiff, went to Kennedy's used car lot, and talked to Kennedy's son concerning said truck, informing Kennedy's son that plaintiff held a mortgage on said truck. 9. On 17 September, 1951, plaintiff instituted in the Civil Division of the Municipal County Court of Greensboro, North Carolina, claim and delivery proceedings against O'Daniel, and took said truck from the possession of O'Daniel on 18 September, 1951. On 20, September, 1951, Kennedy returned to the defendant O'Daniel $1,100.00, representing the consideration paid by O'Daniel to Kennedy for the truck, and O'Daniel assigned to Kennedy all rights he had in the truck. 10. On 5 October, 1951, Kennedy interpleaded—an order making him a party defendant being signed by the judge of the Municipal County

Court on 5 October, 1951; and Kennedy filed his answer in said court on 9 October, 1951. The defendant O'Daniel filed no answer or pleading and does not appeal. 11. At the time of the seizure of said truck by claim and delivery by the plaintiff from O'Daniel, it had a reasonable market value of $1,200.00. 12. The plaintiff had its sales contract recorded in the office of the Register of Deeds of Guilford County, North Carolina on 26 November, 1951. 13. Each party reserved the right to introduce evidence not in contradiction to the above stipulations. The above stipulations were entered into on 18 April, 1952, in the Superior Court of Guilford County. In the trial in the Municipal County Court there was a judgment signed in favor of the defendant Kennedy, and the plaintiff appealed to the Superior Court.

The plaintiff introduced one witness, J. R. Brown, whose testimony, excluding all parts of it covered in the stipulations, may be summarized as follows: Brown testified that he had a conversation with Kennedy in his Greensboro office 6 September, 1951, in respect to this truck—Brown being an employee of the plaintiff's associate company in Greensboro. He told Kennedy that the plaintiff had a mortgage in the Georgetown office on the truck, and that Blake, who sold him that truck, had been a "skip," and we were looking for him; and asked that Kennedy pay off the mortgage or give the truck to the plaintiff. Kennedy said: "He guessed he'd have to pay it off, to use his exact words. He asked that I call, and get the amount of the balance, which I did, and gave him the figure." Kennedy told Brown that he had checked with the Department of Motor Vehicles or the State Highway Department of South Carolina; that was the only place he checked, and did not make inquiry at Little River, Horry County, South Carolina. The plaintiff has the truck in its possession now under claim and delivery proceeding. As far as I can recollect, the registration card was in Kennedy's possession. The plaintiff introduced a registration card in evidence on this truck with the name on it—W. F. Blake, Little River, Horry County, South Carolina. The plaintiff never knew that Blake lived anywhere else except Horry County, South Carolina. I do not know where Blake is now. I do not know whether Blake ever established a residence in Guilford County. The registration card has never been registered in O'Daniel's name.

The defendant Kennedy then offered evidence—his only witness being himself—whose testimony, except the part as covered in the stipulations, is summarized as follows: I bought this truck directly from Blake; I saw he wanted to sell it. I wanted to be sure it was paid for. I said to Blake: "Let's see the stuff you've got, all the papers and everything." Blake showed me a card. I told him before I bought it, I would have to check the title. I called the Motor Club, State Highway in Columbia, South Carolina, to see if it was Blake's truck. They said it was. Blake

told me he owed nothing on the truck. He gave me a bill of sale, also the card and papers. Kennedy introduced in evidence the registration card given to him by Blake, which had on it W. F. Blake, Little River, Horry County, South Carolina. I bought the truck for the purpose of sale. I gave Blake $625.00 and a 1939 Ford for the truck. The reasonable market value of the Ford was $375.00. "I only told Mr. Brown I would take care of the lien only if he would guarantee I wouldn't have to pay somebody else." Brown said he was only interested in his money. On cross-examination Kennedy testified: "I purchase cars for the purpose of selling them to anybody who might want to buy them, whether they live in North Carolina or not. When I purchased this truck from Blake, I retained it under the registration card Blake gave me. When I purchased the truck back from O'Daniel, I took back the same registration title in the name of W. F. Blake, registered in South Carolina. The title is still registered in South Carolina, and never has been registered in North Carolina. A dealer can keep them that way a year. I do not know where Blake is now. I never saw him before this purchase. I have not tried to locate him. I made no inquiry in Horry County, South Carolina, as to whether there was a mortgage against the truck."

The court submitted one issue to the jury, which was answered as follows, to wit: Is the plaintiff entitled to the possession of the 1951 GMC truck, motor number A228373526, serial number P16451, for the purpose of foreclosing its lien thereon? Answer: Yes.

The court signed a judgment for the plaintiff in accordance with the jury's verdict and the defendant Kennedy appealed to the Supreme Court.

Adam Younce for plaintiff, appellee.
J. D. Franks, Jr., for H. W. Kennedy, defendant, appellant.

PARKER, J. The defendant Kennedy assigns as his Error No. One the refusal of the court to nonsuit the plaintiff at the close of the plaintiff's evidence, and assigns as his Error No. Two the refusal of the court to nonsuit the plaintiff at the close of all the evidence. Kennedy in his brief states: "G.S. 44-38.1 applied to the entire transaction in controversy and the motions for judgment as of nonsuit should have been allowed." He further states in his brief "if for any reason G.S. 44-38.1 should be held inapplicable to the instant case because of the effective date of the statute, it is respectfully submitted that G.S. 47-20 and G.S. 47-23 would be controlling."

G.S. 44-38.1 became effective 1 July, 1951, and did not apply to pending litigation. The truck was sold by Blake to Kennedy 10 July, 1951, and this action was instituted 17 September, 1951. G.S. 44-38.1 was in full force and effect, when Blake sold the truck to Kennedy. Whether Sub-

secs. (1) and (2) of G.S. 44-38.1 apply depends upon the question as to whether the truck has acquired a *situs* in North Carolina. Kennedy in paragraph two of his further answer and defense alleges the truck was brought into North Carolina with the intent that it be permanently located in this State, and has been in North Carolina for more than two months next preceding the commencement of this action, and that the truck had acquired a *situs* in North Carolina. The defendant Kennedy having alleged in his answer a change of *situs* of this truck, he has the burden to establish it. 78 C.J.S., Sales, p. 305.

Webster's New International Dictionary defines *situs* as follows: "Situation or location; position; locality." This Court in *Credit Corp. v. Walters,* 230 N.C. 443, p. 446, 53 S.E. 2d 520, says "situated" as used in G.S. 47-20 and 47-23 "means having a site, situation or location; permanently fixed; located . . . 'It connotes a more or less permanent location or *situs,* and the requirement of permanency must attach before tangible personalty which has been removed from the domicil of the owner will attain a *situs* elsewhere.'" See also *Montague v. Shepherd Co.,* 231 N.C. 551, 58 S.E. 2d 118, for a definition of "situated" as used in the same statutes. The word *"situs"* as used in G.S. 44-38.1 and the word "situated" as used in G.S. 47-20 and 47-23 have the same meaning.

Automobiles, unlike land, have no permanent location in one place. Their use and value depend on their mobility, and for that reason unprincipled people have frequent opportunities to cheat and defraud innocent third persons. To protect persons in this State who purchase for a valuable consideration personal property, covered by a chattel mortgage or a conditional sale agreement created in another state, when the property has been brought into this State from another state G.S. 44-38.1 was enacted by the Legislature. The first sentence of Sub-sec. (a) of the statute provides that "personal property acquires a *situs* in this State when it is brought into this State with the intent that it be permanently located in the State." Such intent is often difficult, if not impossible, to establish so as to make out a case for the jury. In order to facilitate the making out of a case for the jury, the second sentence of Sub-sec. (a) was enacted, which reads: "The keeping of personal property in this State for two consecutive months is *prima facie* evidence that such property has acquired a *situs* in this State."

It is agreed in the stipulations between the plaintiff and Kennedy that Blake brought the truck into North Carolina on or about 10 July, 1951, and sold it to Kennedy. On 3 September, 1951, Kennedy sold the truck to O'Daniel, and on 18 September, 1951, the plaintiff seized the truck under claim and delivery from O'Daniel. The truck has been in North Carolina since 10 July, 1951. This agreement in the stipulations of the keeping of the truck in North Carolina for two consecutive months is

prima facie evidence that such property has acquired a *situs* in this State.

Such *prima facie* evidence means, and means no more, than evidence sufficient to justify, but not to compel, an inference that the truck has acquired a *situs* in North Carolina 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; *Mfg. Co. v. R. R.,* 222 N.C. 330, 23 S.E. 2d 32; *Bennett v. R. R.,* 232 N.C 144, 59 S.E. 2d 598.

From the evidence an inference can be drawn that the truck has not acquired a *situs* in North Carolina. The keeping of the truck in North Carolina for two consecutive months is *prima facie* evidence that the truck has acquired a *situs* in this State. That presents an issue of fact for a jury. The defendant Kennedy's Assignments of Errors Nos. One and Two as to the refusal of the court to nonsuit the plaintiff are overruled.

The defendant Kennedy assigns as Errors Nos. Three and Four the peremptory charge of the court to the jury that if they believed all the evidence, they should answer the issue Yes. A peremptory instruction to a jury is proper when the facts are admitted or established, and only one inference can be drawn therefrom. *La Vecchia v. Land Bank,* 218 N.C. 35, 9 S.E. 2d 489; *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892. As different inferences can be drawn from the evidence, it was prejudicial error for the court to give a peremptory charge, and the defendant Kennedy's Assignments of Errors Nos. Three and Four are sustained.

G.S. 44-38.1, Sub-sec. (b), applies to this truck if a *situs* has been acquired; Sub-sec. (c) applies if the truck has acquired no *situs;* Sub-sec. (d) does not apply for it is agreed that the encumbrance on the truck "was duly recorded in the office of the Clerk of Court of Horry County, South Carolina, on 12 June, 1951, at 9 :37 o'clock a.m., as provided by the laws of the State of South Carolina."

The defendant Kennedy is entitled to a new trial, and it is so ordered.

New trial.

MRS. EVA V. GOODSON, ADMINISTRATRIX OF THE ESTATE OF WILLIAM WOODROW GOODSON, DECEASED, v. CLARENCE WOODROW WILLIAMS.

(Filed 4 March, 1953.)

1. Trial § 22a—

On a motion for judgment as of nonsuit, the plaintiff is entitled to have the evidence considered in the light most favorable to him and to the benefit of every reasonable inference to be drawn therefrom.

2. Negligence § 19a (1)—

Nonsuit on the issue of negligence should not be allowed unless the evidence is free from material conflict and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of the defendant, or that his negligence was not the proximate cause of the injury.

3. Automobiles §§ 16, 18h (2)—Evidence held for jury on question of negligence in striking pedestrian on highway.

Evidence tending to show that defendant had dimmed his lights to pass a vehicle traveling in the opposite direction, that as he started to brighten his lights he saw intestate for the first time on the highway in front of him some five feet distant, although the highway was straight and there was no other traffic, that he swerved his car but was unable to avoid striking him, with further testimony of statement by defendant that he couldn't understand how he happened to do it, and testimony of statement of his wife in defendant's presence that defendant swerved to his right and struck intestate as he was almost off the hard surface on the right side of the highway *is held* sufficient to overrule nonsuit on the issue of negligence. G.S. 20-131 (d), G.S. 20-174 (e).

4. Negligence § 19c—

Ordinarily, contributory negligence is an affirmative defense which defendant must plead and prove, and nonsuit on the ground of contributory negligence should not be granted unless the plea of such negligence has been so clearly established by plaintiff's own evidence that no other conclusion can reasonably be drawn therefrom.

5. Automobiles § 16—

A pedestrian is not guilty of contributory negligence as a matter of law because he fails to yield the right of way to a vehicle on the highway when crossing such highway at an unmarked crossing other than at an intersection. G.S. 20-174 (a).

6. Same: Automobiles § 18h (3)—

Evidence tending to show that intestate was crossing the highway at nighttime and was struck by defendant's car just before he had cleared the hard surface on defendant's right, and that the highway was straight and unobstructed except for one vehicle traveling in the opposite direction, *is held* not to disclose contributory negligence on intestate's part as a matter of law.

APPEAL by plaintiff from *Gwyn, J.*, August Term, 1952, of BUNCOMBE.

This is an action for wrongful death resulting from the alleged negligence of the defendant.

The plaintiff's intestate, William Woodrow Goodson, 38 years of age, was killed as a result of being struck by an automobile driven by the defendant. The accident occurred on Sunday night, 4 November, 1951, about 6:55 p.m., on U. S. Highways 19 and 23, approximately two miles west of Enka in Buncombe County.

The defendant was operating his automobile in a westerly direction on said road which is a three-lane highway 30 feet wide. The plaintiff's

intestate was crossing the highway going in a northerly direction. This section of the highway is straight for about one-half mile, and at the point where the accident occurred a car with lights on could be seen approaching from the east for about 200 yards. The speed limit on the section of the road where the accident occurred was 55 miles an hour. The road was upgrade going west.

Fred Almond, a State Highway Patrolman who investigated the accident, arrived at the scene about 30 minutes after it occurred. He testified that when he arrived at the scene, the Williams car was sitting at a northwest angle with the back of the car partly in the center lane and the front in the right-hand lane approximately 10 feet from the body of Mr. Goodson; that the body of Mr. Goodson was lying about two feet from the edge of the pavement on the shoulder of the road on the right-hand side going west; that he observed the car of Mr. Williams, the defendant, and he saw a large dent in the right front fender; that Mr. Williams said he was driving his car about 45 to 50 miles an hour and Mr. Goodson darted out in front of him; that his wife was with him at the time of the accident. On cross-examination this witness further testified that the defendant came to his office shortly after he left the scene of the accident and told him "that he had just met a car and had dimmed his lights and just as he started to brighten his lights, the subject, Mr. Goodson, darted in front of him, he applied the brakes and swerved the car to the center lane but was too near to avoid striking the subject." On re-direct examination this witness said: "I stated, in answer to Mr. Walton's question, that it was a dark night. Re-referring to my record I see that it was a clear night. This is an open, straight highway for half a mile . . . Mr. Walton also asked me if there was anything to prevent a pedestrian walking across here from seeing the headlights of a car. There was not anything there to prevent the driver of a vehicle, driving from Asheville to Canton, from having seen a pedestrian walking across here." The witness also testified that he did not know at what point on the highway the plaintiff's intestate was struck but that the car stopped about 10 feet from where plaintiff's intestate was lying on the shoulder of the highway.

Mrs. Eva V. Goodson, mother of William Woodrow Goodson and the duly appointed and acting administratrix of his estate, testified that the defendant and his wife came to her home on Tuesday night after her son was killed on Sunday night, and there in the presence of others, "I said: 'Mr. Williams, can you tell me how you happened to kill Woodrow?' He just shook his head and sat down, and his wife said: 'Probably I can tell you more than he can.' Then she said: 'They were coming up the road and there was a car coming down meeting them from Canton. They dimmed the lights for the car coming meeting them and when they turned

them back on bright your son was right in front of our car.'" The witness then asked her if the traffic was so heavy they couldn't prevent killing him. Mrs. Williams said: "No, honey, there was not but one car in sight. I don't know whatever possessed my husband to do it. He swerved to his right and when he did, it hit him. He was amost off the pavement." The wife of the defendant in this conversation fixed the location of plaintiff's intestate as being only four or five feet in front of their car when they first saw him. Mrs. Goodson was corroborated by other witnesses as to what was said in this conversation between her and the defendant's wife. These witnesses also testified that the conversation took place in the presence of the defendant.

Mrs. Goodson also testified that several days after plaintiff's intestate was buried, the defendant came back to see her; that he told her he understood she wanted to see him. "I just said that I would like to see you and talk to you and see if you can tell me anything about how you happened to kill the boy, and he said, 'No, ma'am, I can't. I wish I could. It would be a great relief to me if I could get my mind so I could tell you just how it was done. . . . But I just can't understand how I ever happened to do it.'"

At the close of the plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed, and the plaintiff appeals and assigns error.

W. W. Candler and Cecil C. Jackson for plaintiff, appellant.

Harkins, Van Winkle, Walton & Buck for defendant, appellee.

DENNY, J. This appeal raises two questions: (1) Did the plaintiff offer sufficient evidence of actionable negligence on the part of the defendant to carry the case to the jury? (2) If so, does the evidence establish contributory negligence on the part of the plaintiff's intestate as a matter of law?

On a motion for judgment as of nonsuit, the plaintiff is entitled to have the evidence considered in the light most favorable to him and to the benefit of every reasonable inference to be drawn therefrom. *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543; *Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664; *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; *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534.

In passing upon a motion for judgment as of nonsuit when in our opinion the motion was erroneously granted in the court below, a discussion of the evidence should be omitted, except as deemed essential, so as not to prejudice either party on the further hearing. And in our opinion

the defendant's motion for judgment as of nonsuit in the trial below should have been overruled.

A nonsuit on the issue of negligence should not be allowed unless the evidence is free from material conflict and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of the defendant, or that his negligence was not the proximate cause of the injury. *Thomas v. Motor Lines, supra.* Here we have the statement of the defendant to the effect that he met a car on the highway immediately before the accident occurred; that he dimmed his lights and "just as he started to brighten his lights, the subject, Mr. Goodson, darted in front of him, he applied the brakes and swerved the car to the center lane but was too near to avoid striking the subject." Later, however, in talking with the mother of the deceased, he said, "I just can't understand how I ever happened to do it." Further, the defendant's wife, in his presence, said to the mother of the deceased, "I don't know whatever possessed my husband to do it. He swerved to his right and when he did, it (the car) hit him. He was almost off the pavement."

We think a reasonable inference may be drawn from this evidence that the defendant was not keeping a proper lookout for the rights and safety of others who were or might have been on the highway, and that a reasonable inference may be drawn from his statement to the mother of the deceased and the unchallenged statements made to her, by his wife, in his presence, that the accident was not unavoidable but was the result of some act of omission or commission on his part. Furthermore, there is nothing in the statements made to the mother of the deceased from which it may be inferred that plaintiff's intestate darted in front of defendant's car, or was proceeding across the highway in a manner other than in a usual or normal way.

Moreover, there is nothing in the evidence tending to show that the defendant was blinded by the lights of the car he had just passed, and thereby prevented from being able to discern "a person 75 feet ahead," the distance required under normal atmospheric conditions and on a level road, when the lights are dimmed, as required by law. G.S. 20-131 (d).

However, what the evidence may be on another hearing, in rebuttal or denial of plaintiff's evidence, is not our concern. But we must accept as true the evidence as disclosed by the record in considering an exception to a judgment as of nonsuit. *Bundy v. Powell, supra.* In any event, we do not think that the statements made by the defendant to the State Highway Patrolman and to the mother of the deceased, and the statements made by his wife, in his presence, to the mother of the deceased, are susceptible only to the inference that the defendant was entirely free from negligence in connection with the death of plaintiff's intestate.

In the case of *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462, the deceased, who lived on the north side of the highway, crossed the highway to go to her mail box. As she crossed the highway, two heavily loaded oil trucks were approaching from the west, traveling about 45 or 50 miles an hour. The first truck passed the deceased. As the second truck approached, deceased was standing at the mail box on the shoulder of the road, apparently oblivious of the approach of the second truck. When this truck was within 15 or 20 feet of the deceased, she turned suddenly and "started back across the highway in a fast walk." Defendant swerved his truck to the left in an attempt to avoid striking her but the rear-view mirror located on the right side struck her head and her body struck the corner of the truck to the rear of the cab. A motion for judgment as of nonsuit interposed by the defendant was allowed. The plaintiff appealed to this Court and in reversing the judgment, *Barnhill, J.,* in speaking for the Court, said: "A motorist operates his vehicle on the public highways where others are apt to be. His rights are relative. Should he lapse into a state of carelessness or forgetfulness his machine may leave death and destruction in its wake. Therefore, the law imposes upon him certain positive duties and exacts of him constant care and attention. He must at all times operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such manner as will not endanger or be likely to endanger the lives or property of others. G.S. 20-140; *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915. . . . Of course it was the duty of the deceased to look before she started back across the highway. Even so, under the circumstances here disclosed, her failure so to do may not be said to constitute contributory negligence as a matter of law. It is for the jury to say whether her neglect in this respect was one of the proximate causes of her injury and death. *McKinney v. Bissell, supra* (263 S.W. 533)."

The facts in the instant case are distinguishable from those in *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246. There, the plaintiff's testate was walking toward the defendant's truck. The truck was visible from 300 yards to a quarter mile. The accident occurred in broad daylight and there was nothing to put the driver of the truck on notice that the plaintiff's testate was oblivious to its approach. And when he started across the highway immediately in front of the truck, the driver of the truck swerved it to the left and plaintiff's testate apparently walked into the side of the vehicle. Likewise, *Sechler v. Freeze,* 236 N.C. 522, 73 S.E. 2d 160; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; and *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239, are not controlling on this record.

Ordinarily, contributory negligence is an affirmative defense which the defendant must plead and prove. G.S. 1-139. And a nonsuit on the ground of contributory negligence should not be granted unless the plea of such negligence has been so clearly established by the plaintiff's evidence that no other conclusion can be reasonably drawn therefrom. *Levy v. Aluminum Co.*, 232 N.C. 158, 59 S.E. 2d 632; *Dawson v. Transportation Co.*, 230 N.C. 36, 51 S.E. 2d 921; *Bundy v. Powell, supra; Hobbs v. Drewer*, 226 N.C. 146, 37 S.E. 2d 121; *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209.

Negligence is not presumed from the mere fact that one is killed. *Tysinger v. Dairy Products, supra.* Neither is one presumed to be guilty of contributory negligence as a matter of law because he failed to yield the right of way to a vehicle on a highway when crossing such highway at an unmarked crossing other than at an intersection, as provided by G.S. 20-174 (a). *Simpson v. Curry, ante,* 260; *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696. G.S. 20-174 (e) provides that notwithstanding the provisions of G.S. 20-174 (a), "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway."

In *Bank v. Phillips, supra,* which case involved questions similar to those raised on the present record, *Johnson, J.*, in speaking for the Court, said: "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. . . . 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."

We think the evidence offered in the trial below is sufficient to require its submission to the jury on the issues of negligence and contributory negligence.

Reversed.

ATLAS T. NEWSOME v. J. G. SURRATT, T/A S. & S. TRANSIT; FRED C. PORTER, AND JOCIE MOTOR LINES, INC.

(Filed 4 March, 1953.)

1. Torts § 6: Contracts § 7e: Indemnity § 1—

The rule that there can be no indemnity among joint tort-feasors does not apply to a party seeking indemnity who did not participate in the

negligent act, is not *in pari delicto*, but is liable only by reason of a duty or liability imposed by law as a matter of public policy.

2. Same: Master and Servant § 11: Carriers § 14¾: Automobiles § 24e—

The provision of a lease of a vehicle for operation under lessee's I.C.C. license plates in interstate commerce that lessor should indemnify lessee for any loss or damage resulting from the negligence, incompetency or dishonesty of the driver furnished by lessor, *is held* to entitle lessee to recover against lessor the damage resulting from the negligence of the driver in causing a collision with the automobile of a third person, for which damage lessee is liable to such third person as a matter of public policy as a carrier in interstate commerce, notwithstanding that lessor may be an independent contractor.

APPEAL by defendants Surratt and Porter from *Sharp, Special Judge*, December Term, 1952, of WILSON.

This is a civil action to recover for personal injuries sustained by the plaintiff resulting from the alleged negligence of the defendants.

The Jocie Motor Lines, Inc. (hereinafter called Motor Lines), filed an answer to the complaint and set up a cross-action against its codefendants, J. G. Surratt, trading as S. & S. Transit Company (hereinafter called Transit Company), and Fred C. Porter (hereinafter called Porter). The cross-action is bottomed on the terms of a lease between the Transit Company as lessor and the Motor Lines as lessee, the pertinent parts of which will be hereinafter set out.

The Motor Lines in its cross-action prayed for judgment over against the Transit Company and Porter for any loss it might sustain by reason of the matters and things alleged in the complaint.

When the cause came on for hearing, the parties waived a trial by jury and submitted the case to her Honor upon an agreed statement of facts including certain stipulations entered into by consent of counsel for all parties in a pre-trial conference.

The pertinent facts as stipulated and agreed upon are as follows:

1. That plaintiff is a resident of Wilson County; defendants J. G. Surratt and Porter are residents of Mecklenburg County; and the defendant Motor Lines is a corporation with its principal office in Charlotte, Mecklenburg County, N. C.

2. That, on 21 May, 1951, the plaintiff was injured in the collision described in the complaint, and has been damaged thereby in the sum of $6,000.00.

3. That the defendant Porter was negligent in the operation of the motor vehicle which he was driving, and his negligence was the sole proximate cause of plaintiff's injuries and damage.

4. That the truck involved in the collision was owned by the defendant Transit Company, and at the time of the collision was being driven and

operated by the defendant Porter who was a regular employee of the Transit Company.

5. That the truck of the Transit Company was being operated under a lease agreement between the defendant Transit Company and the defendant Motor Lines. The lease provided that the Transit Company, the lessor, "(e) Agrees to indemnify Lessee against (1) any loss resulting from the injury or death of such driver(s) and (2) any loss or damage resulting from the negligence, incompetence or dishonesty of such driver(s)." It was stipulated that the lease agreement between the Transit Company and the Motor Lines was duly executed by the respective parties, and that both are bound thereby.

6. That, at the time of the collision described in the complaint, the truck of the defendant Transit Company was being operated with I.C.C. license plates issued to the Motor Lines attached thereto and under authority of a certificate of license issued by the Interstate Commerce Commission to the Motor Lines.

7. That the collision complained of occurred on U. S. Highway No. 74, approximately 14 miles west of Wilmington, N. C., while the truck of the Transit Company was being used for the transportation of freight for the Motor Lines pursuant to the terms of the aforesaid lease agreement.

8. The consideration for the execution of the lease agreement referred to herein was that the defendant Transit Company was to receive 30 per cent of the freight charges for the load of freight then being transported in said truck, and that the defendant Motor Lines was to receive 70 per cent thereof.

On the facts as stipulated, the court entered judgment in favor of the plaintiff and against the defendant Motor Lines for $6,000.00, and that the defendant Motor Lines have and receive judgment over against its codefendants, the Transit Company and Porter, in the amount of $6,000.00 and the costs of the action. From this judgment the defendants Surratt and Porter appeal, assigning error.

Carr & Gibbons, Goodman & Goodman, and Peter L. Long for defendants Transit Company and Porter, appellants.

Lucas & Rand and Z. Hardy Rose for defendant Motor Lines, appellee.

Gardner, Connor & Lee for plaintiff, appellee.

DENNY, J. The determinative question raised by this appeal is simply this: Did the court below commit error by the entry of a judgment in favor of the Motor Lines over against its codefendants, the Transit Company and Porter, in the sum of $6,000.00 and the costs of the action? The answer must be in the negative.

It is a well settled rule of law that there can be no indemnity among mere joint tort-feasors. But this rule does not apply to a party seeking indemnity who did not participate in the negligent act, but is liable only by reason of a duty or liability imposed by law, or where the parties are not *in pari delicto* as to each other. *Gregg v. Wilmington,* 155 N.C. 18, 70 S.E. 1070; *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859; *R. R. v. Guarantee Corp.,* 175 N.C. 566, 96 S.E. 25; *Power Co. v. Mfg. Co.,* 180 N.C. 597, 105 S.E. 394; *Bowman v. Greensboro,* 190 N.C. 611, 130 S.E. 502; *Taylor v. Construction Co.,* 195 N.C. 30, 141 S.E. 492; *Johnson v. Asheville,* 196 N.C. 550, 146 S.E. 229; *Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118; *Builders Supply Co. v. McCabe,* 366 Pa., 322, 77 A. 2d 368; *Rozmajzl v. Northland Greyhound Lines,* 242 Iowa 1145, 49 N.W. 2d 501; *Panhandle Gravel Co. v. Wilson* (C.C.A. Texas), 248 S.W. 2d 779; *War Emergency Co-Op Ass'n. v. Widenhouse,* 169 F. 2d 403, *certiorari* denied, 69 S. Ct. 300, 335 U.S. 898, 93 L. Ed. 433.

The appellants take the position that since the lease between the Transit Company, the lessor, and the Motor Lines, the lessee, provides that during the term of the lease the vehicle of the Transit Company "shall be solely and exclusively under the direction and control of the Lessee who shall assume full common carrier responsibility (1) for loss or damage to cargo transported in such motor vehicle and (2) for the operation of such vehicle," that this provision created the relation of master and servant between the Motor Lines and Porter, the driver of the truck. Therefore, they contend that the lessee and not the lessor is liable for the negligent acts of Porter, citing *Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608, and *Brown v. Truck Lines,* 227 N.C. 299, 42 S.E. 2d 71.

In order to have a clear understanding of the duties and obligations of the respective parties under a lease agreement like the one under consideration, it is necessary to construe the lease in light of certain principles of law which are applicable to this class of contracts.

In the case of *Hill v. Freight Carriers Corp.,* 235 N.C. 705, 71 S.E. 2d 133, *Barnhill, J.,* in speaking for the Court with respect to a lease agreement similar in form to that under consideration, said: "Hence, as between the plaintiff and the defendant, purely in respect to their mutual contractual rights and liabilities, one to the other, the owner of the vehicle occupied the position of independent contractor. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; *Bass v. Wholesale Corp.,* 212 N.C. 252, 193 S.E. 1; *Hudson v. Oil Co.,* 215 N.C. 422, 2 S.E. 2d 26; *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515; *U. S. v. Trucking Co.,* 141 F. 2d 655. On the other hand, the vehicle was to be operated in interstate commerce in furtherance of the business of the lessee as a franchise carrier of freight. It was to be operated under the franchise and license plates of the lessee

in fulfillment of its contracts for transportation of freight in interstate commerce. Therefore, the person who actually operated the vehicle (whether the owner or a third party hired by him) was, as between the franchise carrier and the consignor, the consignee, and third parties generally, a servant or employee of the defendant. This is true in fact for he transported cargoes in behalf of the franchise carrier and dealt with the consignors, consignees, and the public generally as agent of the franchise carrier. Furthermore, public policy requires it to be so held."

Likewise, it seems to be unanimously held by the courts that where a public authority grants an individual or corporation the right to engage in certain activities involving danger to the public, which right is denied to the general public, the duty to protect the public while performing such franchise activities is legally nondelegable and the franchise holder is therefore responsible for the conduct of those who are permitted to act under such franchise, even though such persons be independent contractors. *Hodges v. Johnson,* 52 F. Supp. 488; *Brown v. Truck Lines, supra; Motor Lines v. Johnson,* 231 N.C. 367, 57 S.E. 2d 388; *Eckard v. Johnson,* 235 N.C. 538, 70 S.E. 2d 488; *War Emergency Co-Op Ass'n. v. Widenhouse, supra; Trautman v. Higbie,* 10 N.J. 239, 89 A. 2d 649; *Zimmerman v. Mathews Trucking Corp.,* 105 F. Supp. 57; *Venuto v. Robinson,* 118 F. 2d 679; *Costello v. Smith,* 179 F. 2d 715, 16 A.L.R. 2d 954; *Barry v. Keeler,* 322 Mass. 114, 76 N.E. 2d 158; *Carter v. E. T. & W. N. C. Transp. Co.* (Tenn. App.), 243 S.W. 2d 505; *Eli v. Murphy* (Cal.), 248 P. 2d 756; *Aetna Casualty & Surety Co. v. Prather,* 59 Ga. App. 797, 2 S.E. 2d 115.

It is stated in 57 C.J.S., Master and Servant, section 591, page 368, "An individual or a corporation cannot evade liability for negligence by delegating performance of work to an independent contractor where such individual or corporation is carrying on an activity, involving danger to others, under a license or franchise granted by public authority and subject to certain obligations or liabilities imposed by public authority."

We have held that when an interstate franchise carrier executes a lease or contract by which its equipment is augmented and used as one of its fleet of trucks under its franchise and with its license plates attached thereto, the holder of the franchise is responsible for the operation of the truck in so far as third parties are concerned. *Brown v. Truck Lines, supra; Wood v. Miller, supra; Motor Lines v. Johnson, supra; Eckard v. Johnson, supra.* We have likewise held that the franchise carrier in such cases is also liable to the driver of such truck for any injury that may arise out of and in the course of his employment within the purview of our Workmen's Compensation Act, and that the driver of such leased vehicle is not bound by any provision in the lease to the contrary. *Brown v. Truck Lines, supra; Roth v. McCord,* 232 N.C. 678, 62 S.E. 2d 64.

The liability thus imposed on interstate franchise carriers is to prevent such carriers from evading their responsibility by the employment of irresponsible persons as independent carriers. *Hodges v. Johnson, supra; War Emergency Co-Op Ass'n. v. Widenhouse, supra.* However, as pointed out by *Parker, J.*, in the last cited case, the liability of the franchise carrier was secondary, and in the absence of some countervailing equity, the carrier is entitled to recover over against the owner of the leased truck.

In the instant case, the owner's regular driver was in charge of the Transit Company's truck, and in reality of course the only thing that the franchise carrier did was to tell him where to go and what to bring or carry. And the duty imposed by law with respect to third parties in no way interfered with the right of the lessor to agree to indemnify the lessee for any loss it might sustain as a result of the negligence, incompetence or dishonesty of any driver which the lessor might furnish to operate the leased truck. Here it is conceded that the negligence of Porter, the driver furnished by the Transit Company, was the sole proximate cause of the plaintiff's injuries and damage.

The appellants also rely on the case of *Hill v. Freight Carriers Corp., supra,* to support the view that a party cannot exculpate himself from liability for his own negligence. In that case, however, the cause of action arose in the State of Georgia and involved an injury to a driver furnished by the lessor to operate the leased truck. Such driver was injured by the negligence of an employee of the lessee. The rights and liabilities of the parties were determinable under the statutory law of the State of Georgia. The case is not in point or controlling on the facts involved in this appeal.

The judgment of the court below is

Affirmed.

CURTIS MOSER v. SILAS FULK, REID JOYCE AND RALPH BOYLES.

(Filed 4 March, 1953.)

1. Malicious Prosecution § 2—

An action for malicious prosecution must be based upon a valid warrant or indictment, and if the warrant or indictment is void on its face, malicious prosecution will not lie.

2. Indictment and Warrant § 9—

A warrant and the affidavit upon which it is based will be construed together and will be tested by rules less strict than those applicable to indictments, but nevertheless the warrant and the affidavit together must charge facts sufficient to constitute an offense under our criminal law.

3. Nuisances § 6e—

Drunkenness itself is not a crime at common law, but must be attended with such circumstances as to constitute it a public nuisance in order to be a criminal offense.

4. Nuisances § 8a: Malicious Prosecution § 2—

The warrant and affidavit upon which plaintiff was prosecuted charged plaintiff with public drunkenness, but failed to allege any circumstances constituting plaintiff's conduct a public nuisance, and failed to allege that plaintiff's drunkenness was within a township of the county stipulated by G.S. 14-335 (8) prescribing that public drunkenness in the stipulated territory should be a criminal offense. *Held:* The warrant and affidavit failed to charge a criminal offense and were insufficient predicate for plaintiff's cause of action for malicious prosecution.

5. Courts § 2—

Neither consent nor waiver can give jurisdiction, and the question of jurisdiction can be raised at any time.

APPEAL by plaintiff from *Crisp, Special Judge,* at October Term, 1952, of STOKES.

This is an action for damages for false arrest, false imprisonment and malicious prosecution.

At the close of the plaintiff's evidence, the defendants moved for judgment as in case of nonsuit. The court granted the motion for judgment of nonsuit being of the opinion as stated in the record that the plaintiff's alleged causes of action were barred by G.S. 1-54, Sub-secs. 1 and 3. From the judgment based on such ruling the plaintiff appealed, assigning error.

P. W. Glidewell, Sr., J. A. Webster, Jr., and Leonard Vannoppen for plaintiff, appellant.

Deal, Hutchins & Minor for defendants, appellees.

PARKER, J. Silas Fulk, Reid Joyce and Ralph W. Boyles, the defendants, were acting deputy sheriffs of Stokes County at the times alleged in the complaint. On 5 or 7 December, 1947, the plaintiff got into a taxicab at Timmons Crossroads, Stokes County, near Richard Clifton's Store. About 15 or 20 people were there. The three defendants arrested him on a charge of public drunkenness in a public place, took him out of the taxicab and carried him to jail in Danbury, and locked him up. Within 30 or 35 minutes the plaintiff was released from jail. On 12 December, 1947, the defendant Silas Fulk swore out a warrant before T. A. Bennett, a justice of the peace of Stokes County, against the plaintiff charging him on or about 7 December, 1947, at and in said county and Yadkin Township with public drunkenness. Fulk dictated to Bennett what charge to put in the warrant. On 12 December, 1947, the warrant was served on the plaintiff by telling him where to appear that night

for trial. On that night he was tried on the warrant by T. A. Bennett, Justice of the Peace, and found not guilty. The affidavit and warrant were introduced in evidence by the plaintiff, and at the trial T. A. Bennett testified he wrote on the warrant "Dismissed"; "Nol Pros.," and "Not Guilty." All three defendants testified in the trial before Bennett.

Summons was issued 6 July, 1949, and served on the defendants 9 July, 1949.

The affidavit and warrant are as follows:

"State of North Carolina — JUSTICE'S COURT
Stokes County — ss — Before T. A. Bennett
Yadkin Township — Justice of the Peace.

STATE
v. — CRIMINAL ACTION
CURTIS MOSER

F. S. FULK, being duly sworn, complains and says, that at and in said county, and Yadkin Township on or about the 7 day of December, 1947, CURTIS MOSER did unlawfully, willfully, and feloniously charged with public drunkenness, against the form of the Statute in such cases made and provided, and contrary to law and against the peace and dignity of the State.

F. S. FULK.

Subscribed and sworn to before me, the 12 day of Dec., 1947.

T. A. BENNETT, J. P.

"STATE OF NORTH CAROLINA

To any Lawful Officer of Stokes—GREETINGS:

You are hereby commanded to arrest CURTIS MOSER and him safely keep, so that you have him before me at my office in said county, immediately, to answer the above complaint, and be dealt with as the law directs.

Given under my hand and seal this 12 day of Dec., 1947.

T. A. BENNETT (J. P. Seal)

Witnesses marked X recognized to appear. Case tried 12 day of Dec., 1947. Bond fixed at $..... before T. A. Bennett, associate, P. C. Campbell, J. P.

Across the top of warrant: Nol Pros. December 12, 1947, Wednesday 7:30. STATE v. CURTIS MOSER

Warrant for Public Drunkenness
Summons for the State:
R. W. Boyles
Reid Joyce."

The plaintiff appellant concedes in his brief that his action for false arrest or false imprisonment is barred by the statute of limitations. G.S. 1-54, Sub-sec. 3.

This question is presented: Construing the affidavit and warrant together, is the warrant void?

An action for malicious prosecution "presupposes valid process." *Allen v. Greenlee,* 13 N.C. 370; *Baldridge v. Allen,* 24 N.C. 206; *Zachary v. Holden,* 47 N.C. 453; *Parrish v. Hewitt,* 220 N.C. 708, 18 S.E. 2d 141; *Caudle v. Benbow,* 228 N.C. 282, 45 S.E. 2d 361.

If the warrant upon which the plaintiff was arrested was void, the action for malicious prosecution will not lie. An action for malicious prosecution must be based on a warrant charging a crime. If the warrant charges no crime, it is void, and an action of malicious prosecution cannot be based thereon, for malicious prosecution must be founded upon legal process maintained maliciously and without probable cause. *Allen v. Greenlee, supra; Bryan v. Stewart,* 123 N.C. 92, 31 S.E. 286; *Rhodes v. Collins,* 198 N.C. 23, 150 S.E. 492; *Parrish v. Hewitt, supra; Melton v. Rickman,* 225 N.C. 700, 36 S.E. 2d 276; *Caudle v. Benbow, supra.*

A warrant is insufficient and void if, on its face, it fails to state facts sufficient to constitute an offense. However, the strictness required in an indictment is not essential. 4 Am. Jur., Arrest, p. 9; *S. v. Jones,* 88 N.C. 672; *S. v. Gupton,* 166 N.C. 257, 80 S.E. 989.

"Since a warrant for an arrest is void when the justice or court issuing it had no jurisdiction, it is customary not only for the warrant to show facts conferring jurisdiction, but for the affidavit upon which it is based similarly to show such facts. The affidavit and warrant are considered as together constituting the precept; and if the complaint shows on its face that the justice of the peace who signed the warrant of arrest had no jurisdiction or authority to issue it, the warrant is defective and void." 4 Am. Jur., Arrest, p. 12.

Where the affidavit upon which the warrant is based sets out the charge in full, and the justice appends the warrant thereto, this incorporates the charge, and makes it part of the warrant. *S. v. Davis,* 111 N.C. 729, 16 S.E. 540; *S. v. Sharp,* 125 N.C. 628, 34 S.E. 264; *S. v. Gupton, supra.* The warrant and the affidavit must be construed together. *Young v. Hardwood Co.,* 200 N.C. 310, 156 S.E. 501; *Parrish v. Hewitt, supra.*

Venue can be waived, and a failure to lay the venue properly is not fatal to a justice's warrant. *S. v. Williamson,* 81 N.C. 540. However, neither consent nor waiver can give jurisdiction, and the court will not proceed when it appears from the record that it has no authority. The question of jurisdiction can be raised at any itme. *S. v. Miller,* 100 N.C. 543, 5 S.E. 925; *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136; *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700.

"Drunkenness in itself is not a crime at common law, unless attended with such circumstances as to become a public nuisance." 28 C.J.S., Drunkard, pp. 558-9. "By the early common law of England public drunkenness was not an offense, unless attended with such circumstances as to become a public nuisance. Drunkenness as an offense is now regulated by statute in the various jurisdictions." 19 C.J., Drunkards, p. 797.

Mr. Justice Henderson, speaking for the Court in *S. v. Waller,* 7 N.C. 230, says: "Private drunkenness is no offense by our municipal laws. It becomes so by being open and exposed to public view, to that extent that it thereby becomes a nuisance *commune nocumentum;* and that is a question of fact to be tried by a jury. There being no charge in this indictment to that effect, the jury has not, and could not pass on it; which being of the very essence of the crime, the judgment must be arrested." See also *S. v. Freeman,* 86 N.C. 683.

The affidavit and warrant in this case do not charge that the public drunkenness of the plaintiff Moser was attended with such circumstances as to become a public nuisance, and thereby a criminal offense at common law is not charged in the affidavit and warrant.

The statute law of North Carolina as to drunkenness is set forth in G.S. 14-335 and its various sub-sections. The pertinent part as to Stokes County is set forth in sub-sec. 8: "By a fine of fifteen dollars or imprisonment for ten days for the first offense; by a fine of twenty-five dollars or imprisonment for twenty days for the second offense; by a fine of fifty dollars or imprisonment for thirty days for the third and subsequent offenses, in the King high school district, Stokes County. (1933, c. 287.)" Pub. Laws 1933, Ch. 287, is entitled "An Act to Amend Section 4458 of the Consolidated Statutes Relating to Public Drunkenness in the King High School District, Stokes County."

Construing the affidavit and warrant together there is no charge therein that the defendant Curtis Moser, the plaintiff here, was publicly drunk in the King High School District, Stokes County. An inspection of the affidavit and warrant discloses that no criminal offense known to the laws of North Carolina is charged. The warrant is void, and will not support a suit for malicious prosecution. "We can know judicially only what appears on the record." *Utilities Com. v. Kinston,* 221 N.C. 359, 20 S.E. 2d 322.

Rhodes v. Collins, supra; Young v. Hardwood Co., supra; and *Parrish v. Hewitt, supra,* are strikingly similar. See also *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609; *Hawkins v. Reynolds,* 236 N.C. 422, 72 S.E. 2d 874.

In the *Rhodes case* the warrant charged the slander of a man. This Court held the slander of a man was not a criminal offense under our laws; the warrant was void; and a suit for malicious prosecution would not lie.

In the *Young case* the warrant charged that the defendant and two others "did unlawfully, wilfully and feloniously have in their possession certain goods which plaintiff is fully satisfied were stolen goods from said company's commissary, etc." It was held that the warrant charged no legal offense; was void and no suit for malicious prosecution could be based thereon.

In the *Parrish case* the warrant charged the plaintiff Parrish "did unlawfully, wilfully and feloniously endorse a check made to him without his knowledge or consent and receive the money for said check and failed to account to him for the funds received for the check, etc." It was held the warrant charged no criminal offense, and an action for malicious prosecution could not be based thereon.

The ruling of the trial judge in sustaining the motion for judgment as in case of nonsuit was correct. However, in the suit for malicious prosecution we have based our decision on a different ground.

Affirmed.

LYNWOOD LOVEGROVE v. MARGARET LOVEGROVE.

(Filed 4 March, 1953.)

1. Appeal and Error § 1—

The Supreme Court will take judicial notice of a defect of jurisdiction *ex mero motu.*

2. Courts § 3a—

The Superior Court has statewide jurisdiction and is but a single court with terms of court in each county in the State at least twice in each year. Constitution of N. C., Art. IV, sec. 2; Art. IV, sec. 10.

3. Courts § 8—

A county recorder's court is a court for the county wholly independent of any other court or system of courts. Constitution of N. C., Art. IV, sec. 2.

4. Venue § ½—

Venue means the place of trial.

5. Venue § 4a—

The right to demand change of venue is purely statutory, and a change of venue changes the place of trial but not the court of trial.

6. Same: Courts § 11—

A recorder's court of one county has no jurisdiction to order a cause pending therein transferred to the recorder's court of another county, and such order confers no jurisdiction upon the second court and proceedings had therein subsequent thereto are a nullity.

7. Appeal and Error § 1—

The jurisdiction of the Supreme Court is derivative and when the court below has no authority to enter the order from which the appeal is taken, the Supreme Court has no jurisdiction to entertain the appeal on its merits.

APPEAL by plaintiff from *Williams, J.*, October Term, 1952, EDGECOMBE.

Civil action for divorce.

Both plaintiff and defendant reside in Edgecombe County. On 3 January 1952 plaintiff instituted this action in the recorder's court of Nash County for divorce on the ground of two years' separation. On 19 January 1952, defendant, after due notice to plaintiff, appeared and filed a written motion addressed to the clerk of the Superior Court of Nash County for a removal of the cause to Edgecombe County for trial. The court to which she sought to have the cause removed is not designated in the motion. On 28 January 1952 the clerk of the Superior Court found as a fact that Edgecombe County was the proper venue for the trial of the cause and entered an order removing the cause "from the Recorder's Court of Nash County to the Recorder's Court of Edgecombe County." Counsel for plaintiff consented.

The defendant in her answer pleads a cross action for divorce *a mensa* and prays an allowance of alimony and counsel fees *pendente lite*.

At the trial in the recorder's court of Edgecombe County the jury answered the issues both on plaintiff's cause of action and defendant's cross action in favor of defendant. From judgment on the verdict defendant appealed to the Superior Court. The recorder had theretofore allowed alimony *pendente lite* from which defendant had appealed.

At the October Term 1952, Edgecombe Superior Court, on motion of defendant for alimony and counsel fees *pendente lite*, the court found the essential facts and entered an order allowing alimony, etc., as appears of record. Plaintiff excepted and appealed.

Cameron S. Weeks and T. Chandler Muse for plaintiff appellant.

Fountain & Fountain for defendant appellee.

BARNHILL, J. We are met at the threshold of this appeal by a question of jurisdiction of which we must take judicial notice *ex mero motu*. *Shepard v. Leonard*, 223 N.C. 110, 25 S.E. 2d 445; *S. v. Clarke*, 220 N.C. 392, 17 S.E. 2d 468; *S. v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166; *S. v. Jones*, 227 N.C. 94, 40 S.E. 2d 700; *S. v. Miller*, 225 N.C. 213, 34 S.E. 2d 143.

The right to demand a change of venue and the authority of the courts to remove a cause from one county to another for trial is purely statu-

tory. 56 A.J. 4, 5, 49, 61. And the clerk of the Superior Court, whether he was acting as such or as *ex officio* clerk of the recorder's court, was without statutory authority to remove the cause to a local court in another county.

Article IV, sec. 2, of the Constitution established a Superior Court for the State as a whole, *S. v. Pender,* 66 N.C. 313, and Article IV, sec. 10, requires terms thereof to be held "in each county at least twice in each year." The term "Superior Court" had a well-defined meaning at the time of the adoption of the Constitution. It was one court having State-wide jurisdiction, *Rhyne v. Lipscombe,* 122 N.C. 650.

The Code of Civil Procedure, General Statutes Ch. 1, applies to the Superior Court. *Fisher v. Bullard,* 109 N.C. 574; *Mohn v. Cressey,* 193 N.C. 568, 137 S.E. 718. In the subchapter designated "venue," G.S. 1, Ch. 1, Art. 7, it designates the county in which various types of actions shall be instituted, and when an action is instituted in a county which "is not the proper one," the judge is vested with authority to "change the place of trial" or remove the cause for trial to the county in which, under the statute, it should have been instituted, G.S. 1-83. The word "venue," as used in the statute, means place of trial, Callaghan, Cyc. Law Dic., the place or county where the trial of a cause is to be held, Webster, New Int. Dic., 2d Ed.

The authority thus vested in the Superior Court judge to remove a cause instituted in a county which "is not the proper one," as provided by the statute fixing the venue of actions, is the power to change the place of trial. The trial, nonetheless, is to be had in the same court which ordered its removal—the Superior Court.

The recorder's court of Nash County was created by statute, ch. 633 P.L. 1909, ch. 176 P.L.L. 1911. It is an inferior court the creation of which is authorized by Art. IV, sec. 2, of the Constitution. But it is a court for the County of Nash, wholly independent of any other court or system of courts.

It is vested with jurisdiction to try divorce actions, ch. 768 S.L. 1943, and "the same rules and practice as to venue of causes of action cognizable in said recorder's court, civil or criminal, shall apply as is now provided by law for the superior courts." Sec. 17, ch. 176, P.L.L. 1911. Just what is the purpose, intent, and scope of the latter provision relating to venue we are not now called upon to decide. Suffice it to say that it may not be construed to confer the power or authority to remove a cause therein pending for trial to another local court in another county. Such removal not only changed the place of trial as authorized by our venue statute above cited but also the court in which the cause was to be tried. Jurisdiction could not thus be conferred on the recorder's court of Edgecombe County. Indeed the venue statute, as broad and comprehensive as it is,

does not empower a Superior Court sitting in one county to transfer a cause for trial to an inferior court of another county.

The statutory provisions for change of venue "were only intended to provide for a change of the place of trial from the district court for one county to the same court for another county, and were never designed to authorize the transfer of an action from one court to another differently organized and possessing a different jurisdiction, as from a municipal court to the district court, or to a justice of the peace, or from the district court to a municipal court." *Janney v. Sleeper,* 16 N.W. 365; *Austin, Tomlinson & Webster Mfg. Co. v. Heiser,* 61 N.W. 445; *Brust v. First Nat. Bank,* 198 N.W. 749.

It follows that this cause is still pending in the recorder's court of Nash County. The proceedings had and the orders entered in the recorder's court and in the Superior Court of Edgecombe County are without force or effect.

The jurisdiction of this Court is derivative. Since the court below had no authority to enter the order from which plaintiff appealed, we have no jurisdiction to entertain the appeal on its merits. *Stafford v. Wood,* 234 N.C. 622, 68 S.E. 2d 268.

The parties live in Edgecombe County. The subject of the action—the marital status of the parties—is of necessity located in that county. Therefore we do not mean to say that defendant may be compelled to defend the action pending in the recorder's court of Nash. She has a remedy, but it is not our custom to chart future proceedings in a cause not finally disposed of by us on appeal.

The appeal is dismissed and the cause is remanded with direction that the action be dismissed from the docket.

Appeal dismissed.

FENNER RESPASS v. WILLIAM BONNER, CLAUDE BONNER, MRS. MARY P. KEYS, MONTCELLUS KEYS, RICHARD MURRELL AND MRS. MAGNOLIA DUDLEY.

(Filed 4 March, 1953.)

1. Appeal and Error § 10b—

The rules requiring service to be made of case on appeal within the allotted time are mandatory, and when appellant fails to serve case on appeal within the time allotted there is no case on appeal.

2. Appeal and Error § 22—

The record imports verity, and the Supreme Court is bound thereby.

3. Appeal and Error § 31b—

Failure to have statement of case on appeal does not in itself work a dismissal, but the Supreme Court may review the record proper for errors appearing upon its face.

APPEAL by plaintiff from *Sharp, Special Judge,* at November Term, 1952, of MARTIN.

Civil action to reform a certain deed, and to declare plaintiff owner in fee simple of certain lands described therein.

The record proper filed in this Court discloses:

(1) That plaintiff alleges in his complaint substantially the following: That at a public sale by commissioners in a special proceeding instituted by Vanderbilt Respass for sale of the Willie Respass homeplace in town of Williamston, N. C., he, the plaintiff, became the last and highest bidder for the land, and, having arranged to pay the purchase price, requested that deed be made to him and his wife, Carrie Respass, but that by mistake deed dated 4 October, 1944, was made to Carrie Respass only; and that he did not discover the mistake until February, 1951, after the death of Carrie Respass.

(2) That defendants, sisters and heirs at law of Carrie Respass, answering, deny in material aspect the allegations of the complaint, and plead three years statute of limitations and assert claim for rents.

(3) That, upon trial in Superior Court, issues were submitted to, and the first only answered by the jury as follows: "1. Was the name of Fenner Respass omitted from the deed described in the complaint by an error of the draftsman as alleged? Answer: No.

"2. Is the plaintiff's action barred by the statute of limitations as alleged in the answer? Answer: .....

"3. What amount, if any, are the defendants entitled to recover from the plaintiff as rents for the property in question? Answer: ....."

(4) That upon the verdict rendered the trial judge entered judgment in favor of defendants and against plaintiff, and that plaintiff excepted, and gave notice of appeal to Supreme Court, and was allowed 40 days to serve case on appeal, and that defendants were allowed 15 days thereafter to serve exceptions or countercase.

(5) That there is total absence of agreement to case on appeal, or of settlement of case on appeal, save and except the following: It appears that on 16 January, 1953, erroneously written 1952, as appellee admits, LeRoy Scott, attorney for defendants, signed this entry: "Received copy of above one page case on appeal in Fenner Respass *v.* William Bonner, *et al.,* and service is accepted."

(6) That appellant, at 9:43 o'clock a.m., on Tuesday, 20 January, 1953, docketed in office of Clerk of Supreme Court a certified copy of

purported record proper and a purported statement of case on appeal, including a statement of assignments of error, pages 9 to 37, a total of 27 pages of the printed record, bearing certificate of Clerk of Superior Court of Martin County, dated 19 January, 1953, to the effect that "the foregoing is a full, complete and correct copy of the entire record and case on appeal in the matter of Fenner Respass *v.* William Bonner, *et al.*, composed of 24 pages" typed.

Now appellee filed motion in this Court to dismiss the appeal for that appellant failed to docket his case on appeal by 10 o'clock a.m., on Tuesday, 20 January, 1953, for the reason that what he docketed was not a case on appeal, in that it had not been agreed to by opposing counsel, nor served upon him, but that actually only one page, containing matter which covers in the printed record only the first three pages, 9, 10 and 11, service of which as "one page case on appeal" was accepted by counsel for appellee. Attached to and in support of the motion is affidavit of counsel for appellee, in which among other things it is stated that "the Superior Court of Martin County at which this case was tried during the first week of court convened on November 17th, 1952 and adjourned on November 26th, 1952 as your affiant is advised."

And the record fails to show that appellant answered the motion and supporting affidavit.

The record also fails to show that appellant has made application for extension of time, for *certiorari* or for waiver of failure to file within the time prescribed by established rule.

Upon the record, and papers filed, appellant assigns error.

Hugh Horton and P. H. Bell for plaintiff, appellant.
LeRoy Scott for defendants, appellees.

WINBORNE, J. The right of appeal must be exercised in accordance with the established rules and procedure governing appeals. *S. v. Moore,* 210 N.C. 686, 188 S.E. 421. Indeed, rules requiring service to be made of case on appeal within the allotted time are mandatory, and not directive. *S. v. Daniels,* 231 N.C. 17, 56 S.E. 2d 2, and cases cited.

Hence where an appealing party fails to file his statement of case on appeal within the time allowed and fails to make application for extension of time, or for waiver of failure to file within the time prescribed, or fails to file petition for *certiorari,* if such procedure be available, such party loses his right to bring up the "case on appeal." *S. v. Moore, supra.*

In this connection, the record docketed in this Court discloses that plaintiff, appellant, was allowed forty days in which to serve case on appeal. And the statute G.S. 7-70 fixes a term of Superior Court for Martin County to begin on eleventh Monday after the first Monday in

September to continue for two weeks for the trial of civil cases. In 1952 this term of court began on 17 November, and, if not earlier adjourned, expired by limitation on 29 November, 1952. Forty days thereafter expired 9 January, 1953. Hence, even if the "one page case on appeal" should be considered a partial compliance with the rule requiring service of case on appeal, it was not served within the forty days allotted. So, we have here no case on appeal.

The record imports verity, and the Supreme Court is bound thereby. *S. v. Dee,* 214 N.C. 509, 199 S.E. 730, and cases cited. See also *S. v. Miller,* 214 N.C. 317, 199 S.E. 89; *S. v. Cannon,* 227 N.C. 336, 42 S.E. 2d 343.

But the failure to have a statement of case on appeal does not by itself, that is, *ipso facto,* work a dismissal, *Parrish v. Hartman,* 212 N.C. 248, 193 S.E. 18, and cases cited, but this Court may review the record proper for errors appearing upon the face of it. However, here error does not so appear. In fact, a reading of the whole record including all that plaintiff sets out therein fails to indicate prejudicial error. It would seem that a clear-cut issue was raised, and submitted by the court to the jury, as the first issue. And the jury has decided against plaintiff.

For reasons stated, the judgment below will be, and is hereby

Affirmed.

MRS. ANNIE M. HOLLIFIELD v. ELMER C. EVERHART AND EARL GASS, TRADING AND DOING BUSINESS AS THE EVERHART CONSTRUCTION COMPANY; JIM EVERHART, MRS. NELLIE BOWLS AND HUSBAND, OSCAR BOWLS.

(Filed 4 March, 1953.)

1. Pleadings § 19c—

Upon demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action, the facts alleged in the complaint will be taken as true, together with relevant inferences of fact necessarily deducible therefrom, and the pleading will be liberally construed with a view to substantial justice between the parties, and the demurrer overruled unless the complaint be fatally defective.

2. Automobiles §§ 18a, 18b, 18d—Upon facts alleged, negligence of demurring defendants was not proximate cause and did not concur in producing injury.

The facts alleged in the complaint disclosed that plaintiff was driving along the highway during the daytime when she was suddenly confronted with a vehicle traveling in the opposite direction which had flashing red lights and red flags on its front, followed a short distance behind by a large tractor-trailer loaded with heavy equipment, that plaintiff instinctively put on brakes, and was rammed by a car which had been following

her too closely on the highway and was being operated without proper regard to conditions then existing and without a proper lookout. Plaintiff sued the driver of the car following her and also the drivers and owners of the vehicles which were traveling in the opposite direction. *Held:* Even conceding that the operators and owners of the vehicles traveling in the opposite direction were guilty of negligence (G.S. 20-130.1) the facts alleged failed to disclose any causal connection between such negligence and plaintiff's injury, and their demurrer to the complaint should have been sustained, it being apparent on the facts alleged that the negligence of the driver of the car following plaintiff independently caused the collision.

APPEAL by plaintiff from *Patton, Special Judge,* at September-October Regular Civil Term, 1952, of MADISON.

Civil action to recover for personal injuries and property damage allegedly resulting from actionable negligence of defendants, heard upon demurrer of defendants Elmer C. Everhart and Earl Gass, trading and doing business as The Everhart Construction Company, and Jim Everhart, upon the ground that the facts alleged do not constitute a cause of action against them in that no causal connection is shown, as a matter of law, between the alleged acts or omissions of these defendants, and the alleged damage sustained by plaintiff.

Plaintiff alleges in her complaint, briefly and pertinently, the following facts: On the morning of 31 January, 1952, she, the plaintiff, was operating her Buick sedan on U. S. Highways 25 and 70 in a southeasterly direction, in North Carolina, from Walnut toward Marshall, at a moderate rate of speed and with due care under the conditions then and there existing. Soon after she left Walnut, a Ford automobile driven by defendant Mrs. Nellie Bowls followed the automobile of plaintiff for several miles "at such a close distance as to create some apprehension in the mind of this plaintiff." When plaintiff reached a point on said highway near the old Madison County Home, and still being closely followed by the automobile operated by Mrs. Bowls, she, the plaintiff, "was suddenly confronted by a Pontiac automobile traveling" in opposite direction, and "bearing various flashing red lights and red flags that were waving or being waved, a very short distance behind the said Pontiac automobile was some large tractor-trailer truck loaded with some large heavy equipment." And "upon being suddenly confronted with the Pontiac with red flags and red flashing lights . . . plaintiff was startled and alarmed and instinctively placed her foot on the brake pedal and decreased the speed of her automobile," and, as she did so, "it was suddenly rammed from the rear by the Ford driven by the defendant Nellie Bowls," inflicting personal injury to plaintiff and damage to her automobile.

Plaintiff further alleges in her complaint "that among the specific acts of negligence on the part of the defendants, which were the direct, concurring and proximate causes of the automobile crash heretofore referred to and of the resulting injuries to this plaintiff were:

"A. The acts of the defendants Everhart and Gass in operating a motor vehicle upon the highways of the State of North Carolina while displaying the red lights and other warning devices on the front of said vehicle, in violation of G.S. 20-130.1."

And "B," "C" and "D" as against defendant Mrs. Bowls, that she followed "another automobile too closely, in violation of G.S. 20-152"; she operated "her automobile without proper regard to the conditions then and there existing" and negligently, carelessly and recklessly failing to keep a proper lookout."

And plaintiff further alleges that, as she is informed and believes, at the time of the accident and injuries to her, the defendant Earl Gass was operating the Pontiac automobile referred to, and Jim Everhart was operating the large tractor-trailer truck, while Elmer C. Everhart was trailing them in a third vehicle.

The cause coming on for hearing at October 1952 Civil Term, upon demurrer as hereinabove set forth, the presiding judge sustained the demurrer and ordered the action dismissed as to the demurring defendants, and plaintiff appeals to Supreme Court, and assigns error.

A. E. Leake and Calvin R. Edney for plaintiff, appellant.
Meekins, Packer & Roberts for defendants, appellees.

WINBORNE, J. The challenge to the ruling of the court below in sustaining the demurrer filed, as set forth above, 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 the demurrants on actionable negligence.

For this purpose the truth of the allegations contained in the complaint 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." *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761. See also *McLaney v. Motor Freight, Inc.,* 236 N.C. 714, and cases 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 the defendants, the demurrants, 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 and damages of which plaintiff complains were, 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, Mrs. Nellie Bowls. See *McLaney v. Motor Freight, Inc., supra,* where the principle was recently applied, and supporting authorities cited. While it is true that the statute G.S. 20-130.1 declares that it shall be unlawful for any person (with certain exception) to drive upon the highways of this State any vehicle displaying red lights visible in front of said vehicle, it may be fairly assumed that the General Assembly intended the statute to apply to vehicles operated at the time when lights are required, that is, "during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead." G.S. 20-129, as amended by 1947 Session Laws Chap. 526. See *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377.

But be that as it may, if it be conceded that the allegations of the complaint set forth facts constituting negligence on the part of the defendants, demurrants, the allegations fail to disclose proximate causal relation between the red lights on the front of the motor vehicle of defendants, demurrants, as alleged, and the act of Mrs. Bowls, acting independently of any act on the part of defendants, demurrants, in permitting her Ford automobile to ram the rear of plaintiff's automobile. There was no contact between the motor vehicle of defendants, demurrants, and that of plaintiff. And plaintiff was not caused to leave the road. She just instinctively slowed the speed of her automobile. And Mrs. Bowls, following too closely, did not stop her automobile in time to avoid a collision.

The factual situation in *McLaney v. Motor Freight, Inc., supra,* is similar to the case in hand. Demurrer was sustained there. And so it must be here.

Affirmed.

M. L. LEDFORD, ADMINISTRATOR OF THE ESTATE OF KAREN LOIS HARRIS, DECEASED, v. MARION TRANSPORTATION COMPANY, A CORPORATION.

(Filed 4 March, 1953.)

Appeal and Error § 40f—

The denial of a motion to strike certain portions of the complaint will not be disturbed on appeal when appellant has not been harmed or prejudiced thereby.

APPEAL by defendant from *Pless, J.*, at Chambers in Marion, N. C., 29 December, 1952. From McDOWELL.

This is an action for wrongful death resulting from the alleged negligence of the defendant.

The defendant in apt time moved to strike certain portions of the complaint. The motion was denied. The defendant appeals and assigns error.

Proctor & Dameron and Hamrick & Jones for plaintiff, appellee.

Everette C. Carnes for defendant, appellant.

DENNY, J. No useful purpose would be served by setting out in detail the specific allegations of the complaint challenged by the motion to strike. However, if it be conceded that the complaint is not as concise and devoid of repetition as it might be in stating the plaintiff's cause of action, we can see nothing in it that will be harmful or prejudicial to defendant's rights.

In *Hinson v. Britt*, 232 N.C. 379, 61 S.E. 2d 185, we said: "This Court does not correct errors of the Superior Court unless such errors prejudicially affect the substantial rights of the party appealing. Hence, the denying or overruling of a motion to strike matter from a pleading under the provisions of G.S. 1-153 is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party," citing *Teasley v. Teasley*, 205 N.C. 604, 172 S.E. 197. *Neal v. Greyhound Corp.*, 235 N.C. 225, 69 S.E. 2d 319; *Terry v. Coal Co.*, 231 N.C. 103, 55 S.E. 2d 926; *Hawkins v. Moss*, 222 N.C. 95, 21 S.E. 2d 873; *Hill v. Stansbury*, 221 N.C. 339, 20 S.E. 2d 308; *McDonald v. Zimmerman*, 206 N.C. 746, 175 S.E. 92.

The ruling of the court below is

Affirmed.

HANDLEY MOTOR CO., INC., v. E. A. WOOD AND W. W. WINSTEAD, TRADING AS W. & W. MOTOR COMPANY.

(Filed 18 March, 1953.)

1. Courts § 16—

Where all the evidence shows that the sale of the automobile in suit took place in the District of Columbia, its laws, unless contrary to public policy of this State, govern substantive features of the case under the doctrine of comity, but the laws of this State govern matters of procedure, including the pleadings.

2. Payments § 2: Sales § 11—

Under the laws of the District of Columbia if a so-called cash sale is made upon delivery of a check by the purchaser, such payment is conditional and title does not pass until the check is paid, and if the check is dishonored, title remains in the seller. Such law will be enforced in this State under the doctrine of comity because such is the law of this State.

3. Sales § 12—

As a general rule, the seller of personal property without title cannot transfer a better title than he has, unless some principle of estoppel comes into operation, and the true owner may assert his title even as against an innocent purchaser for value.

4. Same: Principal and Agent § 7d—

The fact that the owner has entrusted the mere possession and control of personal property to another is ordinarily insufficient to estop him from asserting his title against a person who has dealt with the possessor on the faith of his apparent ownership or authority to sell; but where the owner clothes such other with apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected.

5. Same: Automobiles § 5—

Where there is no evidence that successive purchasers of an automobile from the person who acquired possession from the original dealer had any knowledge of any asserted registration card given such purchaser by the original dealer, there is no evidence to estop the original dealer from asserting his title against such subsequent purchasers.

6. Estoppel § 11a—

An equitable estoppel must be pleaded.

7. Sales § 12: Automobiles § 5—

Where conflicting inferences can be drawn from the evidence as to whether defendants were *bona fide* purchasers for value without notice, a peremptory instruction in their favor upon the issue is error.

APPEAL by plaintiff from *Williams, J.*, September Civil Term, 1952, of WILSON.

Civil action in claim and delivery for the recovery of an automobile.

The following is a summary of the plaintiff's evidence. Handley Motor Co., Inc., the plaintiff, at the times complained of, was an authorized dealer for the Ford Motor Co., selling new Fords in Washington, D. C. When it receives a new car, it receives a manufacturer's certificate of origin showing proof of ownership. There are three assignments on the back of the certificate to be signed by the dealer when the car is sold. The plaintiff has this certificate in its possession, and has never turned it over to anyone, nor signed any of the assignments on the back. A day or two before 6 January, 1951, James P. Junghans, Jr., made a deposit of $50.00 in cash on the new Ford automobile described in the complaint, owned by the plaintiff, which was on display at its place of business for sale. The banks in Washington, D. C., are closed on Saturday. On Saturday, 6 January, 1951, Junghans came to get the automobile, and tendered in payment his personal cheque—not certified—drawn on a Washington, D. C., bank in the amount of $1,847.50. The price of this car delivered was $1,897.50. The salesman brought Junghans to Mrs. Marie Cross, Secretary and Office Manager, of the plaintiff. Junghans told Mrs. Cross he needed the car over the week-end, and requested her to let him have the car, and hold the certificate of origin until his cheque cleared the following week. Mrs. Cross let him have the possession of the car with that understanding. On Monday, 8 January, 1951, the plaintiff was informed by the bank Junghans' cheque was worthless. That afternoon about 2:00 o'clock Junghans came in, and asked for the certificate of origin to go to Baltimore to get his Maryland tags. The request was refused, and he was told his cheque was worthless. Junghans said he would go to his home at Silver Spring, Md., about 3 miles from Washington, and get cash for the car. He never came back, his cheque has never been paid, nor has he paid anything on the car, except his $50.00 deposit. On Wednesday, 10 January, 1951, the plaintiff told Junghans over the telephone he would have to bring cash or return the car. He said he would, but has done neither. On Monday, 15 January, 1951, the plaintiff asked the police and the Motor Vehicles Departments of the States of New York and Pennsylvania to try to locate the car.

The plaintiff never executed and delivered any title to the car to Junghans nor to anyone. The plaintiff did not give Junghans a ten day temporary registration card, nor did it give him a receipt for his cheque. Junghans said he had his own license plates to use in driving the car away. Mrs. Cross handles all sales transactions for plaintiff. The plaintiff never had any prior business with Junghans. It made no credit investigation. It was a cash sale.

The plaintiff offered in evidence in rebuttal a deposition of Junghans. It was in accord with the evidence offered by the plaintiff in chief, except as set forth below. Junghans testified that the plaintiff gave him a

receipt that he had paid on this car $1,847.50, which is now in his records, and also a ten day temporary registration card. He didn't remember if he received any tags—he thought the plaintiff put a set of dealer's tags on. At the time Junghans was a fleet taxicab owner in Silver Spring, Md. He bought this car for Mr. Goldberg, who works in Philadelphia for a man by the name of Mozes, whom he has not met. Goldberg said he was in the car business. Immediately after the plaintiff let Junghans have the car, he turned it over to Goldberg about a block from where he received it from the plaintiff. Goldberg gave Junghans $1,897.50 in cash for the car. Junghans gave Goldberg no papers: "How could I when I didn't have any papers?" He did not give Goldberg a receipt for the money.

The plaintiff offered in evidence the manufacturer's certificate of origin of this car and Junghans' worthless cheque.

The plaintiff instituted this action in Wilson County 26 January, 1951, and summons was duly served on the defendants. At the time this automobile was seized under claim and delivery, and the defendants replevied it.

The following is a summary of the defendants' evidence. It consisted of the depositions of Leonard Goldberg and Adolph Mozes, and the testimony of the two defendants and 4 exhibits.

Leonard Goldberg lives in Philadelphia, Penn., and buys and sells automobiles. He is not employed by anyone. He had bought approximately 70 cars from Junghans. About noon Saturday, 6 January, 1951, he bought this Ford car from James P. Junghans, Jr., in Silver Spring, Md., paying him for it approximately $1,835.00 in cash. At the time and place Junghans gave Goldberg a Bill of Sale—which was offered in evidence—which states that Junghans sells, assigns and transfers this Ford automobile to Mozes Autos, Philadelphia, Penn. It was notarized on 6 day of ....., 1951, by one Miller, a Notary Public of Philadelphia, Penn. Goldberg did not receive from Junghans a certificate of title; Junghans saying the certificate was in progress. A new car comes from the factory with a certificate at large, which is sent to the Department of Motor Vehicles, and they issue a title certificate. Junghans was not a car dealer. Goldberg always got title certificates in the other 70 deals he had with Junghans. He never received a certificate of title from Junghans on this car. He brought this car to Philadelphia, and was going to deliver it to Lee Motors, Long Island, N. Y., on Sunday afternoon. About 9:00 o'clock p.m. he received a call to deliver the car to Mozes Autos, Philadelphia. He bought this car in his own capacity. He sold the car to Lee Motors for $1,885.00. He delivered the car to Mozes Autos on Sunday morning. Lee Motors did not inquire of Goldberg if he had received a title certificate. Goldberg knew Junghans had bought

this car from plaintiff. Goldberg was not in the District of Columbia that day. He delivered no papers to Mozes Autos with the car.

Adolph Mozes is a used car dealer in Philadelphia. On 6 January, 1951, he bought this Ford car from Lee Motors, Long Island, N. Y., paying for it $1,910.00 in cash—$25.00 to Lee Motors and $1,885.00 to Goldberg. He knew Lee Motors was not in possession of the car, and that Goldberg was. Goldberg was not Mozes' employee. Several days after the transaction Mozes received a title certificate for this car from Lee Motors. Mozes contacted Lee Motors about the purchase of this type car 6 January, 1951, about 3:00 p.m. They informed him they did not have one there, but they had contracted to buy one from Leonard Goldberg. On Saturday, 6 January, 1951, Mozes sold this car to the defendants at Wilson, North Carolina, for $2,000.00. About a week later he gave the defendants a title certificate to this car from the State of Pennsylvania. On Sunday, 7 January, 1951, the defendants had a driver to get this car, and it was delivered to them in Wilson, North Carolina, on 8 January, 1951. Mozes testified Goldberg delivered to him no papers on the car, and that when Goldberg brought the car to Mozes it had on it Mozes' dealer's tags. Mozes testified he did not know where Goldberg got the car. Mozes sold this car to defendants in about 15 minutes after he received it. Mozes said "as a matter of fact W. W. was waiting for the car; the deal was all fixed late Saturday on the telephone."

The defendants are used car dealers in Wilson. They bought new and used cars from dealers in cities, because the factories allot more new cars to dealers in cities than small towns, therefore, they can buy them close to their invoices. They were having calls for new Fords. On 6 January, 1951, they called Mozes Autos, from Wilson, and bought this car. They did not know from where Mozes Autos got this car. They had a driver in Philadelphia to pick up this car and some others. The defendants offered in evidence the $2,000.00 cheque which they paid for this car. The defendants received from Mozes Autos an invoice for the car, which they introduced in evidence. They paid the driver by cheque, for driving the cars, $110.00, and introduced it in evidence. The defendants sold this car 10 January, 1951. The defendants had dealt with Mozes Autos since 1949, their sole relationship being buyer and seller. They had no knowledge at the time of purchase or information leading them to believe that there was anything wrong with the title to the car. To the question eliciting this answer the plaintiff objected, was overruled, and excepted. The defendants had never heard of Junghans at the time. The defendants knew Mozes Autos was not an authorized Ford dealer. The defendants' plates were on this car when it was brought from Philadelphia; they leave plates with their driver there.

The court submitted to the jury two issues. The first being: "Is the plaintiff the owner and entitled to the possession of the Ford automobile described and referred to in the complaint?"; and the second being as to the value of the car at the time it was seized under claim and delivery. It was agreed that the value of the car was $1,897.50. The court instructed the jury on the first issue "if you find the facts to be as all the evidence tends to show, you will answer the first issue No." The jury answered the first issue No, and the second issue $1,897.50. From judgment on the verdict, the plaintiff appealed, assigning errors.

Gardner, Connor & Lee for plaintiff, appellant.
Carr & Gibbons for defendant, appellee.

PARKER, J. All the evidence shows that all the transactions as to the sale of the new Ford automobile described in the complaint between the plaintiff and James P. Junghans, Jr., and the delivery of it by the plaintiff to Junghans took place in the District of Columbia. Therefore, the sale in its substantive features is governed by the laws of the District of Columbia, and such laws on the doctrine of comity in the forum will be enforced in North Carolina, unless contrary to the public policy of this State. *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592; 11 Am. Jur., Conflict of Laws, Sec. 140.

The District of Columbia in 1937 adopted the Uniform Sales Act. D. C. Code 1940, Secs. 28-1101 to 28-1608. Sec. 18 of the Uniform Sales Act, which is Sec. 28-1202 of the D. C. Code 1940, is as follows: "Property in specific goods passes when parties so intend.—(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

In *Daine v. Price,* Mun. Court of Appeals for the District of Columbia, 63 A. 2d 767 (1949) the Court said: "In the case of a so-called cash transaction in which the passage of title depends upon payment, a check is generally considered conditional payment only and does not operate to effect payment unless the check is itself paid." The District of Columbia Court cites in support of its statement *"Standard Inv. Co. v. Town of Snow Hill, N. C.,* 4 Cir., 78 F. 2d 33; and see *Publicker Commercial Alcohol Co. v. Harger,* 129 Conn. 655, 31 A. 2d 27." In the *Town of Snow Hill case, Parker, Circuit Judge,* speaking for the Court, said: "The rule that a check of a debtor is merely conditional payment applies to obligations arising out of immediate transactions, as well as to payment of antecedent debts; and where there is a sale for cash on delivery,

and payment is made by check of the buyer, such check constitutes only conditional payment. Until the check is itself paid, the title, as between the parties, passes only conditionally; and upon dishonor of the check, the seller may rescind the transaction and reclaim that with which he has parted," citing many authorities in support.

All the evidence in this case tends to show that the sale of this car to Junghans was a cash sale, and that Junghans gave for the purchase price a worthless cheque. If a jury should so find from the evidence then under the laws of the District of Columbia no title to the car passed to Junghans, but the plaintiff retained the legal title.

Such law will be enforced in the courts of North Carolina, because such is the law of this State. *Parker v. Trust Co.*, 229 N.C. 527, 50 S.E. 2d 304, which cites many authorities to support its ruling. See also *Davidson v. Furniture Co.*, 176 N.C. 569, 97 S.E. 480.

Title like a stream cannot rise higher than its source. The general rule is that a seller of personal property without title cannot transfer a better title than he has, unless some principle of estoppel comes into operation, where the owner by some direct and unequivocal act has clothed the seller with the indicia of ownership. It is also the general rule that the fact that the owner has entrusted someone with the mere possession and control of personal property is not sufficient to estop the real owner from asserting his title against a person who has dealt with the one in possession on the faith of his apparent ownership or authority to sell. It is also well settled that when the owner of personal property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected. 46 Am. Jur., Sales, Sec. 458 and Sec. 460; *Cowdrey v. Vandenburgh,* 101 U.S. 572, 25 L. Ed. 923; *Supply Co. v. Machin,* 150 N.C. 738, 64 S.E. 887; *Bank v. Dew,* 175 N.C. 79, 94 S.E. 708; *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; *Discount Corp. v. Young,* 224 N.C. 89, 29 S.E. 2d 29; *Parker v. Trust Co., supra.*

While Mrs. Cross testified that the plaintiff gave Junghans no records or papers of any kind, and Junghans testified the plaintiff gave him a receipt that he paid $1,875.50 for the car and a ten day temporary registration card, there is no evidence that Goldberg ever saw such a receipt and temporary registration card, and they were not introduced in evidence. There is no evidence, if the plaintiff gave Junghans such papers, Goldberg was induced thereby to buy the car from Junghans relying upon such papers; Lee Motors, Mozes Autos and the defendants knew nothing about any such papers according to the evidence. There is no evidence to estop the plaintiff from asserting its legal title. Further, the defendants have not pleaded an estoppel, as they are required to do to be available to them as a defense. *Laughinghouse v. Ins. Co.,* 200 N.C. 434,

157 S.E. 131; *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209; *Motors v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469. "The *lex fori* also governs the rules of pleading." 11 Am. Jur., Conflict of Laws, p. 502; *Central Vermont R. Co. v. White,* 238 U.S. 507, 59 L. Ed. 1433.

If the jury found as all the evidence tends to show that the plaintiff's sale to Junghans was a cash sale, and Junghans paid for the car with a worthless cheque, the title is still in the plaintiff, and as there is no evidence nor defense in the answer that the plaintiff is estopped to assert its title, then under those circumstances it is an elementary general rule, which is incorporated in the Uniform Sales Act, Sec. 23, that no one can transfer a better title than he has, and, with certain well known exceptions, an innocent purchaser for value from one without title does not acquire title as against the true owner. 46 Am. Jur., Sales, Sec. 458; Vold, Sales, pp. 174-176; Williston on Sales, Rev. Ed., Vol. 2, Sections 346a and 346b.

Williston, *ibid.,* Sec. 346a, says: "Sometimes after a bargain for a cash sale the buyer gives in payment of the price a worthless check, and it has been held that such a false check is no payment; and that not only does no title pass to the fraudulent buyer, but that the seller may assert his title against an innocent purchaser from the buyer," citing many cases in support of such statement. Williston criticizes such decisions as unsound, but says *ibid.,* p. 346, "it must be admitted that so far as the cases on worthless checks are involved the author's analysis is not supported by the weight of authority."

Vold, *ibid.,* p. 174, says: "Payment by check is without special agreement commonly regarded as only conditional payment until cashed. Following this analysis it is held by the great weight of American authority that delivering the goods to the buyer and taking his check for the price is not a waiver of the condition of payment in cash but that the property passes when the check is cashed. If, then, the check is dishonored on presentation, as for instance where it was forged or where the drawer had no funds, it is held that the goods still belong to the seller unless the seller is shown to have accepted the check in absolute payment, and that he can recover them from subsequent purchasers from the buyer even when they are purchasers in good faith for value without notice." In support of the statement "he can recover them from subsequent purchasers from the buyer even when they are purchasers in good faith for value without notice" Vold cites: *Barksdale v. Banks,* 206 Ala. 569, 90 So. 913; *Clark v. Hamilton Diamond Co.,* 209 Cal. 1, 284 P. 915; *Johnson v. Iankovetz,* 57 Or. 28, 102 P. 799, 110 P. 398; 29 L.R.A. (N.S.) 709; *Young v. Harris-Cortner Co.,* 152 Tenn. 15, 268 S.W. 125, 54 A.L.R. 516, Rehearing Denied, 152 Tenn. 34, 268 S.W. 1120; *John S. Hale & Co. v. Beley Cotton Co.,* 154 Tenn. 689, 290 S.W. 994.

In *Young v. Harris-Cortner Co., supra,* the Court said: "We feel safe in saying that, as a matter of custom and convenience, most of the cash transactions of the country are paid with checks. A farmer brings his cotton, tobacco, or wheat to town for sale and sells same, and as a general rule, is paid by check, although all of such sales are treated as cash transactions. If, in such a case, the purchaser can immediately resell to an innocent party and convey good title, it would follow that vendors would refuse to accept checks and would require the actual money, which would result in great inconvenience and risk to merchants engaged in buying such produce since it would require them to keep on hand large sums of actual cash. This would result in revolutionizing the custom of merchants in such matters."

"It is a general, well-established principle that no one can transfer a better title than he has. No person can by his sale"—in 135 N.E. the preceding word "sale" is left out—"transfer to another the right of ownership in a thing in which he has not the right of property, except in the case of cash, bank bills, checks, and notes payable to bearer, or transferable by delivery in the ordinary course of business to a person taking the same *bona fide* and paying value for it. (Citing authorities.) The purchaser of property wrongfully taken by his vendor from the true owner can obtain no more perfect title to the property purchased than the vendor himself possessed, and an innocent purchaser without notice of a wrongful taking can acquire no better title to property than his vendor had. 24 R.C.L. 374." *Drain v. State Bank,* 303 Ill. 330, 135 N.E. 780 (1922).

Our General Assembly has added another exception to the general rule by exempting therefrom Warehouse Receipts. G.S. 27-51.

"It is an elementary principle of the common law as to sales that one cannot transfer title to property in which he has no title or interest." *Coolidge v. Trust Co.,* 259 Mass. 515, 156 N.E. 701 (1927); *Hooper v. Britt,* 35 Ala. App. 612, 51 So. 2d 547 (1951).

Dobbins v. Martin Buick Co., 216 Ark. 861, 227 S.W. 2d 620 (1950), follows the general rule. The Martin Buick Company of Cookeville, Tennessee, brought this action of replevin to recover an automobile to which it claimed title. Title was also claimed by Dobbins. One Atkinson on 5 February, 1948, purported to purchase this car from the Buick Company at its place of business in Tennessee, and fraudulently gave a check on a nonexistent account in a Georgia bank in payment for the car. Atkinson, at once, took possession of the car, and the Buick Company gave Atkinson an invoice identifying the car and stating the price $1,825.00. Nothing in the invoice indicated that the price had been paid. No bill of sale was issued to Atkinson, it being the Buick Company's purpose to execute a bill of sale only after the cheque had cleared. The

cheque was worthless. Atkinson immediately brought the car to Arkansas, and secured, on 9 February, 1948, an Arkansas State license and a certificate of registration. Shortly thereafter Atkinson sold the car to the Baker Automobile Company, automobile dealers at Searcy, Arkansas, who bought it in good faith and for value in reliance upon the invoice and the Arkansas certificate of registration bearing Atkinson's name. The Baker Automobile Company in turn sold the car to Dobbins, who was likewise an innocent purchaser. Those facts were established by stipulation of the parties. It was held that the law of Tennessee governed as to the purported sale of the car, and that under the Tennessee law the title remained in the defrauded seller. Dobbins contended that the Martin Buick Company was estopped to deny that the Baker Automobile Company and subsequently himself acquired good title to the car by the *bona fide* purchase from Atkinson. It was held that whether such an estoppel is to be applied against the Martin Buick Company is to be determined by the law of Arkansas. The Court concluded as follows: That under the law of Arkansas the Martin Buick Company did not vest Atkinson with such indicia of title to the car as to estop the Martin Buick Company from setting up its own valid title against an innocent purchaser of Atkinson's nonexistent title.

Our authorities which we have been able to find, while not on all fours, seem to support the general rule. In *Jones v. Zollicoffer,* 4 N.C. 645, at 660, the Court said: "When a bill, therefore, is filed by one who has the legal title, but who comes into equity because he cannot be *completely* relieved at law, it is no defense for the defendant to plead that he is an innocent purchaser for a valuable consideration without notice, because the complainant is not seeking to disarm him at law, the defendant at best having but a *wooden* sword, incapable of protecting him against the assault of a legal claimant."

In *Lance v. Butler,* 135 N.C. 419, 47 S.E. 488, it was held that where one who was an agent for the sale of goods for another allowed them to be mixed with his stock of goods and then gave a mortgage on the entire stock, the mortgagee obtained no better title than the mortgagor had. See also *Bank v. Winder, supra.*

There is no plea of estoppel in the answer, nor evidence to support such plea, if it had been made. Therefore, if the jury finds from the evidence that the transaction between the plaintiff and Junghans was a cash sale and that Junghans paid the purchase price for the car with a worthless check, then no title passed to Junghans and the legal title remained in the plaintiff. In that event these interesting questions arise on the pleadings and the evidence, which are not before us for decision: First, are the defendants innocent purchasers for value and without notice, and if so, is that a defense against the plaintiff's legal title, according to the laws of

the State of Pennsylvania, where the defendants made their contract with Mozes Autos and received delivery of the car; second, if the defendants are innocent purchasers for value and without notice, and that is not under the laws of the State of Pennsylvania a defense against plaintiff's legal title, or if the defendants are not innocent purchasers for value and without notice, were Goldberg, Lee Motors and Mozes Autos, or either of them, innocent purchasers for value and without notice of this car, and if so, is it a defense against the plaintiff's legal title in the states or state where such sales, or any one such sale, was executed; third, if the defendants can prevail in any of these contentions, is it against the *lex fori* to enforce such a defense against plaintiff's legal title to the car? According to Junghans' testimony the executed sale of the car by him to Goldberg occurred in the District of Columbia, according to Goldberg's testimony in Maryland. The defendants allege in their answer that they are innocent purchasers for value and without notice. The burden is upon them to establish such defense. Inferences can be drawn from the evidence that neither defendants, nor Goldberg, nor Lee Motors, nor Mozes Autos are *bona fide* purchasers for value and without notice, therefore, a peremptory instruction that the defendants or Goldberg or Lee Motors or Mozes Autos were *bona fide* purchasers for value and without notice under the evidence in this case would be error. *Price v. Goodman, supra;* 11 Am. Jur., Conflict of Laws, Sec. 140; *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892.

The issues submitted to the jury are not determinative of the controversy between the parties and the judgment signed is erroneously entered. *Bank v. Broom Co.,* 188 N.C. 508, 125 S.E. 12; *Braswell v. Johnston,* 108 N.C. 150, 12 S.E. 911. For the reasons stated above the court's peremptory instruction to the jury on the first issue was error, and the plaintiff's Assignment of Error No. 6 to such charge is sustained.

Under the facts of this case, G.S., Sections 44-38.1, 47-20 and 47-23 have no application.

It is not necessary to consider the other assignments of error as to the admission of evidence, for they may not arise when the case is tried again.

The defendant Wood testified he received the car on 8 January, and sold it 10 January. The replevin bond is not in the record, but in the stipulation it is stated "defendants' replevin bond need not be printed as a part of the record on case on appeal." In paragraph 6 of the defendants' answer it is stated: "It is admitted that the defendants are in possession of said automobile and that they refuse to turn it over to the plaintiff."

There must be a new trial, and it is so ordered.

New trial.

MRS. MAMIE L. GARNER v. JESSE T. PITTMAN AND EDWARD E. SIPE.

(Filed 18 March, 1953.)

1. Negligence § 17—

In an action for negligence, plaintiff must show that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of the injury or damage, which is a cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was likely under all the facts as they existed.

2. Negligence § 19a—

What is negligence is a question of law, and when the facts are admitted or established, it is for the court to determine whether defendant was negligent and, if so, whether such negligence was the proximate cause or one of the proximate causes of the injury.

3. Negligence §§ 19b (1), 19d—

A demurrer to the evidence is properly sustained in negligence cases when all the evidence taken in the light most favorable to plaintiff fails to show any actionable negligence on the part of defendant, or when it clearly appears that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person.

4. Negligence § 7—

Foreseeability is the test of whether the intervening act of a third person is such new and independent cause as to insulate the negligence of the original wrongdoer, since if the original wrongdoer could reasonably foresee the intervening act and resultant injury, the sequence of events is not broken by a new and independent cause.

5. Automobiles § 8a—

Even in the absence of statutory requirements, the operator of a motor vehicle must exercise that degree of care which an ordinarily prudent man would exercise under similar circumstances, and in the exercise of such care it is his duty to keep his vehicle under control and keep a reasonably careful lookout so as to avoid collision with persons and vehicles on the highway.

6. Automobiles § 8i—

The driver of a vehicle entering a public highway from a private road or drive is required to look for vehicles approaching on the highway and to look at a time when his precaution may be effective, and to yield the right of way to vehicles traveling on the highway, G.S. 20-156 (a). Operators of vehicles on the highway, in the absence of anything that gives or should give notice to the contrary, may assume, and act upon the assumption, even to the last moment, that an operator entering the highway from a private road or drive will yield the right of way as required by law.

7. Automobiles §§ 18d, 18h (4), 21—In guest's action, nonsuit of defendant whose negligence was not proximate cause is correct.

Plaintiff's evidence tended to show that she was a passenger in a car that was being driven from a private drive midway a warehouse building into a highway, that the driver of the car crossed the street slightly diagonally in order to turn left into the stream of traffic on the far side of the highway, that he did not see the car driven by the other defendant approaching along the highway from his right until it was almost upon him, although his view in the direction from which it approached was clear and unobstructed for 200 or 300 feet, and that the other car crashed into the right side of his car. *Held:* Even conceding that the driver of the other car was exceeding the speed restrictions applicable, plaintiff's evidence discloses that the negligence of the driver of the car in which she was riding, in failing to yield the right of way to the vehicle traveling along the highway was the sole, efficient proximate cause of the collision, and that the driver of the other car was not under duty to anticipate such negligence, and therefore such negligence insulated any negligence of the driver of the other car, and his motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Stevens, J.*, at September Term, 1952, of JOHNSTON.

Civil action to recover for personal injury resulting allegedly from actionable negligence of defendants.

The action arises out of a collision between an automobile, a Hudson 4-door sedan, owned and operated by defendant Jesse T. Pittman, son-in-law of plaintiff, and in which she was riding, and an automobile, a Buick with attached two-wheel trailer on which a boat was loaded, operated by defendant Edward E. Sipe, accompanied by his wife and two children. The collision occurred about 1 o'clock on the afternoon of 11 August, 1950, on Market Street in the town of Smithfield, North Carolina. At the time the Sipe automobile was traveling east and in the line and lane of eastbound traffic, and the Pittman automobile had just emerged from a private driveway about midway of a tobacco warehouse, known as the Perkins Warehouse, located on the north side of Market Street between First and Second Streets, and was proceeding across the street, turning to left, that is, east, to get into the line and lane of eastbound traffic. The tobacco warehouse is on the street, "only the sidewalk is between it and the street." Market Street is in estimate of the chief of police "about 40 feet or more wide in front of the Perkins Warehouse," and, in opinion of defendant Pittman "about 60 feet wide." There was an unobstructed view from the warehouse along Market Street in westerly direction for 200 to 300 feet to the bridge over Neuse River. Cars were parked along Market Street on the south or right-hand side of the eastbound traffic.

As against defendant Pittman plaintiff alleges in her complaint these acts of negligence, as a proximate cause of her injuries: That he attempted to drive his automobile out of the warehouse into Market Street,

at a time when he saw, or by the exercise of due diligence, should have seen the automobile of defendant Edward E. Sipe approaching at a fast and unlawful rate of speed along Market Street, and drove same into the path of the Sipe automobile, and that he entered the street without blowing his horn or giving other proper and sufficient signal as he was required to do under the circumstances and conditions then existing and in accordance with the laws of the State.

And as against defendant Sipe, plaintiff alleges in her complaint these acts of negligence, as a proximate cause of her injuries: That he operated his automobile in the business section of the town of Smithfield on Market Street at an unlawful and reckless speed of approximately fifty miles per hour when, and immediately before striking the automobile in which she was riding, he saw or by the exercise of due diligence should have seen that this automobile was entering Market Street from a warehouse into the path of his automobile, and failed to use his brakes or otherwise stop, and failed to give any signal, by horn or otherwise, that he was approaching.

Upon the trial in Superior Court plaintiff testified as a witness in her own behalf, and offered the testimony of defendants Jesse T. Pittman and Edward E. Sipe and the testimony of the Chief of Police of the town of Smithfield, North Carolina.

Plaintiff, as a witness for herself, testified: ". . . I was riding on the front seat with Jesse Pittman. He drove right out of the warehouse across the street. He did not stop his automobile between the time he left the warehouse and the time the wreck occurred . . . When Jesse Pittman got into the street he tried to turn east to go home. He had crossed the center of the street before he turned east. . . . I did not see any automobile coming from the east. After we got into the middle of the street I saw an automobile coming from towards the river traveling east. It was about 100 feet from us and was coming at a speed of about 50 miles per hour. That automobile came on and whirled to its right a little and then cut back and struck the Hudson automobile on its side where I was sitting. It hit both doors . . . Before it struck our car it slowed up some and was traveling about 30 or 35 miles per hour when it hit our car."

Then, on cross-examination, plaintiff continued her testimony: ". . . I didn't look to the left, but I looked to my right toward the river. When I saw the car it was on this side of the river bridge. Jesse's car was up in the middle of the street . . . and I said I guessed when I saw the car it was about 100 feet away . . . on this (east) side of the river . . . I watched it until it hit us, but I didn't say anything to Jesse Pittman . . . I think we had just crossed over the center of the street when we were struck . . . Jesse Pittman did not go out of the warehouse straight across

the street, but more to his left or east and when he got across the middle of the street he turned to his left. I did not have time to tell Jesse Pittman that some other car was coming from the west and I don't know which way he looked. I looked west toward the bridge and saw Mr. Sipe coming toward us . . . There were some cars parked on the street on his right. Jesse Pittman went something like the length of his car after the collision . . . He did not blow his horn when he drove into the street . . . he didn't put his brakes on until about the time we hit, I suppose . . ."

Defendant Jesse Pittman, called as a witness by plaintiff, testified in pertinent part: ". . . I drove out of the front of the warehouse on Market Street. I did not see any automobile coming along Market Street from toward Raleigh. . . . When I first saw the automobile driven by Mr. Sipe it was coming into the side of me and was between me and the curbing. I have no idea as to the speed it was traveling when I first saw it, or where it came from. When I first came out of the warehouse there was a car coming to my left and I stopped while it went by. I looked both ways and did not see any car coming either way and pulled out and got started up and was going from second gear into high gear. . . . By that time Mr. Sipe came around from where there were not any cars and came slanting into me."

Then this witness continued on cross-examination: ". . . I made a turn to the east when I got into the street. I had traveled about 90 feet from the warehouse before I saw the Sipe car coming from my rear. It came between me and my right-hand side. I first came out of the warehouse and stopped. There was a line of cars on my right-hand side parked against the curbing and two or three cars to my left. I was straight in front of the driveway about 90 feet away and that was when I saw the Sipe car. From the time I made my turn I did not stop. I slowed down because the car spit back through the carburetor. . . . There was nothing to obstruct my view from the east and west."

And on cross-examination by attorney for defendant Sipe, the witness continued: ". . . When I came out of the warehouse I could see the Neuse River bridge about 100 yards away . . . with cars parked on both sides east and west traffic had room to pass. I stopped before entering Market Street and waited for one car to pass going west. Then I did not go into Market Street until I looked both ways and I could not see anything between me and the river bridge. There was nothing to obstruct my view. No cars were coming from the west until Mr. Sipe's car came by and I had not seen it because it was not between me and the river bridge. It struck my car in the center on the right side. My car was struck by the left front fender of the Sipe automobile. I came out in front of the warehouse and did not make a gradual left turn. My car

stopped . . . about 20 feet away. I went back to where the Sipe car was near the warehouse . . . about 96 feet on this side of the warehouse. I said I did not see the Sipe car between me and the bridge . . . When I came out of the warehouse and entered Market Street and stopped my rear wheels were at the curb like it would be if I had driven up to the curb and parked, and I could see to the river bridge . . . I told Mr. Sipe I didn't see his car until the impact . . . When I went into Market Street there was no car approaching from the east within a distance of 100 feet from me."

Defendant Edward E. Sipe, called as a witness for plaintiff, testified in pertinent part: "I live in Schoolfield, Virginia, and on August 11, 1950, I was driving in Smithfield . . . When I came into Market Street . . . I saw the Pittman automobile just beyond the Buick building. When I first saw it, it was probably 150 feet away. It was over on the other side of the street coming out of the warehouse to my left and on the north side of Market Street. He looked like he was attempting to come into the street. His car was still, or approximately so. I had been trailing traffic into the edge of Smithfield for four or five miles and there was a car in front of me as I was coming into town 30 or 40 feet in front of me. Mr. Pittman stopped to let a car go by in front of him and then made his attempt to come out, and I blew my horn. He came out anyway and when he made his attempt and started to go, it looked like his car stalled or something before it came out and when he did get started I was too close to stop. I didn't hear him sound any horn and didn't see any signal. I did not see any car going west pass in front of him. The Buick place is almost across from the entrance to the Perkins Warehouse . . . Mr. Pittman came out on Market Street into my line of traffic, and his wheels did not get all the way across the middle of the street. The rear end of his automobile was not across the center line."

Then on cross-examination, this witness continued: "When I came to the other side of the river bridge I was traveling around 45 miles per hour pulling my boat and trailer. When I first saw Mr. Pittman I was traveling about 30 to 35 miles per hour, because the other cars in front of me had slowed down . . . He came out as though he was going to stop and then pulled on out. I did not turn to my right. Cars were parked along the street to my right. There was not enough room for me to swing out against the curb, cars were parked there. I had to stay in a direct line. I stayed directly in the lane of traffic. His car did not get all the way into the full line of traffic. If it had I would have hit the back bumper. At the time of the collision I was not going over 20 or 25 miles per hour. I had good brakes. My car skidded about half the length of the car or about 8 feet. I was right on him before I could stop . . . There was traffic ahead of me going in the same direction. Mr. Pittman

waited for the car ahead of me to pass. I blew my horn and he pulled out across this way at an angle in front of me and in my lane of traffic. The first impact was on the panel door just beyond the post of the door. The first impact on my car was on the left front fender . . . I . . . talked to Mr. Pittman and he said 'I didn't see your car.' He told me it was all his fault . . . The street was wet. My car stopped at the point of impact where the collision occurred."

And the Chief of Police testified in brief that on 11 August, 1950, along Market Street between First and Second Streets where the Perkins Warehouse is located about 75 per cent of the buildings are business buildings; that no speed limit markers have been posted in that section.

Motion of defendant Sipe entered at close of plaintiff's evidence for judgment as of nonsuit was allowed. Plaintiff excepted, and to judgment signed in accordance with the ruling of the court, plaintiff appeals to Supreme Court and assigns error.

Wellons, Martin & Wellons for plaintiff, appellant.
Shepard & Wood for defendant Sipe, appellee.

WINBORNE, J. When the evidence offered by plaintiff upon the trial in Superior Court, as revealed by the record of case on appeal, is taken in the light most favorable to her, we are of opinion that the case comes within the principles enunciated in *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239, and *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361, and is insufficient to require that an issue of negligence as to defendant Sipe be submitted to the jury. All the evidence offered by plaintiff manifests that defendant Pittman was negligent. Indeed, the uncontradicted evidence is that he admitted that "it was all his fault." If defendant Sipe were negligent, it is clear that it was insulated by the negligence of Pittman, and that his, Pittman's, negligence was the sole proximate cause of the collision. This conclusion finds support in *Harton v. Tel. Co.,* 146 N.C. 429, 59 S.E. 1022, and other cases cited in *Reeves v. Staley, supra,* at page 582.

In an action for recovery for injury to person or damage to property, resulting from alleged actionable negligence, the plaintiff must show: First, 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 plaintiff under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury or damage,—a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from

which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. See *Ramsbottom v. R. R.*, 138 N.C. 38, 50 S.E. 448; *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84, and numerous later cases.

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 to the feature of proximate cause," *Hoke, J.*, in *Hicks v. Mfg. Co.*, 138 N.C. 319, 50 S.E. 703; *Reeves v. Staley, supra,* and cases there cited.

In the case of *Lineberry v. R. R.*, 187 N.C. 786, 123 S.E. 1, 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." Again, in *Russell v. R. R.*, 118 N.C. 1098, 24 S.E. 512, it is stated that "Where the facts are undisputed and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether an injury has been caused by the negligence of one or the concurrent negligence of both of the parties."

Furthermore, it is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit: "1. When all the evidence taken in the light most favorable to the plaintiff fails to show any actionable negligence on the part of the defendant . . . 2. When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person . . ." *Smith v. Sink, supra,* and cases cited. See also *Reeves v. Staley, supra,* and cases cited. Also *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849, and *Clark v. Lambreth,* 235 N.C. 578, 70 S.E. 2d 828.

"Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act. That is to say, if the original wrongdoer could reasonably foresee the intervening act and resultant injury, then the sequence of events is not broken by a new and independent cause, and in such event the original wrongdoer remains liable," as expressed by *Brogden, J.*, in *Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555. See *Reeves v. Staley, supra,* and cases cited.

Too, it is a rule of law even in the absence of statutory requirements, 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. And 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 highways. 5 Am. Jur., Automobiles, Sections 165, 166, 167.

Also it is provided by statute, G.S. 20-156 (a), that "the driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway." And in order to comply with this statute, the driver of such vehicle is required to look for vehicles approaching on such public highway, and this "is required to be done at a time when his precaution may be effective," as expressed by *Stacy, C. J.*, in *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598, citing cases.

Likewise, in *Matheny v. Motor Lines, supra,* involving a motor vehicle collision at an intersection, in opinion by *Devin, C. J.*, 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."

Moreover, the operator of an automobile traveling upon a public highway in this State is under no duty to anticipate that the driver of an automobile entering the public highway from a private road or drive will fail to yield the right of way to all vehicles on such public highway, as required by the statute, G.S. 20-156 (a), 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, even to the last moment, that the driver of the automobile so entering the public highway from a private road or drive will, in obedience to the statute, yield the right of way. See *Reeves v. Staley, supra.*

Applying these principles to the evidence in the case in hand, it is clear that defendant Pittman, driver of the automobile in which plaintiff was riding, in entering Market Street, a public highway, from a private road or drive, failed to "yield the right of way" to the automobile of defendant Sipe, as it was his duty to do, G.S. 20-156 (a), when he saw, or by the exercise of due care, would have seen it approaching on Market Street. All the evidence shows that the view from the entrance to the private road or drive to the river bridge, the direction from which the automobile of defendant Sipe was approaching, was unobstructed for a distance of 200 to 300 feet. Yet defendant Pittman stated to defendant Sipe at the time, and testified on the witness stand that he did not see the Sipe automobile until the moment of impact. Plaintiff saw it when it was 100 feet away. The evidence of the conduct of defendant Pittman makes him guilty of negligence as a matter of law. Such negligence, if the sole proximate cause of the injury and damage of which plaintiff complains,

will bar recovery by plaintiff from Sipe, even though she be only a guest in the Pittman automobile. See *Powers v. Sternberg, supra; Miller v. R. R.,* 220 N.C. 562, 18 S.E. 2d 232; *Reeves v. Staley, supra.* The defendant Sipe was under no duty to anticipate that defendant Pittman, in entering the public highway from a private road or drive would fail to yield the right of way to his automobile approaching on the public highway; and in the absence of anything which gave or should give notice to the contrary, he was entitled to assume and to act on the assumption, even to the last moment, that defendant Pittman would not only exercise ordinary care for his own safety as well as that of plaintiff riding in his car, but would act in obedience to the statute, and stop before entering the line and lane of motor vehicles then traveling on the street. As in *Reeves v. Staley, supra,* the evidence points to the emergency caused by the failure of defendant Pittman to yield the right of way and stop. Such a situation was not reasonably foreseeable by defendant Sipe. All the evidence further shows that Sipe was operating his automobile on his right-hand side of the street before and at the time of the collision.

Plaintiff contends, however, that there is evidence tending to show that the speed of the Sipe automobile was fifty miles per hour, reduced to 30 or 35 miles per hour, and, therefore, under the circumstances, unlawful. Even so, it is clear from the evidence that its speed would have resulted in no injury or damage to plaintiff but for the negligent act of defendant Pittman. See *Cox v. Freight Lines,* 236 N.C. 72. Hence, the proximate cause of the collision must be attributed to the palpable negligence of Pittman, as in *Butner v. Spease, supra,* and *Reeves v. Staley, supra.*

The cases relied upon by plaintiff are distinguishable.

The judgment below is

Affirmed.

FLOYD GREENE, ADMINISTRATOR OF THE ESTATE OF NORMA LEE GREENE, DECEASED, v. MITCHELL COUNTY BOARD OF EDUCATION AND STATE BOARD OF EDUCATION.

(Filed 18 March, 1953.)

1. State § 3a—

The Industrial Commission is vested with jurisdiction under the State Tort Claims Act to hear claims against the State for personal injuries sustained by any person as a result of negligence of a State employee while acting within the scope of his employment. G.S. 143, Art. 31.

2. State § 3c—

Where an appeal from an award made by the Industrial Commission under the State Tort Claims Act is not supported by any exception, the appeal presents the single question whether the facts found by the Commission support the award, and does not challenge the sufficiency of the evidence to support the findings of fact or any one of them.

3. Same—

The findings of fact of the Industrial Commission in a proceeding under the State Tort Claims Act are binding upon appeal when supported by competent evidence. G.S. 143-293.

4. Automobiles § 17—

When a motorist sees, or by the exercise of due care should see, a child or children on or near the highway he must immediately recognize the peril attendant their immaturity and must proceed in such manner and at such speed as is reasonably calculated to avoid striking such child or children.

5. Schools § 5½—

The duty of a motorist to exercise a high degree of caution when he sees, or by the exercise of ordinary care should see, children on or near the highway applies with particular emphasis to the operator of a school bus transporting children to their homes after school, and such driver is required by the rule of the N. C. Board of Education to supervise their activities from their discharge from the bus until they have crossed the highway in safety or are otherwise out of danger, and not to start the bus until he sees them to be out of danger.

6. Same: State § 3b—Evidence held to sustain finding of Industrial Commission that school bus driver was guilty of negligence proximately causing death of child who had alighted from bus.

Evidence tending to show that a driver of a school bus stopped for five children to alight, three of whom were to cross the road on the way to their homes, and drove off in a hasty manner as the last one alighted, and that immediately after the bus had moved off one of the children was found near the center of the road mortally injured, and that no other vehicle had passed, *is held* sufficient to sustain the conclusion of the Industrial Commission that the driver of the bus was guilty of negligence and that such negligence was the proximate cause of the child's death, and findings as to just where the child was standing when struck or whether she was in a position to have been seen by the bus driver are minor details having no substantial bearing upon the issue, since the negligence of the driver does not rest upon whether he could have seen the child in a position of peril in time to have avoided colliding with her.

7. State § 3c—

Where in a proceeding under the State Tort Claims Act, the Industrial Commission has found all essential facts necessary to support its award, appellant's motion to remand for additional facts is untenable.

8. Same—

On appeal to the Superior Court from award of the Industrial Commission under the State Tort Claims Act, whether the court should interrupt

the hearing and call in the court reporter so that appellants might make specific exceptions to certain findings of fact and conclusions of law of the Commission, rests in his sound discretion, it being the duty of appellants to enter exceptions to the findings of the Commission prior to the hearing in the Superior Court.

APPEAL by defendants from *McLean, Special Judge,* September Term, 1952. Affirmed.

Claim for wrongful death under the State Tort Claims Act of 1951.

On 20 April 1951 plaintiff's intestate, a child of seven years of age, was a passenger on a school bus being operated by one Dean Peake, assistant or substitute school bus driver. Peake was taking the children home after school, and this was his second trip. When he reached a point opposite the home of plaintiff's intestate, he stopped the bus on the right-hand side of the road and five children, including plaintiff's intestate, got off. Three, including plaintiff's intestate, had to cross to the left-hand side of the road to go home.

Plaintiff's intestate alighted first and started around the front of the bus to cross to the left. Peake testified the last time he saw her she was about one foot to the left of the left front fender of the bus. Other witnesses testified the bus moved off so quickly they did not have time to pass in front and they did not know whether the deceased had at the time cleared the front of the bus. Just as soon as the last child left the bus, Peake released his clutch and closed the bus door with the mechanical arm "with approximately simultaneous motions," at the same time cutting or turning his bus to the left towards the traveled portion of the gravel road.

As the bus drove off, one of the children saw something on the bus he thought was a coat, and just as soon as the bus left, the deceased was seen prostrate in the road, slightly to the left of the center. She had received injuries which caused her death.

From the time the bus stopped to the time deceased was found fatally injured, no other vehicles had passed. There was nothing on the bus to indicate it came in contact with the body of the deceased.

Theretofore, when the bus was stopped, it would wait until all the children crossed the road. "That's what we ordinarily did, cross the road and got in the path before the bus pulled out. Before this time, the bus driver would stop and put out the flag until we crossed the road and until we got across the creek going up the road to our house."

The Industrial Commission found all the essential facts, including the finding and conclusion:

"9. That it was the duty of the said Dean Peake to ascertain that the children who had been discharged from his bus were in positions of safety

before proceeding, and in failing so to do he was negligent; that he drove away in a hasty manner while simultaneously closing the bus door, without keeping a proper lookout and without using due caution and circumspection, and in so doing struck and killed Norma Lee Greene; that his negligence was the proximate cause of the injury and death of the said Norma Lee Greene and that there was no contributory negligence on her part." Thereupon it made an award in the sum of $6,000. Defendants appealed.

When the cause came on for hearing in the Superior Court the judge below entered judgment affirming the award and defendants excepted and appealed.

W. E. Anglin for plaintiff appellee.

Attorney-General McMullan, Assistant Attorney-General Love, and Powell and White, Members of Staff, for defendant appellant.

BARNHILL, J. Ch. 1059, Session Laws 1951 (codified as General Statutes Ch. 143, art. 31, supplement of 1951) provides for the payment of damages for personal injuries sustained by any person "as a result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted." Recovery by any one claimant is limited to $8,000, including medical and other expenses. G.S. 143-291.

The Industrial Commission is vested with jurisdiction to hear claims arising under the Act, and its findings of fact are conclusive if there is any competent evidence to support them. G.S. 143-293.

While defendants in their application for a review by the full Commission of the award made by the hearing commissioner assigned certain errors on the part of the hearing commissioner, they neither excepted to nor assigned error in the award made by the full Commission. Neither did they except to the award entered. They were content to give written notice of their appeal to the Superior Court.

At the hearing in the court below they, through counsel, moved to remand for "(1) A specific hearing (*sic*) as to the specific acts of negligence complained of; (2) a finding as to where Norma Lee Greene, deceased, was standing at the time of the bus' departure, and how long she had been standing there, and (3) whether she was in a position to have been seen by the driver of the bus." They likewise moved for judgment of nonsuit and excepted to the refusal of the court to interrupt the hearing and send for the court reporter so that they might, at that time, enter exceptions to specific findings of fact and conclusions of law of the Industrial Commission. They likewise moved the court to strike the Commis-

sion's finding of fact No. 9. The appeal to this Court is based on the exceptions to the rulings of the court below made on these motions entered at the hearing.

Since the appeal of the defendants from the Industrial Commission to the Superior Court was unsupported by any exception, it amounted to nothing more than a general exception to the decision and award of the Commission. It was insufficient to challenge the sufficiency of the evidence to support the findings of fact of the Commission or any one of them. It 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; *Greene v. Spivey*, 236 N.C. 435; *In re Sams*, 236 N.C. 228.

The facts found by the Commission are fully supported by the evidence and are therefore, under the terms of the statute, binding on us. G.S. 143-293. They sustain the conclusion of the Commission that the death of plaintiff's intestate was proximately caused by the negligence of an employee of defendants, State agencies, in the course of his employment, and the award was within the limit prescribed by statute. G.S. 143-291.

We have repeatedly held that the presence of children on or near a highway is a warning signal to a motorist. He must recognize that children have less capacity to shun danger than adults; are more prone to act on impulse, regardless of the attendant peril; and are lacking in full appreciation of danger which would be quite apparent to a mature person. When, therefore, he sees, or by the exercise of due care should see, that children are on the highway, he must immediately bring his vehicle under control and, in the exercise of ordinary care, proceed in such manner and at such speed as is reasonably calculated to enable him to avoid striking such child or children. *Hawkins v. Simpson*, 237 N.C. 155; *Hughes v. Thayer*, 229 N.C. 773, 51 S.E. 2d 488; *Sparks v. Willis*, 228 N.C. 25, 44 S.E. 2d 343; *Edwards v. Cross*, 233 N.C. 354, 64 S.E. 2d 6; *Yokeley v. Kearns*, 223 N.C. 196, 25 S.E. 2d 602; *Smith v. Miller*, 209 N.C. 170, 183 S.E. 370; *Moore v. Powell*, 205 N.C. 636, 172 S.E. 327.

This duty to exercise a high degree of caution in order to meet the standard of care required of a motorist, *Rea v. Simowitz*, 225 N.C. 575, 35 S.E. 2d 871, when he sees or by the exercise of ordinary care should see children on a highway applies with peculiar emphasis to the operator of a school bus transporting children to their homes after school. His passengers are in his care and he knows that many of them must cross the road after they alight from the bus. It is his duty to see that those who do alight are in places of safety before he again puts his vehicle in motion.

The rules adopted by the N. C. Board of Education governing public school transportation as they relate to the operation of school buses ex-

pressly provide that the driver of a school bus must "supervise the activities of children discharged from the bus until they have crossed the highway in safety or are otherwise out of danger" and "shall not start the school bus until pupils are seen to be out of danger." Rules, Regulations and Laws Governing Public School Transportation in North Carolina, p. 19, G.S. 115-19.

Here five children got off the bus at the same time and place. Three of them had to cross over to the left side of the road to get to their homes. Ordinarily the bus remained stationary until they had reached the path or road which led to their homes. On this occasion the bus driver "pulled out" as soon as the last child had alighted. "The little girl's brother hadn't started more than a step or two in front of the bus, and he pulled off. We didn't have a chance to go. I didn't make more than one step until he pulled out." He "drove away in a hasty manner while simultaneously closing the bus door." Just as soon as the bus moved off, the deceased was found near the center of the road, mortally injured. No other vehicle had passed.

Certainly this and the other evidence in the record will support—indeed compels—the inference that the bus collided with the little girl and inflicted the injury which caused her death. It is apparent it "sideswiped" her as it moved off.

It is equally clear that the unfortunate occurrence was proximately caused by the negligence of the bus driver. If he had merely taken time to glance to his left he could have ascertained that the little girl had not crossed the road. He says he did look but did not see her. If so, this put him on notice that she was still somewhere about his bus, out of his sight. Yet he made no effort to ascertain her whereabouts before he put his bus in motion. Such lack of due care toward a child of tender age under the circumstances leaves defendants in poor position to contest the issue of negligence.

So far as this record discloses, there was no testimony of any conduct on the part of the deceased which evidenced any want of due care on her part. Hence we need not discuss or decide whether a child of her age could by her conduct bar her right of recovery.

The motion to strike paragraph 9 of the findings of fact is without merit. It is true this paragraph incorporates a conclusion of law with findings of fact. Yet the facts therein found as well as the conclusion of law are essential to a final determination of the rights of the parties and we find ourselves in full accord with the contents thereof. The findings of fact therein contained are supported by the evidence and the conclusion is a correct statement of the law.

Likewise the motion to remand for further findings is untenable. The Commission found all the essential facts. While it did not find just where

the child was standing when she was struck by the bus or just what part of the bus struck her or whether she was in a position to be seen by the bus driver, these are, on this record, mere minor details which have no substantial bearing on the issues of fact the Commission was required to answer. Negligence here does not rest on the fact the bus driver, by the exercise of ordinary care, could have seen the child in a position of peril in time to stop and avoid colliding with her. It lies in the fact that he, having discharged the children from the bus, failed to exercise proper care to ascertain that they and each of them "had crossed the highway in safety" or were "otherwise out of danger." Hence the cases cited and relied on by defendants are not in point.

If the defendants desired to enter exceptions to the findings of fact made by the Commission, they should have been filed prior to the hearing in the Superior Court. Whether the judge should interrupt the hearing and call in the court reporter, at that late date, "so that specific exceptions could be taken to specific findings of fact and conclusions of law of the Industrial Commission" rested in his sound discretion. Therefore, the denial of the motion of defendants cannot be held for prejudicial error. *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869.

For the reasons stated the judgment entered in the court below is Affirmed.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF DUNCAN CAMERON WADDELL, JR., DECEASED, v. VAUGHN A. WADDELL, WIDOW; MARY WADDELL JORDAN, WIDOW; KATE WADDELL, UNMARRIED; FRANCIS C. JORDAN; MARY JORDAN, UNMARRIED; JANET JORDAN, UNMARRIED; BETTY JORDAN JACOBS AND HER HUSBAND, R. L. JACOBS; THORNTON JORDAN, A MINOR; RALPH E. LEE, STEPHEN R. ADAMS; THE UNIVERSITY OF NORTH CAROLINA; ALL BODILY HEIRS OF FRANCIS C. JORDAN AND MARY JORDAN NOT NOW IN ESSE; LYNN BARNARD JACOBS, A MINOR; ALL UNKNOWN BODILY HEIRS OF FRANCIS C. JORDAN AND MARY JORDAN, NOW LIVING.

(Filed 18 March, 1953.)

1. Executors and Administrators § 29—

When testator stipulates in his will the compensation to be paid his executor, such provisions are binding on all interested parties.

2. Same—

In the absence of a provision in the will fixing the compensation of the executor, it is the prerogative of the clerk of the Superior Court, acting as probate judge, to make an allowance to the executor, by way of commissions, within the statutory maximum of 5% of receipts and disbursements,

for services rendered in the settlement of the estate, taking into consideration the time, responsibility, trouble and skill involved therein. G.S. 28-170.

3. Same—

Where the will provides that the executor is not to receive more than 2½% on receipts nor more than 2½% on disbursements, the will does not fix or purport to fix the compensation to be paid the executor but merely fixes a maximum percentage on receipts and disbursements in lieu of that fixed by statute, to guide the clerk in making an allowance to the executor, and in doing so the clerk must of necessity construe the word "receipts" as used in the will.

4. Same—

An executor has no right to determine and charge the compensation to be received by him.

5. Wills § 31—

When the meaning of any part of a will is a subject of controversy, it is the prerogative of the court to construe the contested provision and declare the true meaning thereof to effectuate the intent of the testator as expressed in the instrument.

6. Same—

In ascertaining the intent of testator, the will is to be considered in the light of the conditions and circumstances existing at the time the will was made.

7. Same—

Ordinarily, words used in a will are to be construed as having the ordinary, natural, and customary meaning given them at the time of their use, unless it clearly appears that they were used in some other sense.

8. Same—

If words at the time of their use in a will had a well known legal or technical meaning, they are to be so construed unless the will itself discloses that another meaning was intended.

9. Appeal and Error § 40d—

The rule that, nothing else appearing, it will be presumed that the judge found facts sufficient to support the judgment entered, does not apply when it is clearly apparent upon the record that the court acted under an erroneous conception of the applicable law.

10. Appeal and Error § 1—

In the absence of a ruling by the lower court upon a particular matter, the Supreme Court on appeal may not determine the question, since in such instance it has no original jurisdiction.

DEVIN, C. J., took no part in the consideration or decision of this case.

APPEAL by defendant Kate Waddell from *Gwyn, J.*, November Term, 1952, BUNCOMBE. Error and remanded.

This action was originally instituted to obtain the instructions of the court in respect to certain questions which had arisen in the course of the administration of the estate of plaintiff's testator. It has been before this Court on two prior appeals. (See 234 N.C. 34, 234 N.C. 454). This appeal relates only to the commissions by way of compensation to be allowed the executor for its services.

The estate of testator, the total value of which exceeded one and one quarter million dollars, consisted very largely of municipal, county, state, and U. S. bonds and corporate stocks. In addition there was certain personal property of a relatively minor value. The executor received in cash, dividends collected, etc., $116,881.41 and disbursed $453,205.08, a part of which was the proceeds of assets sold in the course of the administration. The total value of choses in action, personal property, and cash (other than from the sale of assets) plus the disbursements totals $1,736,415.98.

In ITEM SIXTEEN of his will the testator provides that: "My Executor and Trustee is not to receive more than (2½%), two and one half per cent on receipts, nor more than (2½%), two and one half per cent on disbursements." The executor filed its final account in which it claimed credit for compensation equal to 2½% of the value of all personal property received and 2½% of total disbursements. In addition, 2½% of receipts and disbursements of income from real and personal property during administration in the sum of $2,757.04 was claimed. The summary schedule of commissions charged contains the following: "Commission—2½ x $1,736,415.98 = $43,410.39, per will." And the account of expenditures includes this item, to wit: "Wachovia Bank & Trust Co., 2½% on receipts and expenditures of personal property ($1,736,415.98), as per will $43,410.39."

Beneficiaries appeared before the clerk and objected to the claim or credit for compensation. The clerk approved the account as filed. The beneficiaries excepted and appealed to the judge of the Superior Court. Thereafter the plaintiff filed a motion in this cause, praying a formal approval of its final account.

At the hearing in the court below the motion in this cause and the appeal from the clerk were consolidated for hearing. The court, upon consideration of the motion and appeal, concluded that it had jurisdiction to treat the motion "as a petition praying for an account and settlement of said estate as authorized by General Statutes, Section 28-165," and entered its order dismissing the appeal from the clerk and approving the account filed. Kate Waddell, one of the beneficiaries under the will, excepted and appealed.

Bernard, Parker & McGuire for plaintiff appellee.
Andrew Joyner, Jr., for defendant Kate Waddell, appellant.

BARNHILL, J. Whether this action was open for a motion for an account and settlement of testator's estate under G.S. 28-165 is not presented for decision. There was no objection or exception to the procedure adopted by the court below and, in any event, the material questions at issue were presented by the appeal from the clerk.

The objections and exceptions of appellant to the final account of plaintiff executor before the clerk and in the court below challenge both the reasonableness of the amount of commissions allowed plaintiff and the basis upon which the commissions were allowed. These exceptions raise two material questions for the clerk, in the first instance, and the judge, on appeal, to decide, to wit: (1) What is the meaning of the word "receipts" as used in ITEM SIXTEEN of the will limiting the amount of commissions to be paid the executor, and (2) what amount should be paid to plaintiff in compensation for its services in settling the estate of the testator?

A testator may stipulate in his will the compensation to be paid the person appointed executor with power to settle his estate. When this is done the provisions of the will are binding on all interested parties, *Lightner v. Boone,* 221 N.C. 78, 19 S.E. 2d 144. But an executor has no right to fix and determine the compensation to be received by him. In the absence of a provision in the will fixing the compensation of the executor, it is the prerogative of the clerk of the Superior Court, acting as probate judge, to make an allowance to an executor, by way of commissions, for services rendered in the settlement of the estate committed to his care, in no event, however, to exceed 5% of receipts and disbursements. And in determining the amount to be allowed, the clerk must "consider the time, responsibility, trouble and skill involved in the management of the estate." G.S. 28-170; *Grant v. Reese,* 94 N.C. 720; *Bank v. Bank,* 126 N.C. 531; *In re Hege,* 205 N.C. 625, 172 S.E. 345.

Here the will does not fix or purport to fix the compensation to be paid testator's executor as compensation for services in settling his estate. It merely fixes the maximum percentage on receipts and disbursements at 2½%. It was, therefore, the duty of the clerk to make an allowance to plaintiff for services rendered as executor, subject to the maximum limitation stipulated in the will rather than the maximum fixed by statute. G.S. 28-170; *Lightner v. Boone, supra.*

But in performing this duty it was necessary for the clerk to consider, determine, and abide by the meaning of the word "receipts" as used by the testator in ITEM SIXTEEN of his will.

A will, as to its dispositive provisions, speaks as of the date of the death of the testator. But when the meaning of any part of a will is the subject of controversy, it is the prerogative of the court to construe the contested provision and declare the true meaning thereof. And in construing a will, or any part thereof, the discovery of the intent of the testator, as expressed in his will, is the dominant and controlling objective, for the intent of the testator, as so expressed, is his will. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578, and cases cited.

In ascertaining the intent of the testator, the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made. Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12.

". . . the court should place itself as nearly as practicable in the position of the testator . . . at the time of the execution of the will." *In re Will of Johnson, supra.* And ordinarily, words used in a will are to be construed as having the ordinary, natural, and customary meaning given them at the time of their use, unless it clearly appears that they were used in some other sense. *Williams v. McPherson,* 216 N.C. 565, 5 S.E. 2d 830; *Bank v. Phillips,* 235 N.C. 494, 70 S.E. 2d 509; *Sharpe v. Isley,* 219 N.C. 753, 14 S.E. 2d 814; *In re Will of Johnson, supra.* If words at the time of their use had a well-known legal or technical meaning, they are to be so construed unless the will itself discloses that another meaning was intended. *Ferguson v. Ferguson,* 225 N.C. 375, 35 S.E. 2d 231; *Henry v. Leather Co.,* 234 N.C. 126, 66 S.E. 2d 693. See also 2 Schouler on Wills, Executors and Administrators, 6th Ed., 984, 1094; 2 Page Wills, Lifetime Ed., 815-16, 894, 898.

Usually, nothing else appearing, it is presumed that the judge found facts sufficient to support the judgment entered, but that rule has no application here, for it is apparent from an examination of the record before us that both the clerk and the judge allowed compensation to plaintiff upon the assumption the will fixes the rate of compensation and directs that 2½% be allowed on the total value of all bonds, stocks, cash, and other personal property received by the executor. The compensation allowed is so estimated "as per will." Thus they acted under an erroneous conception of the applicable law.

The appellant is entitled to have the clerk in good faith fix the compensation to be allowed plaintiff as provided in G.S. 28-170. In so doing the clerk is limited to a maximum of 2½% of the total receipts and disbursements. In determining this question he must of necessity construe the meaning of the word "receipts" as used in the will. From his findings and conclusions any interested party may appeal. *Bank v. Bank, supra.*

"Why doesn't this Court perform this judicial function and be done with it? Simply because this Court possesses no original jurisdiction in such matters. Its duty is to review the decisions of the Superior Courts of the State." *Woodard v. Clark, supra.* Furthermore, the allowance of commissions, by way of compensation, to an executor requires the exercise of judicial discretion and judgment by the clerk of the Superior Court. It is he who has original jurisdiction. If any interested party conceives that the allowance made by him is either inadequate or excessive, or is made under an erroneous conception of the law, he may appeal. *Bank v. Bank, supra.*

For the reasons stated the judgment entered is vacated. The court below is directed to remand the appeal from the clerk to the end that he may allow plaintiff compensation for its services in accord with this opinion. In the meantime, this cause will remain on the docket for further proceedings after final judgment by the clerk fixing the compensation of plaintiff and approving its final account.

Error and remanded.

DEVIN, C. J., took no part in the consideration or decision of this case.

JOE HENRY WHITE AND WIFE, MARGARETTE E. WHITE, v. C. F. PRICE AND WIFE, MARIE E. PRICE.

(Filed 18 March, 1953.)

1. Appeal and Error § 38—

The burden is upon appellant not only to show error but also that the alleged error was prejudicial.

2. Reference § 3—

Doubt as to whether a processioning proceeding involved a complicated question of boundary or required a personal view of the premises within the purview of G.S. 1-189 (3), will be resolved in favor of the validity of the order for compulsory reference.

3. Reference § 14a—

Exceptions to the referee's report *held* sufficient in form to entitle plaintiffs to trial by jury on the issue tendered.

4. Trial § 4—

The continuance of a cause rests in the discretion of the court.

5. Boundaries § 5d—

Where it appears that declarant's statement was made subsequent to the time he divested himself of title to the land in question and before controversy arose, testimony of such declaration is competent.

6. Appeal and Error § 39e—

Exception to the admission of evidence will not be sustained when it appears that evidence of similar nature was admitted at the trial without objection.

7. Trial § 39—

A verdict of the jury may be interpreted and given significance by reference to the pleadings, evidence and charge of the court.

APPEAL by defendants from *Frizelle, J.*, August Term, 1952, of BERTIE. No error.

This was a processioning proceeding to determine the boundary line between the lands of the plaintiffs and defendants. G.S. 38-3.

The title of the plaintiffs and defendants to their adjoining lands respectively was admitted, and the only question presented was the exact location of the dividing line between them. There was no dispute as to the general location of the line, which extended in a northeast direction from a holly stump, now maple and postoak, indicated on the court map by the letter G, an admitted corner, in a practically straight line, 3,340 feet to the Republican-Aulander road. But the matter at issue was whether a portion of this line, the middle portion, ran along the center of a ditch, or along the center of a path or cartway on the southeast side of the ditch. Only a narrow strip 4 to 7 feet wide on the southeast bank of the ditch for a distance of about 1,500 feet, from the point marked E on the map to the point marked B, was involved. There was no dispute as to the line from the maple-postoak corner G, along the ditch to the point E, 1,330 feet, nor at the other end of the line as to distance from B, where the ditch ended, 500 feet, to the road.

The plaintiffs claimed the center of the path as the line from E to B, and the defendants claimed the center of the ditch as the dividing line between these points.

The plaintiffs in their complaint set out the sources of title to their land, together with all the boundary lines, and described the dividing line in dispute claimed by them as follows: Beginning "at a holly stump in a branch, going thence N. 47 deg. E. along a line which is along a ditch a part of the way and along the center of a path for the balance of the way (said path lying between the said J. E. Odom Davidson farm and the Arthur Bazemore land) a total distance from the holly stump of 3,340 feet to the aforesaid Republican-Aulander road."

The defendants in their answer admitted plaintiffs' title to the land adjoining their own and alleged that the correct boundary line between their lands was "a ditch extending from a holly stump on the back side of the lands of petitioners and defendants and running along said ditch and the center thereof to the center of a path at the end of said ditch and

then along the center of said path to the public road leading from Republican to Aulander."

On these pleadings and the evidence offered the Clerk rendered judgment in favor of defendants and the plaintiffs appealed to the Superior Court. In the Superior Court a compulsory reference was ordered to which plaintiffs and defendants excepted, reserving right to jury trial.

The referee found in accordance with the contentions of the defendants that the line ran from the maple and postoak at the point indicated on the map by the letter G, thence along the ditch to the point marked E, thence along the ditch to the point marked B, thence a straight line to a point on the road marked A.

The referee's report was filed 3 May, 1952. The case was set for trial in the Superior Court at the May Term which convened 12 May, and to be heard 13 May. On that day plaintiffs filed exceptions to the referee's report. When the case was called that day plaintiffs moved to amend their exceptions. This was denied. The plaintiffs then moved the court to be permitted to withdraw their exceptions, as the report had been filed less than 10 days prior to the convening of the court, and that the case be continued. This motion was allowed and defendants excepted. Thereafter the plaintiffs filed exceptions to the referee's report and the case was heard at the August Term. The defendants then moved to strike out the plaintiffs' exceptions, and to strike plaintiffs' demand for jury trial. These motions were denied and the defendants excepted.

During the trial the court with consent of counsel marked on the map the figure 2 to indicate the point on the Republican-Aulander road where the straight line from G, as claimed by the plaintiffs, would reach the road. The point on the map at which the line claimed by defendants and as found by the referee would reach the road was indicated on the map by the letter A.

The plaintiffs offered evidence tending to show the true location of the dividing line was along the center of the path; that the general reputation in the community supported this view; that the drainage of plaintiffs' land was into the ditch, while the drainage on defendants' land was in the opposite direction; that formerly a fence on each side enclosed the path and ditch; that the path extended all the way from the road along the ditch to the woods near point E; that the fences have long since been removed, but the path or lane was still in use by hunters and others in going to and from the woods. The defendants' evidence, on the other hand, tended to show that the true location of the dividing line was along the center line of the ditch all the way from G to B, where the ditch ended, and thence to A on the road; that the general reputation in the community as to the location of the line supported their contention that the ditch was the line, and that there had been marks along the ditch,

formerly a marked pine and a cherry tree, indicating the ditch as the line. This was controverted by plaintiffs.

The court, after stating the evidence and the contentions of the parties, charged the jury as follows:

"If the plaintiffs have satisfied you upon the evidence, and by its greater weight, that their allegations are true and correct, then, gentlemen, you should answer that issue in favor of the plaintiffs in this case, by writing as your answer, 'Beginning at the letter G, running thence in a northeasterly course a straight line to the figure 2 on the Republican-Aulander road.'

"If the plaintiffs have failed to so satisfy you, then, gentlemen, you should answer that issue in favor of the defendants' contention, to wit: 'Beginning at the letter G, running thence with the center of the ditch in a northeasterly direction to the letter D, thence center line of ditch extending to the letter A on the Republican-Aulander road.'"

The following issue was submitted to the jury: "Where is the true location of the dividing line between the lands of the plaintiffs and the lands of the defendants?" To this the jury answered "G to 2, a straight line."

From judgment on the verdict in favor of plaintiffs, the defendants excepted and appealed.

E. R. Tyler and John R. Jenkins, Jr., for plaintiffs, appellees.

Jones, Jones & Jones and Pritchett & Cooke for defendants, appellants.

DEVIN, C. J. In their appeal the defendants have brought forward numerous exceptions to rulings of the court noted during the course of the proceeding, from the initial order of reference to the signing of the judgment, but after an examination of the entire record we are left with the impression that no harm has resulted to the defendants from any of these rulings which would warrant us in setting aside the verdict and judgment rendered.

The controversy falls within a narrow compass. A single question was raised by the pleadings and that was whether the disputed portion of the dividing line between the lands of the plaintiffs and defendants, for a distance of some 1,500 feet, should be located along the center of a ditch, or along the center of a path or cartway on the southeast side of the ditch. The plaintiffs claimed the path; the defendants the ditch. The width of the strip involved was 4 to 7 feet. The court's final instruction to the jury epitomized the issue. He charged the jury if they found from the evidence and by its greater weight the location of the line to be in accordance with plaintiffs' contention they should answer the issue that the true dividing line was the line from the corner marked G, a straight line

to the figure 2 on the road. And if not so satisfied, they should answer that the true dividing line was the line from G with the center of the ditch to the point on the road marked A.

We deem it unnecessary to set out in detail the testimony offered in the trial. It is sufficient to say that there was evidence in the record tending to support the contentions of both parties. The jury has considered all the evidence relating to the controverted issue, and has resolved the question in favor of the plaintiffs. The decision thus reached must stand unless there be found such substantial error in the rulings of the trial judge as would appear to have affected the determination of this issue adversely to the defendants. The burden is on the appellants not only to show error but that the result was materially affected thereby to their hurt. *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486; *Hodges v. Malone,* 235 N.C. 515, 70 S.E. 2d 478.

The order of compulsory reference of the case was based on the ground that it involved a complicated question of boundary or required a personal view of the premises, G.S. 1-189 (3). The defendants excepted to the order, and now assign error for the reason that the question of boundary raised by the pleadings was not sufficiently complicated to justify a reference. However, we resolve the doubt in favor of the validity of the order.

The exceptions to the referee's report are sufficient in form to entitle the plaintiffs to trial by jury on the issue tendered. *Cotton Mills v. Maslin,* 200 N.C. 328, 156 S.E. 484; *Brown v. Clement Co.,* 217 N.C. 47, 6 S.E. 2d 842; *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79; *Murphy v. Smith,* 235 N.C. 455, 70 S.E. 2d 697.

The continuance of the case and the allowance of time to the plaintiffs to file exceptions to the referee's report were matters within the discretion of the court, and no prejudicial effect is perceived. *Kerr v. Hicks,* 131 N.C. 90 (94), 42 S.E. 532; *Coleman v. McCullough,* 190 N.C. 590, 130 S.E. 508; *Todd v. Smathers,* 235 N.C. 123, 68 S.E. 2d 783; McIntosh, sec. 533.

The defendants noted exception to the testimony of the witness F. L. Odom as to the declaration of a deceased person, J. E. Odom, relative to the boundary line here in question. The defendants contend this evidence was incompetent, and that the court erred in admitting it. Under the rule stated in *Yow v. Hamilton,* 136 N.C. 357, 48 S.E. 824, and *Corbett v. Hawes,* 187 N.C. 653, 122 S.E. 478, in order to render hearsay evidence or declarations as to boundary competent it must appear that the declarant is now dead, that he was at the time of the declaration disinterested, and that the declaration was made *ante litem motam.* It appears from the record here that J. E. Odom was divested of title to the land in 1938; that he is now dead, and that this proceeding was instituted

in 1950. There was no evidence of prior controversy. Plaintiffs contend it is reasonably to be inferred from the witness' testimony that the declaration was made at a time when witness and not the declarant was owner of the land, and hence that the declarant at that time was disinterested, and further that declarant died before the controversy arose. Stansbury, sec. 151. It would seem that if the declaration was made after 1938, and before suit, it would be competent under the rule, and that in the absence of anything to the contrary the presumption on appeal in favor of the correctness of the trial judge's ruling would apply. However, it appears that evidence of similar nature was admitted without objection. Defendants' assignment of error on this ground is not sustained.

Evidence was also admitted tending to show the general reputation, on the one hand, that the path was the line, and on the other that the ditch was so regarded, and that both the path and the ditch had been there from a remote period, one witness thought as much as one hundred years. *Owens v. Lumber Co.,* 212 N.C. 133, 193 S.E. 219; *Hemphill v. Hemphill,* 138 N.C. 504, 51 S.E. 42; Stansbury, sec. 150. The competence of this evidence was not challenged.

There was no exception to the sufficiency of the verdict. However, the rule is that the verdict may be interpreted and given significance by reference to the pleadings, evidence and charge of the court. *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493.

We have examined defendants' exceptions to the judge's charge to the jury, as well as each of the other exceptions noted, and find nothing therein which should be held prejudicial to the defendants' rights.

We conclude that the verdict and judgment should be upheld.

No error.

RALPH C. WILLIAMS, BY HIS NEXT FRIEND, ELI WILLIAMS, v. ALDRIDGE MOTORS, INC., AND WACHOVIA BANK & TRUST COMPANY.

(Filed 18 March, 1953.)

1. Intoxicating Liquor § 8—

In a proceeding for forfeiture of a vehicle because used in the illegal transportation of intoxicating liquor, the owner may intervene and obtain possession by showing that the vehicle was used in transporting liquor without his knowledge and consent, and a lienholder may intervene and have the proceeds of sale applied to the satisfaction of the lien by showing that the lien was created without the lienor having any notice that the vehicle was being used for the illegal transportation of liquor. G.S. 18-6.

2. Same: Infants § 7—Findings held insufficient to support judgment on lienors' counterclaims for independent tort of infant in using car in liquor traffic.

An infant purchased a car and executed a conditional sale contract for the deferred balance due on the purchase price. Later, the car was seized and sold because of the infant's use of the car in the illegal transportation of intoxicating liquor. In the infant's suit to rescind the contract of purchase, lienors pleaded counterclaim for the infant's independent tort in using the car to transport liquor, resulting in its seizure and forfeiture, and in failing to notify lienors of the seizure so that they could protect their rights under G.S. 18-6, lienors alleging that they were without notice from other sources. *Held:* Findings by the court that the car had been seized for cause and that lienee failed to notify lienors of the seizure is insufficient to support a judgment on the counterclaim in the absence of further findings that lienors were without knowledge or notice of the forfeiture from any other source and that by reason thereof failed to intervene, and a further finding that lienors were without knowledge or notice that the automobile was being used for the illegal transportation of liquor, together with a finding as to the amount of loss sustained by lienors by reason thereof.

3. Appeal and Error § 6c (2)—

Where the findings are insufficient to support the judgment entered, an exception to the judgment must be sustained, the judgment reversed, and the cause remanded for further proceedings.

4. Pleadings § 17c—

A demurrer to a pleading for its failure to state a cause of action must specify wherein the pleading is deficient.

DEVIN, C. J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Pless, J.*, 28 June, 1952, Civil Term of GUILFORD (Greensboro Division).

Civil action by plaintiff to disaffirm contract made during minority and to recover consideration paid by him. The defendants set up counterclaims for damages based on alleged independent tort of the plaintiff.

Upon the call of the case for trial, the parties by written stipulation waived trial by jury and agreed that the presiding judge should hear the case, find the facts, and render judgment.

The findings of fact and conclusions of law, separately stated, are set out in the judgment. They are summarized as follows:

On 22 September, 1949, the plaintiff, Ralph C. Williams, being then about 20 years of age, purchased a 1947 Hudson sedan from the defendant Aldridge Motors, Inc., at the price of $1,771.64. The plaintiff paid $300.00 in cash and traded in a 1940 Hudson sedan at an agreed trade-in value of $545.00, making a total down-payment of $845.00. To evidence the deferred balance of $926.64, the plaintiff executed a note in that amount payable in 18 monthly installments of $51.48 each, and to secure

the note the plaintiff executed a conditional sale contract on the automobile. Immediately thereafter, the note and conditional sale contract were sold by the defendant, Aldridge Motors, Inc., to the defendant, Wachovia Bank & Trust Company. Neither of the defendants knew that the plaintiff was not of age, and he represented he was of age, at the time of the sale. The plaintiff paid the first six installments due upon the note to the defendant Wachovia Bank & Trust Company, totaling $308.88. The note was in default with $617.76 due thereon when this action was instituted.

On or about 7 April, 1950, the plaintiff was arrested and charged with the illegal transportation of intoxicating liquor in the Hudson automobile. When brought to trial (in State court), he entered a plea of guilty to the charges, and thereupon the Hudson automobile, having been seized at the time of the arrest by the officers, was ordered confiscated and sold, pursuant to State law, and it was thereafter so sold. The plaintiff did not notify either defendant of the arrest, seizure, order of confiscation, or sale of the automobile until weeks after the sale, when he was attempting to disaffirm the contract of purchase.

On or about 10 July, 1950, the plaintiff, being still a minor, gave notice for the first time to each of the defendants of his election to disaffirm the contract, and demanded of the defendants return of the consideration paid. Upon refusal of the defendants to return the consideration, the plaintiff brought this action.

Each of the defendants entered a general denial and "set up a cross-action, counterclaim and off-set, alleging that the infant plaintiff by his tortious conduct, which was independent of the making of the contract sought to be disaffirmed, had damaged the defendants to the extent of the value of the Hudson automobile he purchased at the time it was seized, confiscated and ordered sold, . . .

"The illegal transportation of intoxicating liquor in said automobile by the infant plaintiff, for which he was arrested and by reason of which the automobile was ordered confiscated and sold under the law of North Carolina, was likewise a violation of the terms of the conditional sale contract executed by infant plaintiff, and his failure to report the seizure of same was a violation of an express covenant contained in said conditional sale contract.

"UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW AS FOLLOWS:

". . . In this case, the act of the infant plaintiff in illegally transporting intoxicating liquor in the automobile was a crime against the State, by reason of which all property rights of the infant plaintiff in the automobile were lost and destroyed. By reason of the failure of infant plaintiff to report his arrest and the seizure, confiscation and order of sale to

the defendants, their rights were likewise lost and destroyed. These acts on the part of the infant plaintiff were tortious as to both defendants, and not in any way connected with the making of the contract, for which the infant plaintiff is liable to the extent of the damage resulting to both defendants. The failure on the part of the infant plaintiff to notify the defendants while connected with the contract sought to be disaffirmed, to the extent that it was a breach of a covenant to give notice to the defendants, was also an independent tort, because his failure to notify the defendants was an independent wrongful act by which infant plaintiff caused the defendants to lose their statutory rights, as innocent lienholders, which resulted in the loss of their property rights in the automobile. . . . The rights of the defendants are protected under this statute (G.S. 18-6) and were lost solely because of the wrongful act of infant plaintiff. . . .

"The Court further concludes as a matter of law that the plaintiff is entitled in this action to disaffirm his contract and to recover of the defendant, Aldridge Motors, Inc., the sum of $845.00 and of the defendant, Wachovia Bank & Trust Company, the sum of $308.88, but that these defendants are entitled, by way of off-set, to a joint judgment against the plaintiff upon their counterclaims and cross-actions for the sum of $932.50, the same being the agreed value of the property at the time the defendants' property rights therein were destroyed by the illegal and wrongful conduct of the infant plaintiff, to be prorated between the defendants as agreed to by them."

Judgment was entered in accordance with the foregoing conclusions of law, and to so much of the judgment as allows the counterclaims of the defendants, the plaintiff excepted and appealed to this Court.

Elton Edwards for plaintiff, appellant.
G. C. Hampton, Jr., for defendants, appellees.

JOHNSON, J. Chapter 1, Section 6, Public Laws of 1923, as amended, now codified as G.S. 18-6, prescribes the procedure under which vehicles used in transporting liquor in violation of law may be seized and confiscated under State law.

Under the provisions of this statute the owner of a seized vehicle may intervene in the forfeiture proceeding and obtain possession of the vehicle by showing that it "was used in transporting liquor without his knowledge and consent." Similarly, the holder of a lien on a seized vehicle may intervene and, by showing that the lien was "created without the lienor having any notice that the carrying vehicle was being used for illegal transportation of liquor," require that the proceeds derived from the sale of the vehicle be applied toward the satisfaction of the lien.

In the case at hand the gravamen of the defendants' counterclaims is that the conduct of the plaintiff in putting the automobile to use in the liquor traffic under circumstances leading to seizure and forfeiture under G.S. 18-6, followed by failure on his part to notify defendants of the seizure—they being without notice from other sources—resulted in failure of the defendants to intervene seasonably in the forfeiture proceeding and protect their rights, and was a willful, criminal, tortious course of conduct as against the defendants, arising subsequent to and independent of the execution of the conditional sale contract, entitling the defendants to recover damages against the plaintiff to the extent of their losses.

Conceding as we may that such conduct on the part of a conditional sale vendee may be made the basis of an independent tort action, 27 Am. Jur., Infants, Sections 92 and 94; 43 C.J.S., Infants, Sec. 89; *Vermont Acceptance Corp. v. Wiltshire,* 103 Vt. 219, 153 Atl. 199, 73 A.L.R. 792; *Collins v. Norfleet-Baggs,* 197 N.C. 659, 150 S.E. 177; Annotation: 127 A.L.R. 1441, p. 1449 (the facts in *Morris Plan Co. v. Palmer,* 185 N.C. 109, 116 S.E. 261, relied on by plaintiff, being distinguishable), even so, recovery may not be sustained where the crucial facts found by the court merely show, as in the instant case, (1) a seizure for cause by the State, and (2) failure of the lienee to notify the lienor of the seizure.

In order to prevail in such circumstances, it must be made to appear substantially (1) that the lienor was without knowledge or notice of the forfeiture proceeding from any source and by reason thereof failed to intervene within the time allowed therefor; (2) that the lienor was without knowledge or notice that the automobile was being used for the illegal transportation of liquor, so that, if he had intervened, he would have been entitled as a *bona fide* lienor to the proceeds of sale for application on his lien debt; and (3) the extent of the resultant loss sustained by the lienor.

In the instant case the findings of fact are silent respecting these vital factors. In gist, the findings are: That the plaintiff entered a plea of guilty to the charge of transporting intoxicating liquor; that the automobile was seized and ordered sold, and was thereafter sold; that the plaintiff did not notify either defendant of the arrest or seizure until weeks after the sale. It is manifest that the findings do not support the judgment. And this is so even if we glean from the conclusions of law such of them as might be termed findings of fact.

Therefore the plaintiff's exception to the judgment, which challenges the sufficiency of the findings of fact to support the judgment (*Medical College v. Maynard,* 236 N.C. 506, 73 S.E. 2d 315; *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421; *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179), must be sustained. It is so ordered. This works a reversal of the judgment as to the counterclaims, and necessitates a remand of the cause for further hearing and proceedings in respect to the issues raised by the

counterclaims. See *Benbow v. Robbins,* 72 N.C. 422; *Trust Co. v. Transit Lines,* 200 N.C. 415, 157 S.E. 62; 31 Am. Jur., Jury, Sec. 48; Annotation: 106 A.L.R. 203; *Erwin Mills v. Textile Workers Union,* 235 N.C. 107, 68 S.E. 2d 813.

In this Court the plaintiff demurred *ore tenus* to each counterclaim for failure to state a cause of action. We are of the opinion and so hold that the demurrers should be overruled. The counterclaims, when construed with that degree of liberality required, present facts sufficient to constitute causes of action. *Scott v. Insurance Co.,* 205 N.C. 38, 169 S.E. 801, and cases cited. Besides, the demurrers are defective in form for failure to specify wherein each counterclaim fails to state facts sufficient to constitute a cause of action. *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750, and cases cited.

The cause will be remanded for further proceedings in accord with this opinion.

Reversed and remanded.

DEVIN, C. J., took no part in the consideration or decision of this case.

MRS. CARRA LEE, ADMINISTRATRIX OF THE ESTATE OF HOWARD DEXTER LEE, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 March, 1953.)

1. Appeal and Error § 39e—

An assignment of error to the exclusion of testimony will not be sustained when appellant fails to show that the excluded testimony was competent.

2. Evidence § 42b—

Plaintiff offered testimony that within five to seven minutes after his intestate was killed by defendant's train, the engineer stated, after he had stopped the train, that he thought he had hit a man who was down in the track and scrambling around like he was trying to get off. *Held:* The declaration was a mere narration of past occurrences and not competent as a part of the *res gestae,* and testimony thereof was properly excluded.

3. Railroads § 5—

A person down on a railroad track approximately two hundred yards from the nearest crossing is a trespasser, and his negligence in placing himself in such dangerous position will bar recovery for his death unless defendant railroad company had the last clear chance to avoid the injury.

4. Same—

In order for a railroad company to be held liable under the doctrine of last clear chance for the fatal injury of a trespasser on its track, plaintiff must show that his intestate was killed by defendant's train, that at the time intestate was down on the track in an apparently helpless condition, that the engineer saw or by the exercise of ordinary care should have seen intestate in time to have stopped the train before striking him, and that the engineer failed to exercise such care, thereby proximately causing the death of intestate.

5. Same—

Evidence tending to show that the engineer of defendant's train saw intestate sitting on the track immediately the engine cleared a curve putting intestate in view, that the engineer blew his whistle and saw intestate move in an effort to get off the track, and that the engineer stopped the train as quickly as possible, *is held* insufficient to invoke the doctrine of last clear chance, and defendant railroad company's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Grady, Emergency Judge,* November Term, 1952, of JOHNSTON.

Civil action for wrongful death resulting from the alleged negligence of the defendant.

The plaintiff, the duly appointed and acting administratrix of the estate of Howard Dexter Lee, deceased, alleges in her complaint that "on or about the 7th day of December, 1948, at about 6 o'clock P.M., the plaintiff's intestate was lying in an obviously helpless condition across the outside rail of defendant's northbound track at a point north of what is known as the Rance Johnson Crossing and south of what is known as the Woodall Crossing between Benson and Four Oaks, North Carolina . . . That the defendant's said tracks were at said time and are now straight and level and unobstructed in a southerly direction for a distance of approximately three-fourths of a mile from said point . . .; that one of defendant's northbound trains, said train being operated by the defendant's servants and employees, and traveling at an excessive and unlawful rate of speed, and without sounding any warning of its approach to the said Rance Johnson Crossing, carelessly and negligently ran over and killed plaintiff's said intestate . . ."

The evidence tends to show that plaintiff's intestate was 34 years of age, and prior to his death was in good health, but that he was a drinking man, and that a jar of beer was found between the railroad tracks at the point where he was struck by the train. Counsel for appellant, in their brief, state that plaintiff's intestate was lying on the tracks of the railroad "in an apparently helpless condition while in a drunken condition."

The evidence shows that the plaintiff's intestate was struck by defendant's train at a point approximately 200 yards north of the Rance John-

son Crossing. It further shows that the engineer of the defendant's train could not have seen the plaintiff's intestate until the engine of the train rounded a curve south of this crossing. One of plaintiff's witnesses fixed the distance from this curve to the point where plaintiff's intestate was killed as approximately 700 yards, another at 565 steps which he estimated to be 565 yards. However, the plaintiff introduced another witness who testified that he measured the distance and that "it was 365 yards from the crest of the curve toward Benson and the place where Lee was killed."

Several witnesses who lived in the immediate vicinity of the Rance Johnson Crossing at the time of the accident, testified they never heard the train whistle at all; others testified they did hear it. One of the witnesses testified that he heard the train blow and remarked to his wife, "the train is blowing unusual." This witness further testified that the train slowed down and he "went out and saw it stopped completely." The lights on the train were burning. The accident occurred about 6 o'clock p.m.

Plaintiff put the defendant's engineer on the stand who testified that he was in charge of the train that killed the deceased; that it was a passenger train with twenty cars and was pulled with a Diesel; that the brakes and lights were in good condition; that he was making 70 miles per hour and was familiar with the intersection; that he knew pedestrians used the Johnson and Woodall Crossings; that at the speed he was making it would take from 500 to 1,000 feet to stop the train. Apparently this witness intended to say it would require 500 to 1,000 yards to stop the train. Later, on cross-examination, he so testified, pointing out that each car was from 70 to 80 feet long; that assuming his train was from 1,500 to 1,600 feet in length, he thought it could be stopped in that distance. He further testified that he blew for the crossing and was just finishing when he saw an object about 200 yards away, he blew the whistle and then applied the brakes; that deceased was sitting on the west rail with his feet in the side facing east. The deceased made one effort to get up before he hit him. The headlight of the train was on him; that while he was blowing the whistle the deceased raised up.

On cross-examination this witness testified: "I blew the whistle for the first crossing when I came around the curve, which was about a quarter of a mile south of it. I had completed that blow when I saw the man on the track. I began to blow again upon seeing the man and he began to move. I applied the emergency brakes and as a result thereof the train became uncoupled. The train was stopped as quickly as possible. It took from 500 to 1,000 yards to stop the train. . . . It was not possible to stop the train before hitting him."

At the close of plaintiff's evidence, defendant moved for judgment as of nonsuit. The motion was allowed and plaintiff appeals, assigning error.

E. R. Temple, Jr., and J. R. Barefoot for plaintiff, appellant.
Shepard & Wood for defendant, appellee.

DENNY, J. The appellant assigns as error the refusal of the court below to permit one of the plaintiff's witnesses to testify to the contents of a conversation the witness had with a Mr. Hill, who was on the defendant's train at the time plaintiff's intestate was killed. The witness did not identify Mr. Hill as being in any way connected with the defendant, and the record does not disclose the substance or tenor of the conversation or that it would have tended to corroborate the testimony of the witness or the testimony of other witnesses who had testified for the plaintiff. Hence, this assignment of error is overruled. *Armfield v. R. R.*, 162 N.C. 24, 77 S.E. 963; *Warren v. Susman,* 168 N.C. 457, 84 S.E. 760; *Hall v. Hall,* 179 N.C. 571, 103 S.E. 136.

Assignments of error Nos. 2, 3, 4, 5 and 6 are based upon exceptions to the action of the court in sustaining the objections of the defendant to the admission of testimony with respect to a conversation the witness had with someone he referred to as the engineer, and what he overheard between this man and some other party whom he took for granted was an employee of the defendant. The plaintiff contends the conversations took place within five to seven minutes after the deceased was killed and were admissible as part of the *res gestae.* This evidence was offered for no other purpose. An examination of this excluded testimony which was given in the absence of the jury, reveals that the man described as the engineer is purported to have said to the witness: "I think I hit a man up the road, I am not sure. . . . he was scrambling around between the T-irons like he was trying to get off . . . He was down between the T-irons." According to the witness the substance of the above statements were repeated in his presence to a "gentleman coming from the rear of the train."

We think the above statements, if made by an agent of the defendant, fall within the well defined principle of law that a mere narration of a past occurrence is only hearsay and is not admissible as against the principal or employer. *Batchelor v. R. R.,* 196 N.C. 84, 144 S.E. 542, 60 A.L.R. 1091; *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802; *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794; *Coley v. Phillips,* 224 N.C. 618, 31 S.E. 2d 757.

Stacy, C. J., in speaking for the Court in *Hubbard v. R. R., supra,* said: "It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or

employment, is admissible as a part of the *res gestae,* and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer."

The remaining assignment of error is based on an exception which challenges the correctness of the ruling of the court below on the motion for judgment as of nonsuit.

The plaintiff's intestate having entered upon the defendant's railroad track without license, invitation, or other right, occupied the status of a trespasser at the time he was killed. The accident occurred approximately 200 yards from the nearest crossing. His act in placing himself in a dangerous position on the defendant's railroad track, constituted such negligence on his part as would preclude a recovery of damages from the defendant for his death, unless the defendant had the last clear chance to avoid the injury. *Osborne v. R. R.,* 233 N.C. 215, 63 S.E. 2d 147; *Long v. R. R.,* 222 N.C. 523, 23 S.E. 2d 849; *Justice v. R. R.,* 219 N.C. 273, 13 S.E. 2d 553; *Mercer v. Powell,* 218 N.C. 642, 12 S.E. 2d 227.

In order to recover of a railroad company for the death of a trespasser on its railroad track, under the application of last clear chance or discovered peril doctrine, the personal representative of the deceased trespasser must establish by competent evidence the following: (1) That the decedent was killed by the railroad company's train; (2) that the decedent at the time he was killed was down on the track in an apparently helpless condition; (3) that the engineer saw, or by the exercise of ordinary care in keeping a proper lookout could have seen the decedent in time to have stopped the train before striking him; and (4) that the engineer failed to exercise such care, thereby proximately causing the death of the decedent. *Osborne v. R. R., supra,* and cases cited therein.

It is admitted that plaintiff's intestate was killed by the defendant's train. But it is denied that he was down on the track in an apparently helpless condition. On the contrary, the only witness who saw the decedent on the railroad track was the defendant's engineer who was plaintiff's witness. He testified the decedent was sitting on the west rail facing east. He blew the whistle and the man began to move. He applied his emergency brakes and stopped the train as quickly as possible.

The doctrine of last clear chance does not apply where a trespasser or licensee is upon a railroad track, and is apparently in possession of his normal faculties, the engineer of the train producing the injury having no knowledge or information to the contrary. In such cases the engineer is under no duty to stop his train or to slacken its speed. He has the right to assume that such person will use his faculties for his own pro-

tection and get off the track in time to avoid injury. *Mercer v. Powell, supra.*

The last clear chance does not mean the last possible chance to avoid the accident. 65 C.J.S., Negligence, section 137 (2) (e), page 744, *et seq.; Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109. It means such chance or interval of time between the discovery of the peril of the injured party, or the time such peril should have been discovered in the exercise of due care, and the time of his injury as would have enabled a reasonably prudent person in like circumstances to have acted in time to have avoided the injury. *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Manufacturing Co. v. R. R.,* 233 N.C. 661, 65 S.E. 2d 379; *Aydlett v. Keim, supra; Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337.

In our opinion, the evidence presented by the plaintiff in the trial below is insufficient to invoke the last clear chance or the discovered peril doctrine, and the judgment as of nonsuit entered below is

Affirmed.

C. L. CHERRY AND HUBERT CHERRY v. ROANOKE TOBACCO WAREHOUSE COMPANY, A CORPORATION.

(Filed 18 March, 1953.)

1. Vendor and Purchaser § 26—In action on covenant of seizin to recover for shortage in acreage conveyed, burden of proof is on plaintiff grantee.

In the grantee's action for breach of covenant of seizin for partial failure of title to the land described in the deed, the burden of proof is on grantee to show failure of title to a part of the land described, and the mere introduction of a deed to a third party is insufficient for this purpose, but he must also fit the description in the deed to such third party to the land it covers in accordance with appropriate rules of law and evidence, and show that deed to such third party conveyed valid title to a part of the *locus* described in plaintiff grantee's deed, and without such proof an instruction to the effect that the deed to the third party conveyed title to a part of the land described in plaintiff grantee's deed is error.

2. Boundaries § 5a—

Description of land in a deed must be certain in itself or capable of being reduced to certainty by matters *aliunde* pointed out in the deed itself.

3. Same—

Where the description in a deed is patently ambiguous, parol evidence is not admissible to aid the description; but when its terms leave it uncertain what property is intended to be embraced therein, parol evidence is admissible to fit the description to the land, provided the parol evidence does not

enlarge the scope of the descriptive words and provided the deed itself points out the source from which evidence *aliunde* is to be sought.

4. Boundaries § 8b—

A call in a deed to a natural object will control courses and distances at variance therewith.

5. Appeal and Error § 40i—

Nonsuit will not be granted on appeal even though the record evidence is insufficient when the court below has denied the motion upon an erroneous conclusion as to the legal effect of the evidence introduced, since except for such erroneous ruling plaintiff might have offered evidence sufficient to withstand the motion.

APPEAL by defendant from *Sharp, Special Judge,* at November Term, 1952, of MARTIN.

Civil action to declare plaintiffs to be owners of land, hereinafter referred to, located as alleged, but if not so entitled, to recover damages for alleged breach of warranty of title to land.

It is admitted of record that on 5 March, 1951, defendant conveyed to plaintiffs by warranty deed, duly recorded, "that certain strip or parcel of land beginning at the corner of the Washington Street sidewalk and the right of way of the Atlantic Coast Line Railroad at an iron stake at said location, and running thence along the right of way of the said Atlantic Coast Line Railroad north 60 degrees east a distance of 147 feet to a stake; thence north 28 degrees west 66 feet to an iron pipe at the driveway of the Roanoke-Dixie Warehouse; thence south 84 degrees 10′ west 156.8 feet to the point of beginning, and being lot No. 2 of the property shown and described on a map or plat thereof made by D. G. Modlin, Surveyor, December 9th, 1950."

Plaintiffs allege in their complaint, briefly stated, that the northern boundary line of the land conveyed to them by defendant begins at a point 7½ feet from the center of the railroad track of the Atlantic Coast Line Railroad Company, and runs along the right of way of said company—a line 7½ feet from the center of the railroad track, whereas, in fact, as plaintiffs are advised and believe, and upon information and belief, the right of way of the railroad company extends 15 feet from the center of the railroad track instead of 7½ feet; that, therefore, plaintiffs will lose a strip of land 7½ feet wide and 147 feet long which is included in the right of way of the railroad company, to their damage in the value of the lot; and that "they are entitled to damages for that part of the lot conveyed to them by defendant which belongs to the Atlantic Coast Line Railroad Company, and for which defendant gave" them "a warranty fee simple deed" which is made a part of the complaint. Wherefore plaintiffs pray, with other relief, judgment, for damages for "breach of warranty."

Defendant, answering, denies the allegations of the complaint above set forth except as to the description contained in the deed, which it admits,—and, for a further answer and defense, avers among other things "that said railroad company has never acquired a legal title to its said right of way, and has never used more than fifteen (15) feet for the purpose of operating and maintaining same."

Upon the trial in Superior Court, the parties stipulated:

(1) That the map P-1 illustrates the property described in the complaint and is the map from which the deed from defendant to plaintiffs for said property was drawn;

(2) That the beginning point in said deed and shown on the map as an iron pipe was located at the time the map was drawn 7½ feet from the center of the railroad track;

(3) That the deed recorded in WWW at page 539 from the Town of Williamston to the Atlantic Coast Line Railroad covers the right of way referred to in the deed from the defendant to the plaintiffs and represents the railroad's title to such right of way; and

(4) That the plaintiffs paid the defendant $4,000 as the purchase price for said property.

And plaintiffs offered in evidence:

(1) Deed from defendant to plaintiffs containing (a) description of the lot as hereinabove set forth, and (b) covenants of seizin, right to convey, freedom of encumbrances and general warranty.

(2) Deed dated 7 October, 1912, and registered in Book WWW, page 539, from Town of Williamston, a corporation duly chartered and organized under the laws of North Carolina, as party of the first part, to Atlantic Coast Line Railroad Company, a corporation organized under and pursuant to the laws of the State of Virginia and doing business in the State, as party of the second part, which reads as follows: "That, whereas, under and by virtue of resolution adopted by the Town Commissioners authorizing the execution of an easement, over Railroad Street, said resolution being passed at a meeting of the Board of Commissioners regularly held on the 10th day of September 1912.

"Now, therefore, the said Town of Williamston in consideration of Ten Dollars in hand paid to it by said Atlantic Coast Line Railroad Company, the receipt of which is hereby acknowledged, has bargained and sold and by these presents, does bargain, sell and convey to said Atlantic Coast Line Railroad Company, its successors and assigns, certain tracts or parcels of lands in Williamston Township, State and County first above written, described as follows: Strip of land thirty feet wide extending along Railroad Street, which begins at the terminus of said Coast Line Railroad track running along Railroad Street, crossing Smithwick Street at right angles to and across Watts Street said strip of land

lying fifteen feet on either side of the Center Line of a Railroad to be constructed by said Atlantic Coast Line Railroad Company its successors and assigns.

"To Have and To Hold the aforesaid tract or parcel of land and the privileges and appurtenances thereunto to the said Atlantic Coast Line Railroad Company, its successors and assigns, so long as the same shall be used for and devoted to the purpose of operating a railroad over and upon it, with full right of free ingress, egress and regress for the said Atlantic Coast Line Railroad Company its successors and assigns at all times and forever hereafter. And the said Town of Williamston, party of the first part, for itself does covenant to and with said Atlantic Coast Line Railroad Company its successors and assigns that it is seized of said premises in fee and has a good right to convey the same in fee simple. That the same is free from all encumbrances, and that it will warrant and defend the title to the same against the lawful claims of all persons whomsoever."

And plaintiffs offered testimony tending to show that the Atlantic Coast Line Railroad Company had been running trains across the track adjoining the lot in controversy for the past 30 years; and that plaintiffs at the time they purchased the lot from defendant had no knowledge that the line of the right of way of Atlantic Coast Line Railroad Company was more than 7½ feet from the center of the railroad track; and that losing the strip 7½ feet by 147 feet depreciated the value of the lot in the amount of $1,500.

Defendant, reserving exception to the denial of its motion for judgment as of nonsuit entered when plaintiffs first rested their case, offered evidence tending to show that the parties understood that the location of the right of way of the railroad company was uncertain, and that defendant was selling, and plaintiffs were buying all the land from the driveway to the Atlantic Coast Line Railroad, regardless of what it was, and so on.

Motion of defendant for judgment as of nonsuit at the close of all the evidence was overruled, and defendant excepted.

These issues were submitted to and answered by the jury as shown:

"1. When the defendant conveyed to the plaintiffs the land described in the complaint did the parties intend that only the land between the defendant's driveway, the Martin Supply Company lot and the Atlantic Coast Line's right of way should be conveyed and that footages should be omitted from the deed, as alleged in the answer? Answer: No.

"2. If not, what amount, if any, have the plaintiffs been damaged? Answer: $1,150.00."

Judgment was rendered on the verdict. Defendant appeals therefrom to Supreme Court and assigns error.

Clarence Griffin and Peel & Peel for plaintiffs, appellees.
R. L. Coburn for defendant, appellant.

WINBORNE, J. In an action for damages for breach of a covenant of seizin, where the defendant denies the breach, and there are no admissions to the contrary, the burden of proof to show the breach is upon the plaintiff under our code system of pleading,—so this Court held in *Eames v. Armstrong,* 142 N.C. 506, 55 S.E. 405. Under this rule, plaintiffs in the case in hand have the burden of proof to show a breach of the covenant of seizin in the deed from defendant to them, that is, that there is a partial failure of title to the land described in this deed.

In this connection it seems that the controversy involves these questions: (1) Does the Atlantic Coast Line Railroad Company own a right of way on and along Railroad Street in the town of Williamston?; (2) If so, what is the width of it, and where is it located with reference to the lines of Railroad Street?

As to the first question, the parties stipulate that the deed from the town of Williamston to the Atlantic Coast Line Railroad Company covers the right of way referred to in the deed from defendant to plaintiffs, and represents the railroad's title to such right of way.

By what authority, therefore, did the town of Williamston act on 7 October, 1912, in making the deed to the railroad company? Did the town own the land in fee simple? If so, how did it acquire title to it? This may be shown by various methods which are specifically set forth in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142. See also *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673.

If the town of Williamston did not own the land in fee simple, did the town have legislative authority to make the kind of deed it did make? If not, did the town have such authority to grant to the railroad company a right of way along Railroad Street on which to lay a track, and operate trains? In this connection, see *S. v. R. R.,* 141 N.C. 736, 53 S.E. 290; *Butler v. Tobacco Co.,* 152 N.C. 416, 68 S.E. 12; *Staton v. R. R.,* 147 N.C. 428, 61 S.E. 455.

If the town had such authority, is the railroad track so laid that a right of way of the width specified is in fact within the boundaries of Railroad Street? This question requires the location of the lines of the street, as they existed at the date of the deed, and the location of the railroad track as originally laid with reference to the lines of the street. In other words, plaintiffs, in the case in hand, must offer not only the deed upon which it relies, but they must by proof fit the description in the deed to the land it covers,—in accordance with appropriate rules of law and evidence. The deed, without the proof, is not sufficient. Hence, there is error in the charge of the court to the jury "that the legal effect of that deed which

was introduced in evidence is to give to the Atlantic Coast Line Railroad a right of way which extends 15 feet on each side of the center line of the railway track." Defendant excepts to this instruction, and the exception is well taken.

Moreover, it is not amiss to call attention to the description as set out in the deed from defendant to plaintiffs. The course and distance called for in the second call, nothing else appearing, seems to lead across the railroad track, and to relate to land in, and north of it, rather than south of it, as the map, identified by the parties, indicates.

Decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers. The office of description is to furnish, and it suffices when it does furnish means of identifying the land intended to be conveyed. Where the language used is patently ambiguous, parol evidence is not admissible to aid the description. But when the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought. See *Self-Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889, where the authorities are cited. See also *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501; *Linder v. Horne, ante,* 129.

Moreover, in *Byrd v. Spruce Co.,* 170 N.C. 429, 87 S.E. 241, it is held, as epitomized in headnote 1, "Where there is a call in the description to a given boundary in a conveyance of land, which is at variance with the course specified therein, the natural object will control the course, it being the evident intent of the parties that the line should be thus established, and not that a mere word, in which a mistake is more likely to occur, should control."

In the light of these principles, the course and distance of the second call may be controlled by proof of the location of "the driveway of the Roanoke-Dixie Warehouse," *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603; *S. c.,* on rehearing, 233 N.C. 617, 65 S.E. 2d 144, for which purpose parol evidence is competent. The stipulation of parties may have been intended to meet this situation.

In view of the ruling of the court in respect to the deed from the Town of Williamston to Atlantic Coast Line Railroad Company, as above set forth, motion for judgment as of nonsuit will not be sustained. For if

the court had ruled adversely to plaintiffs they might have offered evidence sufficient to withstand the motion.

For error pointed out, there must be a

New trial.

STATE v. ROBERT E. DOUGHTIE.

(Filed 18 March, 1953.)

1. Criminal Law § 62f—

In North Carolina, a court has no power to pass a sentence of banishment, and if it does so, the sentence is void.

2. Same—

The Superior Court has jurisdiction to suspend judgment for some special purpose for a reasonable time, and such conditions will be upheld as favorable to the defendant and consonant with sound public policy.

3. Same—

The suspension of sentence on condition that defendant leave the State and not re-enter its boundaries for a period of two years is a sentence of banishment and is void as contrary to public policy, and upon defendant's appeal from order executing the sentence for condition broken, the order and the original sentence will be vacated, and the cause remanded for a proper sentence.

APPEAL by the defendant from *Williams, J.*, November Special Term, 1952, of EDGECOMBE.

This is an appeal from the signing of a judgment putting into effect a two-year road sentence suspended on condition that the defendant leave the State of North Carolina, and be out of said State not later than 12:00 noon 19 October, 1951, and not return or enter into the State of North Carolina for two years.

At the October Criminal Term, 1951, of the Superior Court of Edgecombe County the defendant Robert E. Doughtie entered a plea of guilty to a charge of a criminal assault with a deadly weapon, to wit, a pistol, on R. C. Robbins. The sentence passed against the defendant Doughtie on said plea by the Honorable Henry L. Stevens, Jr., Judge presiding, was as follows: "The defendant comes into Court and pleads guilty. Thereupon it is considered, ordered and adjudged by the Court that the defendant be confined in the Common Jail of Edgecombe County for the term of two years and be assigned to work the roads under the direction of the State Highway and Public Works Commission, suspended on condition that defendant leave the State of North Carolina and be out of same not later than 12:00 Noon October 19, 1951, and not return or enter

into the State of North Carolina for two years. Upon defendant entering in any part of the State of North Carolina, capias and commitment to issue to any and all counties within said State. Costs to be remitted."

At the November Special Criminal Term, 1952, of the Superior Court of Edgecombe County the solicitor for the State moved that the two-year road sentence against the defendant entered at the October Criminal Term, 1951, of said court be put into effect on the ground that the defendant had willfully violated the condition on which said road sentence was suspended. The solicitor offered evidence tending to show such violation. The presiding judge found the following facts and made the following order: "After hearing the evidence the defendant admits that he has violated the terms and conditions upon which said sentence was suspended in that since the October Term, 1951, he has, on two occasions, entered the State of North Carolina, on one occasion having been indicted and convicted in the Recorder's Court of Edgecombe County of driving a motor vehicle on the highways at an unlawful speed of 80 miles per hour and that he was sentenced to 60 days on the roads and to pay a fine of $100.00 and costs, road sentence suspended upon the payment of fine and costs, and that he has paid the fine and costs imposed in that sentence, and the Court finds as a fact that the defendant has violated the terms and conditions upon which the sentence was suspended at the October 1951 Term of this Court: Now, therefore, it is considered, ordered and adjudged that the sentence of the Superior Court at the October 1951 Term be, and the same hereby is put into effect, and that capias issue and commitment of the defendant be made to serve said sentence as there imposed."

The defendant excepted to the signing of the judgment and appealed, assigning error. This is his only assignment of error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Cameron S. Weeks and T. Chandler Muse for defendant, appellant.

PARKER, J. In North Carolina a court has no power to pass a sentence of banishment; and if it does so, the sentence is void. This is the general rule in American Courts. *S. v. Hatley,* 110 N.C. 522, 14 S.E. 751.

"In the states of the United States, a sentence banishing one convicted of crime from the state is generally held to be beyond the power of the court. It is impliedly prohibited by public policy." 15 Am. Jur., Criminal Law, Sec. 453. To the same effect, *People v. Baum,* 251 Mich. 187, 231 N.W. 95, 70 A.L.R. 98; *S. v. Baker,* 58 S.C. 111, 36 S.E. 501. See also *People v. Lopez,* 81 Cal. App. 199, 253 Pac. 169.

"In the absence of statutory authorization, banishment and deportation of accused is not proper punishment." 24 C.J.S., Criminal Law, Sec. 1991.

In *People v. Baum, supra,* the sentence was a fine of $500.00 and $500.00 costs. In addition, defendant "must leave the State of Michigan within 30 days and not return for a period of probation" which was fixed at five years. The Court held the sentence erroneous and remanded it for a legal sentence.

In *S. v. Baker, supra,* the sentence was 7 years in prison; "after you have served five years, you will be released, with the understanding that you leave the state, and never set foot in it again. If you do return, after notice on you by the state and a cause shown, you will be called back to serve out the full term, etc." The judgment of the circuit court was reversed, and the case remanded for re-sentence.

In *People v. Lopez, supra,* the sentence was that after the defendant had served the term imposed, he should be deported to Mexico. The Court modified the judgment by striking out "after sentence has been served, defendant is to be deported to Mexico," and after such modification the judgment was affirmed.

The sentence given the defendant Doughtie is not a sentence of banishment. It is a road sentence of two years suspended on condition that the defendant leave North Carolina and be out of same not later than 12:00 noon 19 October, 1951, and not return or enter the State for two years, and upon the defendant entering into any part of the State, capias and commitment to issue to any and all counties within said State.

This question of law is presented for our decision: Is a two-year road sentence, suspended on condition that the defendant leave North Carolina and remain out of the State for two years, valid?

In *S. v. Hatley, supra,* the sentence was: "That the defendants be imprisoned for twelve months in the county jail, but if the defendants leave the State in 30 days no capias to issue; otherwise capias do issue and defendants to be imprisoned for twelve months each." The Court, holding that the judgment of the court cannot be fairly construed as a judgment of banishment, said: "The only judgment passed by the court was that the defendants be imprisoned twelve months, and the words, 'but if the defendants leave,' etc., constitute no part of the sentence or judgment of the court, but were manifestly intended only as a note or memorandum directing the clerk to postpone the period at which the sentence shall go into execution, and not as a punishment for the defendants or an infliction upon some other community, etc." A similar case is *S. v. Hinson,* 156 N.C. 250, 72 S.E. 310. Neither decide the question of law presented in the instant case.

In *S. v. McAfee,* 189 N.C. 320, 127 S.E. 204, the sentence was: "It is adjudged by the court that the defendant, Mrs. T. E. McAfee, be confined in the common jail of Lenoir County for a term of fifteen months. Execution of sentence suspended, upon payment of costs, for 30 days; if thereafter the defendant be found within the State of North Carolina, capias shall issue to the Sheriff of Lenoir or to any other county in the State, at the discretion of the solicitor, and upon apprehension the defendant shall be committed to serve the sentence imposed." There is no suspension of the jail sentence on condition that the defendant leave the State, and manifestly this case is not a precedent for the question of law for us to decide. Mrs. McAfee was before this Court again in *S. v. McAfee,* 198 N.C. 509, 152 S.E. 393, and the sentence from which she appealed set forth in *S. v. McAfee,* 189 N.C. 320, *supra,* was put into effect.

The common law courts of criminal jurisdiction undoubtedly had power to suspend judgment on a defendant for some special purpose or for some reasonable time. In modern times this power has been extensively exercised by trial judges of courts of general criminal jurisdiction desiring to show mercy and to reform offenders, particularly youthful ones. Such exercise of power has been generally upheld by appellate courts as favorable to the defendant, and as sound public policy. *S. v. Hilton,* 151 N.C. 687, 65 S.E. 1011; *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706, which cites numerous cases; 15 Am. Jur., Criminal Law, Sec. 479. Upon this foundation is based our probation system which has had marked success in many cases in restoring youthful offenders to society as law-abiding citizens.

A sentence of banishment is undoubtedly void. A sentence of two years on the roads suspended on condition that the defendant leave the State of North Carolina and not return or enter into the State for two years is in all practical effect a sentence of banishment or exile for two years. It gives the defendant no opportunity to avoid serving the road sentence except by exile. It is not favorable to him to force him to go for two years into another state, where the State of North Carolina can exercise no restraining influence upon him for purposes of reformation. Through the ages the lot of the exile has been hard. There comes ringing down the centuries the words of the Psalmist: "By the rivers of Babylon, there we sat down, yea, we wept, when we remembered Zion." It is not sound public policy to make other states a dumping ground for our criminals. In many cases this Court has sustained the suspension of sentences on condition that the defendant remain for a fixed period of time of good behavior, pay a certain sum of money, etc.; conditions which were favorable to the defendant, permitting him if he obeyed the conditions to avoid serving the sentence, and in furtherance of sound public policy. *S. v.*

Hilton, supra; S. v. Pelley, 221 N.C. 487, 20 S.E. 2d 850; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143; *S. v. Graham,* 225 N.C. 217, 34 S.E. 2d 146; *S. v. Jackson, supra; S. v. Simmington,* 235 N.C. 612, 70 S.E. 2d 842.

In *S. v. Stallings,* 234 N.C. 265, 66 S.E. 2d 822, *Chief Justice Devin* speaking for the Court said: "The power of a court, in proper case, to suspend judgment on conviction of a criminal offense for a reasonable length of time, conditioned upon continued obedience to the law, is well recognized in this jurisdiction, and frequently exercised in order to carry out the more humane concept of the purpose of punishment for crime."

We therefore conclude that the two-year road sentence suspended on condition that the defendant Doughtie leave the State of North Carolina and not return or enter into the State for two years, with capias and commitment to issue if he does return, is not within the letter or spirit of our decisions affirming the validity of suspended sentences, is not favorable to the defendant, nor sound public policy, nor consistent with the proper punishment for crime. Such a sentence was beyond the power of the court to inflict.

"The suspension or reduction of a sentence on condition that the convicted person leave the state . . . is void." 15 Am. Jur., Criminal Law, Sec. 453.

The defendant pleaded guilty. Where there is an erroneous sentence, the case will be remanded for a proper sentence. *S. v. Lawrence,* 81 N.C. 522; *S. v. Perkins,* 82 N.C. 681; *In re Deaton,* 105 N.C. 59, 11 S.E. 244; *S. v. Walker,* 179 N.C. 730, 102 S.E. 404; *S. v. Satterwhite,* 182 N.C. 892, 109 S.E. 862; *S. v. Phillips,* 185 N.C. 614, 115 S.E. 893; *S. v. Kelly,* 206 N.C. 660, 175 S.E. 294; *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Robinson,* 224 N.C. 412, 30 S.E. 2d 320.

The sentence passed against the defendant at the October Criminal Term, 1951, of the Superior Court of Edgecombe County is reversed, and vacated, and the judgment or order putting said road sentence into effect is reversed, and vacated. The defendant's only assignment of error to the signing of the judgment is sustained.

It is ordered that the case be remanded to the Superior Court of Edgecombe County for a proper sentence.

Error and remanded.

IN THE MATTER OF EXPERIENCE MODIFICATION AUTOMOBILE LIABILITY INSURANCE, BLUE BIRD TAXI COMPANY OF ASHEVILLE, INC.

(Filed 18 March, 1953.)

1. Insurance § 3—

Since G.S. 58-246 (b) provides that the N. C. Automobile Rate Administrative Office may encourage safety in the operation of taxicabs by offering reduced premium rates upon approval of the Commissioner of Insurance, the statute does not authorize, to accomplish this purpose, the imposition of increased premium rates on companies having a higher loss experience than the average.

2. Statutes § 5a—

Where a statute expressly provides one method for accomplishing a stated objective, it necessarily excludes other methods for accomplishing such objective under the maxim *expressio unius est exclusio alterius.*

APPEAL by petitioner Blue Bird Taxi Company of Asheville, Inc., from *Carr, J.*, at June Term, 1952, of WAKE.

Proceeding by owner of taxicabs attacking as excessive certain premium rates for liability insurance established by an experience rating plan promulgated by the North Carolina Automobile Rate Administrative Office and approved by the Commissioner of Insurance.

The proceeding arises out of the statutes, the regulations, the ordinance, and the facts stated in the numbered paragraphs set forth below.

1. Every insurance company engaged in writing automobile bodily injury and property damage insurance in North Carolina is required to maintain membership in the North Carolina Automobile Rate Administrative office, a rating bureau, which is placed under the supervision of the Commissioner of Insurance and regulated by the statutes embodied in Article 25 of Chapter 58 of Volume 2B of the General Statutes.

2. Under G.S. 58-246 (a), the North Carolina Automobile Rate Administrative Office has authority "to maintain rules and regulations and fix rates for automobile bodily injury and property damage insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau." It is empowered, moreover, by G.S. 58-246 (b) "to encourage safety on the highways and streets of the State, by offering reduced premium rates under a uniform system of experience rating as may be approved by the Commissioner of Insurance."

3. Under G.S. 58-248, rates fixed by the North Carolina Automobile Rate Administrative Office for automobile bodily injury and property damage insurance are submitted to the Commissioner of Insurance, who must approve them before they can be put into effect in this State. G.S. 58-248.1 provides that "Whenever the Commissioner, upon his own mo-

tion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory, he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest."

4. The establishment of rates on bodily injury and property damage insurance for taxicabs operating in the State is governed by Article 25 of Chapter 58 of Volume 2B of the General Statutes. See: G.S. 58-246 (d).

5. The North Carolina Automobile Rate Administrative Office has done these things with the approval of the Commissioner of Insurance for each premium-paying period during recent years: (1) It has placed in a special classification those owners of taxicabs who have paid total premiums of not less than $400 "during the latest year or latest two years of the experience period" defined in accompanying regulations and who have maintained at least five insured taxicabs in service "during the latest year of the experience period" defined in such regulation; (2) it has made the premiums payable by owners of taxicabs included in the special classification for bodily injury and property damage insurance determinable by the provisions of an experience rating plan; and (3) it has made the premiums payable by all other owners of taxicabs for bodily injury and property damage insurance determinable by basic or manual rates. The basic or manual rates are based on the average hazard, as shown by experience, attending the operation of taxicabs in the aggregate. The experience rating plan classifies risks by determining for each owner of taxicabs, who is included in the plan, an insurance rate which recognizes his measurable departure from the average hazard attending the operation of taxicabs in the aggregate. Under the experience rating plan, the worse than average risk is charged a premium measured by an individual experience rate higher than the basic or manual rate, and the better than average risk is charged a premium measured by an individual experience rate lower than the basic or manual rate. The individual experience rates of the owners of taxicabs included in the experience rating plan are based on the actual experience of such owners as to losses during a prescribed experience period. The question arising on this appeal does not necessitate any explanation of the somewhat complicated method employed in computing individual experience rates under the experience rating plan.

6. An ordinance of the City of Asheville, which was in force at the times herein set out, requires every person operating taxicabs for hire within the corporate limits of Asheville to deposit with the City of Asheville in respect to each taxicab so operated by him a policy of liability insurance or a surety bond or a sum of money sufficient to secure the payment of damages for any liability incurred by him on account of bodily injuries resulting from his operation of such taxicab in these amounts: $2,500 for bodily injury to one person, and $5,000 for bodily injuries to two or more persons in any single accident.

7. Persons operating taxicabs for hire within the corporate limits of Asheville customarily satisfy the requirements of the ordinance by carrying liability insurance.

8. The petitioner Blue Bird Taxi Company of Asheville, Inc., has owned and operated approximately 30 taxicabs for hire within the corporate limits of Asheville during recent years and has been included in the special classification described in paragraph 5 during such times. For this reason, the premiums on its bodily injury insurance have been computed on the basis of its individual experience rates in accordance with the experience rating plan. Some of the competitors of the petitioner in the taxicab business at Asheville have owned and operated fewer than five taxicabs and consequently have had the premiums on their bodily injury insurance measured by the basic or manual rates.

9. Inasmuch as the petitioner proved itself to be a worse than average risk during the relevant experience period, the premiums on each taxicab owned by the petitioner under the experience rating plan for bodily injury insurance satisfying the requirements of the ordinance of the City of Asheville for the annual period beginning 1 March, 1951, was 52 per cent higher than that on each taxicab operated by the competitors of the petitioner, whose premiums were measured by the basic or manual rates.

10. Upon ascertaining the fact stated in the preceding paragraph, the petitioner initiated this proceeding by filing with the Commissioner of Insurance a petition, wherein it alleged, in essence, that the rates charged it under the experience rating plan for the annual period beginning 1 March, 1951, are actually and legally excessive, and wherein it prayed that the Commissioner of Insurance grant it appropriate relief against such rates under the provisions of G.S. 58-248.1. The Commissioner of Insurance heard the proceeding after notice to the North Carolina Automobile Rate Administrative Office, found facts accordant with those stated above, concluded as a matter of law thereon that the rates charged the petitioner under the experience rating plan are neither actually nor legally excessive, and made a decision denying the petitioner the relief sought by it.

11. The petitioner appealed to the Superior Court under the provisions of G.S. 58-9.3 and G.S. 58-248.5. Judge Carr reviewed the decision of the Commissioner of Insurance at the June Term, 1952, of the Superior Court of Wake County, and rendered a judgment affirming it. The petitioner thereupon appealed to the Supreme Court, assigning the entry of this judgment as error.

John C. Cheesborough for the petitioner, appellant.

Attorney-General McMullan and Assistant Attorney-General Bruton for Waldo C. Cheek, Commissioner of Insurance, appellee.

Joyner & Howison for the North Carolina Automobile Rate Administrative Office, appellee.

ERVIN, J. Counsel for the appellees argue that the experience rating plan is just in that it imposes on each included taxicab owner as far as practicable his fair share of the cost of liability insurance. They assert also that the experience rating plan is wise in that it affords a twofold encouragement to safety on the highways by offering reduced premiums to included taxicab owners who are better than average risks and by exacting increased premiums from included taxicab owners who are worse than average risks. They insist, moreover, that the differences in the premium charges for liability insurance are based on reliable evidence as to losses, and that in consequence there is no discrimination among the individual taxicab owners covered by the experience rating plan or between such taxicab owners as a group and other taxicab owners.

We are impressed in no small degree by the apparent validity of these arguments. We are nevertheless constrained to hold that the North Carolina Rate Administrative Office and the Commissioner of Insurance exceeded the powers conferred upon them by Article 25 of Chapter 58 of Volume 2B of the General Statutes in promulgating and approving the experience rating plan which imposes a premium on each taxicab owned by the petitioner for bodily injury insurance satisfying the requirements of the ordinance of the City of Asheville for the annual period beginning 1 March, 1951, 52 per cent higher than that charged on each taxicab operated by the competitors of the petitioner, whose premiums are measured by the basic or manual rates.

These statutory provisions fall within the purview of the familiar and sound rule of statutory construction embodied in the terse maxim *expressio unius est exclusio alterius,* meaning the expression of one thing is the exclusion of another. When the Legislature granted authority to the North Carolina Automobile Rate Administrative Office and the Commissioner of Insurance "to encourage safety on the highway . . . *by offering reduced premium rates* under a uniform system of experience rating," it

impliedly prohibited them from doing that thing in any other way. *Howell v. Indemnity Co., ante,* 227, 74 S.E. 2d 610; *In re Sale of Land of Sharpe,* 230 N.C. 412, 53 S.E. 2d 302; *Old Fort v. Harmon,* 219 N.C. 241, 13 S.E. 2d 423; *Botany Worsted Mills v. United States,* 278 U.S. 282, 49 S. Ct. 129, 73 L. Ed. 379; *Raleigh & G. R. Co. v. Reid,* 13 Wall. 269, 20 L. Ed. 570; *Stephens v. Smith,* 10 Wall. 321, 19 L. Ed. 933; 50 Am. Jur., Statutes, section 244; 59 C.J., Statutes, section 582. This being true, the North Carolina Automobile Rate Administrative Office and the Commissioner of Insurance passed beyond their statutory authority when they sanctioned an experience rating plan which undertakes to encourage safety on the highways *by imposing increased premium rates.*

For this reason, the premium rates challenged by the petitioner are legally excessive, and the judgment holding that he is not entitled to appropriate relief against them is

Reversed.

GEORGE T. BENNETT v. J. N. STEPHENSON.

(Filed 18 March, 1953.)

1. Trial § 22a—

On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to him.

2. Automobiles § 8i—Respective duties of motorists meeting at intersection.

Where two vehicles approach each other along intersecting streets or highways at about the same time, it is the duty of the driver of the vehicle on the left to decrease his speed or even stop, and yield the right of way to the driver on his right in order to avoid a collision, and the operator of the vehicle on the right may assume that the operator of the vehicle on the left will yield the right of way in accordance with the statute, G.S. 20-155 (a). It is only when the vehicle on the right is a sufficient distance away to warrant the assumption by the driver on the left that he can proceed into the intersection in safety before the vehicle on the right, operated at a reasonable speed, reaches the intersection, that the vehicle on the left is not required to slacken speed or stop.

3. Negligence § 9½—

A person is not under 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, is entitled to assume, and act on the assumption, that others will obey the law and exercise ordinary care.

4. Automobiles § 8i—

If two cars approach each other along intersecting streets or highways, but the car on the left reaches the intersection first and has already entered

the intersection, the operator of the vehicle on the right is under duty to permit it to pass in safety. G.S. 20-155 (b).

5. Same: Automobiles § 18h (2)—Evidence held insufficient to show negligence on part of defendant entering intersection from plaintiff's right.

Plaintiff's evidence was to the effect that his car and defendant's car approached an intersection of streets in a residential district at about the same time, that plaintiff was driving the car approaching the intersection from defendant's left, that at a point 100 feet from the intersection plaintiff could see 300 feet along the street to his right, and plaintiff testified he looked to his right shortly before entering the intersection but did not see defendant's automobile until it was almost upon him. Defendant's car struck plaintiff's right fender and door near the center of the intersection. *Held:* Defendant's motion to nonsuit was properly allowed notwithstanding evidence that defendant's car was traveling 35 to 40 miles per hour, since the evidence discloses that the cars approached the intersection about the same time and that defendant's car was visible for some distance but was not seen by plaintiff until it was almost upon him, and there was no evidence that the speed of defendant's car proximately caused the collision.

APPEAL by plaintiff from *Sharp, Special Judge,* October Term, 1952, of HARNETT. Affirmed.

This was an action to recover damages for a personal injury and injury to property resulting from a collision of automobiles. Negligence of the defendant was alleged in the complaint. Contributory negligence of the plaintiff was alleged in the answer.

The collision which gave rise to the action occurred at a street intersection in a residential district of the town of Dunn, about 9 a.m., 4 October, 1951. Plaintiff was driving his automobile west along West Edgerton Street, and defendant's automobile driven by his wife was proceeding south on North Orange Avenue. In the intersection of these streets slightly west of the center, plaintiff's automobile was struck on its right front fender and the right front door. Skid marks from each car measured 36 feet. Both streets are 30 feet wide from curb to curb with asphalt pavement 18 feet wide in the center. Edgerton Street is straight and level and there was a slight hill north along Orange Avenue. After the impact plaintiff's automobile went 48 feet across a ditch into a vacant lot, and defendant's automobile went west 27 feet. Plaintiff testified his speed was 15 to 20 miles per hour and defendant's 35 to 40 miles per hour, but the highway patrolman who investigated the accident, plaintiff's witness, testified plaintiff told him he was going 30 miles an hour at the time, and defendant's driver said she was traveling 30 to 35 miles per hour.

The plaintiff testified his view toward Orange Avenue was obstructed by a small house fronting on Orange Avenue and some flowers; that 30 feet from the intersection one could see the crest of the grade on Orange

Avenue. The patrolman testified that at a point 100 feet east of the intersection one could see 300 feet to the right along Orange Avenue. Plaintiff testified in substance that he first looked to his right when he was 100 feet from the intersection (later he said 30 feet); that after he entered the intersection he saw defendant's automobile coming on his right; that the first time he saw defendant's automobile it was several feet from him, he thought 15 or 20 feet.

At the close of the evidence defendant's renewed motion to nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Neill McK. Salmon and Glenn L. Hooper, J., for plaintiff, appellant.
Wilson & Johnson and Robert H. Dye for defendant, appellee.

DEVIN, C. J. The plaintiff's appeal from the judgment of involuntary nonsuit rendered by the court below requires consideration of the plaintiff's evidence in the light most favorable for him. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356; *James v. R. R.,* 236 N.C. 290, 72 S.E. 2d 682.

Making due allowance for the somewhat varying estimates of distance, speed and visibility in plaintiff's evidence, the over-all picture presented is that of a collision between two automobiles on a clear day approaching a street intersection at approximately the same time. Hence the question of the negligence of the defendant whose automobile was approaching from plaintiff's right, and that of the plaintiff whose automobile was approaching from the defendant's left must be determined in the light of the duty imposed by the statute G.S. 20-155 (a), as interpreted by the decisions of this Court, notably in *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532, and *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25.

The statute provides that when two automobiles approach an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. Under these circumstances the statute makes it the duty of the driver of the automobile on the left to yield the right of way to the automobile approaching from his right, and to permit it to pass before attempting to cross. The phrase right of way has been interpreted to mean "the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path." 60 C.J.S. 865; *S. v. Hill, supra.* The rule applies when two automobiles approaching an intersection and "their respective distances from the intersection, their relative speeds, and the other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the other vehicle has passed." *S. v. Hill, supra.*

When this situation at an intersection is made to appear the duty devolves upon the driver of the automobile on the left to observe the statute and permit the automobile approaching from his right to pass before attempting to enter the intersection. If the driver of the automobile on the left sees, or in the exercise of reasonable prudence should see an automobile approaching from his right in such a manner that apparently the two automobiles will reach the intersection at approximately the same time, it is his duty to decrease his speed, bring his automobile under control and if necessary stop, and to yield the right of way to the driver of the automobile on his right in order to enable him to proceed and thus avoid a collision. *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554. The law imposes this duty on the driver of an automobile approaching an intersecting highway unless the automobile coming from his right on the intersecting highway is a sufficient distance away to warrant the assumption that he can proceed before the other automobile operated at a reasonable speed reaches the crossing. *Yost v. Hall, supra; Cab Co. v. Sanders, supra.*

If, in the instant case, the two automobiles approached the intersection at approximately the same time, the driver of defendant's automobile, in approaching the intersection, had the right to assume that the driver of the automobile coming from her left would yield the right of way and stop or slow down sufficiently to permit her to pass in safety. *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276. "One is not under 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." *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25. If, on the other hand, the automobile of the plaintiff approaching from the left reached the intersection first and had already entered the intersection, the driver of defendant's automobile was under duty, to permit the plaintiff's automobile to pass in safety. G.S. 20-155 (b); *Davis v. Long,* 189 N.C. 129 (136), 126 S.E. 321; *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316. However, the evidence in the case at bar is insufficient to invoke this principle of law as determinative of the questions involved.

The fact that the defendant's automobile was being driven at the speed of 35 to 40 miles per hour in a residential district with no other vehicle in view would not prevent the application of the rule as to right of way for automobiles entering an intersection at the same time, in the absence of evidence that the speed of defendant's automobile proximately caused the collision. *Cox v. Freight Lines, supra.*

From consideration of the evidence plaintiff has offered, it seems reasonably clear that the plaintiff failed to maintain a proper lookout for automobiles approaching the intersection from his right and failed to see the defendant's automobile in time to avoid the collision.

Plaintiff's witness, the highway patrolman, testified that at a point 100 feet east of the intersection one could see 300 feet along the intersecting street to the right. Though plaintiff testified he looked to his right shortly before entering the intersection, yet he admitted he failed to see a moving object as obvious as an automobile approaching along the street from his right until the defendant's automobile was almost upon him, a distance of several feet. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88. The collision occurred slightly west of the center of the intersection, and plaintiff's witness testified the skid marks from each automobile measured the same, 36 feet.

The facts in *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316, where the refusal to nonsuit was affirmed, were somewhat different from those in our case. There it did not appear that the two cars approached the intersection at approximately the same time.

We think the evidence insufficient to warrant submission to the jury, and that the judgment of nonsuit was properly entered.

Affirmed.

LANE BUCHANAN, ELDRIDGE BUCHANAN, GURNEY BUCHANAN, SAM GOUGE, FLETCHER PHILLIPS AND ERNEST CROWDER v. T. B. VANCE, JR., AND WIFE, PEARL VANCE, ETHEL WALKER AND HUSBAND, JOHN WALKER.

(Filed 18 March, 1953.)

1. Notice § 3: Injunctions § 8—

Upon return of an order to show cause why plaintiff should not be attached as for contempt, heard out of term and in another county, *held* the question of vacating the restraining order theretofore issued in the cause is not before the court, and there being no notice that a hearing relative to vacating the restraining order would then be heard, and no waiver of such notice, order dissolving the restraining order is erroneous and will be vacated and set aside on appeal.

2. Pleadings § 19c—

Upon demurrer for failure of the complaint to state facts sufficient to constitute a cause of action, the complaint will be liberally construed in favor of the pleader, and the demurrer overruled if the complaint, so construed, is sufficient.

APPEAL by plaintiffs from *Sink, J.,* at Chambers in Davie, 4 December, 1952. From AVERY.

BUCHANAN *v.* VANCE.

Civil action in trespass, heard below on return of order requiring the plaintiffs to show cause why they should not be attached as for contempt of court.

On 7 July, 1952, the plaintiffs instituted this action, alleging they are the leasehold owners of certain mining properties located in Avery County upon which the defendants were trespassing and taking and removing mica. By temporary order of injunction the defendants were restrained from entering the mines or "interfering with the plaintiffs' rights to mine and remove the minerals and enjoy the privileges granted to them under their lease."

Thereafter, two of the six plaintiffs conveyed their interest under the lease to the other four plaintiffs.

Following this, and on 21 July, 1952, by order of Judge Sink the temporary restraining order was continued to the final hearing, provided that within ten days the plaintiffs "file with the Clerk" a $15,000 justified bond "by way of indemnity to the defendants for such amount, if any, as they may show they have been endamaged by the continuance of the restraining order."

On 29 July, 1952, the plaintiffs filed the $15,000 justified bond, conditioned as required by Judge Sink's order, signed as principal makers by the four plaintiffs who were the then owners of the leasehold properties.

On 31 July, 1952, counsel for the two plaintiffs who had sold their interests filed with the Clerk a writing, signed by counsel, stipulating that each of these two plaintiffs "takes a voluntary nonsuit" in the case.

On 12 November, 1952, Judge Sink issued an order, on motion of the defendants, requiring the plaintiffs to appear before him at a designated time and place outside the County of Avery, and show cause why they "should not be attached and punished as for contempt of this Court." The plaintiffs answered and appeared before Judge Sink and moved to vacate the order to show cause. At the contempt hearing Judge Sink entered judgment discharging the plaintiffs from the charge of contempt of court, but vacating and dissolving the restraining order previously entered in the cause and taxing the plaintiffs with the costs.

To so much of the judgment as relates to the restraining order and taxes the plaintiffs with the costs, the plaintiffs excepted and appealed, assigning errors.

J. Ray Braswell, McBee & McBee, and W. E. Anglin for plaintiffs, appellants.

Charles Hughes and Burke & Burke for defendants, appellees.

JOHNSON, J. On the record as presented, the question of vacating the restraining order was not before the court. The plaintiffs were ordered

to appear and show cause why they should not be attached "as for contempt." The judgment was entered out of term, in another county, without notice that a hearing would be had relative to vacating the restraining order. Notice of this was necessary; waiver has not been made to appear.

It follows that the restraining order was erroneously dissolved. The judgment appealed from, except as it discharges the plaintiffs from the charge of contempt of court, will be vacated and set aside, and the restraining order will be deemed and treated as being reinstated, and it is so ordered. Decision here is controlled by the principles explained by *Ervin, J.*, and applied by the Court in *Collins v. Highway Commission, ante,* 277.

In this view of the case we do not reach for decision the question whether the grounds recited in the judgment as cause for dissolving the restraining order, including failure of two of the plaintiffs to sign the bond, are sufficient in law, without more, to entitle the defendants to a dissolution of the restraining order. It is observed, however, that the bond appears to be conditioned substantially as required by the order and is signed by E. C. Guy, surety, who justified. Also, it appears that the bond was filed with and approved by the Clerk as required by the order.

In this Court the defendants demurred *ore tenus* to the complaint for failure to state a cause of action. We are of the opinion and so hold that the demurrer should be overruled. The complaint, when construed with the degree of liberality required, presents facts sufficient to constitute a cause of action. *Scott v. Insurance Co.*, 205 N.C. 38, 169 S.E. 801, and cases cited. See also *Williams v. Aldridge Motors, ante,* 352.

The case will be remanded for further proceedings in accord with this opinion.

Error and remanded.

EASOM JOHNSON v. NANCY CATHERINE JOHNSON.

(Filed 18 March, 1953.)

1. Divorce and Alimony § 2a—

In the husband's action for absolute divorce on the ground of separation, it is not required that he establish as a constituent element of his cause of action that he is the injured party, but the wife may establish as an affirmative defense that the separation of the parties was occasioned by the act of the husband in willfully abandoning her. G.S. 50-6.

2. Divorce and Alimony § 12—

In the husband's suit for absolute divorce on the ground of separation, G.S. 50-6, the wife, upon a proper showing, is entitled, under G.S. 50-15, to support during the pendency of the action and counsel fees for her attor-

neys if she sets up a cross action for divorce from bed and board on the ground of abandonment, G.S. 50-7 (1), or merely sets up abandonment as an affirmative defense to his cause of action, or even if she merely denies the validity of the cause of action stated in his complaint.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at January Term, 1953, of JOHNSTON.

Action by husband for absolute divorce heard on motion of wife for alimony pending the action and counsel fees.

The plaintiff Easom Johnson and the defendant Nancy Catherine Johnson are husband and wife. They are living in a state of separation in Johnston County.

The plaintiff sues the defendant for an absolute divorce upon the ground of two years' separation under G.S. 50-6.

The defendant denies that the parties have lived separate and apart for two full years. She also alleges in minute detail in her "further defense and cross action" that the plaintiff willfully abandoned her; that the plaintiff thereby caused the separation of the parties; and that she is the injured party. She prays that plaintiff be denied the relief sought by him; that she be granted a divorce from bed and board; and that she be awarded permanent alimony under G.S. 50-14.

The defendant applied to Judge Burgwyn during the January Term, 1953, of the Superior Court of Johnston County by a motion in the cause for an allowance of alimony pending the action and counsel fees. After hearing affidavits offered by defendant in support of her motion and counter affidavits presented by plaintiff, Judge Burgwyn made extensive findings of fact to the effect that the plaintiff willfully abandoned the defendant without furnishing her an adequate support; that the defendant did nothing to provoke such misconduct on the part of the plaintiff; that the defendant does not have sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary expenses of the litigation; and that the plaintiff has the ability to pay the temporary alimony and counsel fees allowed by the court. Judge Burgwyn thereupon ordered the plaintiff to pay certain sums into the office of the clerk as alimony for the defendant pending the action and as fees for the attorneys retained to aid her. The plaintiff excepted and appealed, assigning the entry of the order as error.

E. R. Temple, Jr., and J. R. Barefoot for plaintiff, appellant.
Lyon & Lyon for defendant, appellee.

ERVIN, J. These propositions are well settled:

1. When the husband sues the wife for an absolute divorce, the wife may plead a cause of action for divorce from bed and board as a cross

action, and obtain upon a proper showing allowances from the estate or earnings of her husband for her support during the pendency of the action and for counsel fees for her attorneys. G.S. 50-15; *Nall v. Nall,* 229 N.C. 598, 50 S.E. 2d 737; *Covington v. Covington,* 215 N.C. 569, 2 S.E. 2d 558; *Barker v. Barker,* 136 N.C. 316, 48 S.E. 733; *Webber v. Webber,* 79 N.C. 572.

2. Since the decision to the contrary in *Reeves v. Reeves,* 82 N.C. 348, is expressly abrogated in *Medlin v. Medlin,* 175 N.C. 529, 95 S.E. 857, the wife may be allowed alimony pending the action and counsel fees in a suit against her for divorce, even though she seeks no affirmative relief and merely endeavors to defeat her husband's case. It follows, therefore, that in an action by the husband for an absolute divorce, the wife may deny the validity of the cause of action alleged by the husband, or plead an affirmative defense to it, and obtain upon a proper showing in either event allowances from the estate or earnings of the husband for her support during the pendency of the action and for counsel fees for her attorneys. *Briggs v. Briggs,* 215 N.C. 78, 1 S.E. 2d 118; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436.

3. Where the husband sues the wife for an absolute divorce upon the ground of two years' separation under G.S. 50-6, he is not required to establish as a constituent element of his cause of action that he is the injured party. Nevertheless, the law will not permit him to take advantage of his own wrong. Consequently, the wife may defeat the husband's action for an absolute divorce under G.S. 50-6 by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in willfully abandoning her. *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796; *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492; *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471; *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466; *Reynolds v. Reynolds,* 208 N.C. 428, 181 S.E. 338.

4. The Superior Court is empowered to "grant divorces from bed and board on application of the party injured, made as by law provided, . . . if either party abandons his or her family." G.S. 50-7 (1). See, in this connection: *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909; *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919; *Horton v. Horton,* 186 N.C. 332, 119 S.E. 490; *Medlin v. Medlin, supra; Setzer v. Setzer,* 128 N.C. 170, 38 S.E. 731.

When the transcript of the record in the instant case is laid alongside these rules, it is clear that Judge Burgwyn had power to allow alimony pending the action and counsel fees to the wife on the facts shown by her and found by him notwithstanding she is the defendant in the action. This is true for each of these reasons: (1) Her answer denies the validity of the cause of action stated in the complaint; (2) her answer pleads an

affirmative defense to the cause of action alleged in the complaint; and (3) her answer pleads a cause of action for divorce from bed and board as a cross action.

The order allowing alimony pending the action and counsel fees is Affirmed.

IN THE MATTER OF THE CUSTODY OF NELLIE SUE MELTON, A MINOR.

(Filed 18 March, 1953.)

Habeas Corpus § 3: Courts § 7½—Habeas corpus will not lie in contest for custody of minor between its father and maternal grandmother.

The juvenile court has exclusive original jurisdiction of all cases involving the custody of a minor under 16, G.S. 110-21 (3), except in contests between the parents, undivorced but living in a state of separation, G.S. 17-39, or where divorce proceedings have been instituted and are pending in this State, G.S. 50-13, or where the parents have been divorced by decree of another state, G.S. 50-13, and the judge of the Superior Court is without jurisdiction to issue a writ of *habeas corpus* for control of such minor child in a contest between the child's father and its maternal grandmother, and such order is void and the denial of a motion to modify such order will be reversed on appeal.

APPEAL by petitioner from the *Honorable J. Will Pless, Jr.*, Resident Judge of the Eighteenth Judicial District, at Chambers in Marion, North Carolina, 22 November, 1952.

Controversy between the father and the maternal grandmother over the custody of a small child heard upon a writ of *habeas corpus*.

For ease of narration, David Melton is called the petitioner, and Zula Whisnant is designated as the respondent.

Nellie Sue Melton is the three-year-old daughter of the petitioner and his wife, Junie Mae Whisnant Melton. The latter is an insane patient in the State Hospital at Morganton. In August, 1952, Nellie Sue Melton was living at the home of her maternal grandmother, the respondent, who refused to surrender her to the petitioner. Thereupon the resident judge, acting on the application of the petitioner, issued a writ of *habeas corpus* requiring the respondent to produce the child before him at Chambers in Marion, North Carolina, on 6 September, 1952, to the end that the controversy between the petitioner and the respondent respecting her custody might be determined. On the return day, the resident judge made an order awarding the custody of Nellie Sue Melton during the first four weeks of each series of five weeks to the petitioner, and during the fifth week of each such series to the respondent. Neither the petitioner nor the respondent excepted to this order. On 22 November, 1952, the peti-

tioner applied to the resident judge at chambers by motion after due notice to the respondent to change the order of 6 September, 1952, so as "to give him exclusive custody of . . . Nellie Sue Melton," and the resident judge entered an order denying the motion. The petitioner excepted to this order and appealed, asserting by his assignments of error that the resident judge erred in refusing to grant him the exclusive custody of his child.

B. T. Jones, Jr., for petitioner, appellant.
Joseph C. Whisnant for respondent, appellee.

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

Reversed.

SHIRLEY DIANE WILLIAMS, AN INFANT, BY HER NEXT FRIEND, WILLIE WILLIAMS, JR., v. RANDOLPH HOSPITAL, INC.

(Filed 25 March, 1953.)

1. Hospitals § 6: Charities § 4—

It is settled law in this jurisdiction that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection and retention.

2. Appeal and Error § 51b—

The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after

ample consideration, should not be disturbed, under the doctrine of *stare decisis*, except for most cogent reasons.

3. Constitutional Law § 8a—

Whether some change should be made in the doctrine of immunity of a charity for the negligence of its servants and employees if the charity has used due care in their selection and retention, is a question of broad public policy to be pondered and resolved by the lawmaking body.

4. Hospitals § 6—

The rule that a charity is not liable for the negligence of its servants and employees provided it has used due care in their selection and retention, applies to a paying patient of a charitable hospital.

PARKER, J., took no part in the consideration or decision of this case.

BARNHILL, J., dissenting.

APPEAL by plaintiff from *Nettles, J.*, at May Civil Term, 1952, of MOORE.

Civil action to recover damages for personal injuries sustained by the plaintiff while a patient in the defendant's hospital, heard below on demurrer to the affirmative defense set up in the defendant's answer.

The plaintiff, an infant, instituted this action, through her father as next friend, to recover damages for personal injuries, in the nature of third degree burns, alleged to have been received by the infant while under a "croup tent," as a result of the negligence of the servants and employees of the defendant. It is alleged that the plaintiff was a paying patient in the defendant's hospital, her allegations being that the bill rendered by the hospital and paid by her father was for an amount "more than adequate and sufficient to defray the costs and expenses of all care and services rendered by the defendant to the plaintiff in treating her for pneumonia."

By answer the defendant denies the plaintiff's allegations of negligence, and by way of affirmative defense alleges that the defendant "is a non-stock charitable corporation which is not and never has been operated for profit . . ."

The plaintiff demurred to the affirmative defense upon the ground that the fact that the defendant is a non-profit, charitable corporation, as alleged by the defendant, does not entitle it to immunity from liability for the injuries sustained by the plaintiff due to the negligence of the servants and employees of the defendant.

The court below, being of the opinion that the defendant's affirmative defense was sufficient in law to constitute a defense to the action, entered judgment overruling the demurrer.

From the judgment so entered the plaintiff appealed.

W. D. Sabiston, Jr., for plaintiff, appellant.
Spence & Boyette and H. M. Robins for defendant, appellee.

JOHNSON, J. It is settled law in this jurisdiction that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection and retention. *Barden v. R. R.,* 152 N.C. 318, 67 S.E. 971; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807; *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914; *Johnson v. Hospital,* 196 N.C. 610, 146 S.E. 573; *Smith v. Duke University,* 219 N.C. 628, 14 S.E. 2d 643. It is to be noted that the rule to which we adhere holds a charitable institution liable for failure to exercise due care in the selection and retention of its servants (*Hoke v. Glenn, supra*), and also permits a servant to recover for administrative negligence of the charity. *Cowans v. Hospital,* 197 N.C. 41, 147 S.E. 672. Thus the rule to which we adhere is that of qualified immunity.

The plaintiff, conceding the existence of the rule which obtains with us, takes a dual position in prosecuting this appeal. First, it is urged that the doctrine of immunity should be eliminated entirely from our law. And as an alternate contention, the plaintiff insists that in any event the instant case does not come within the bounds of our rule of immunity. This because the plaintiff was a paying patient in the defendant's hospital. Our attention is directed to the fact that in none of the decided cases in this jurisdiction has decision been made to turn on the question of the status of the plaintiff as a paying or non-paying patient or patron. Here the plaintiff points to what was said in the recent case of *Williams v. Hospital Association,* 234 N.C. 536, 67 S.E. 2d 662, decided 21 November, 1951:

"While the doctrine followed in this jurisdiction clearly exempts an eleemosynary hospital from liability for the negligence of its servants, who have been selected with due care, in the care and treatment of those who have accepted the benefits of the charity, so far this Court has not applied the doctrine as against one who is not a recipient of the charity but who, instead, pays full compensation for the services rendered. As to such patient, is the plea available to the defendant? While some of the cases cited contain dicta bearing on the question, as yet there is no authoritative decision in this jurisdiction."

The plaintiff does not allege a failure of the defendant corporation to exercise due care in selecting its servants and employees. *Barden v. R. R., supra; Hoke v. Glenn, supra.* Accordingly, the plaintiff's demurrer, which admits the defendant is a charitable hospital, presents for decision the broad question whether we should overthrow entirely our rule of immunity, and also the alternate question whether or not, assuming the

rule is retained, it should be applied against a paying patient of a charitable hospital.

It has been forcefully argued by counsel for the plaintiff that we should re-examine our position and the policy behind it and determine that our rule of qualified immunity shall no longer be followed. Counsel has been diligent in the citation of authority, and the plaintiff's cause has been presented with great resourcefulness.

An examination of the authorities discloses that a great divergence of opinion exists in the various jurisdictions on the question of liability of a charitable institution for the negligence of its servants and employees. The range of decision is from absolute liability to complete immunity, with the weight of authority being on the side of immunity, either total or qualified.

The doctrine of immunity as applied in various jurisdictions rests upon different considerations. One line of cases bases the doctrine on what is called the "trust fund theory," that is to say, that all funds of charitable institutions are held in trust for the particular purpose for which the charity was founded, and that it would amount to a breach of trust to apply them to other uses—that to give damages out of the trust fund would not be to apply it to the object which the author of the fund had in view, but would be to divert it to an entirely different purpose. Other cases proceed upon the theory that one who accepts the benefit of a charitable institution is taken impliedly to have assented to assume the risk of negligent injuries caused by servants properly selected and retained, or to have waived liability for such injuries. In other cases decision is rested on considerations of public policy, with emphasis being given to the fact that these charitable and private eleemosynary institutions frequently perform public functions and render vital services within the zone of governmental duty.

It would serve no useful purpose for us to discuss in detail the merits or demerits, or the strong or weak points of these different theories. Suffice it to say that each of them seems to be subject to some measure of meritorious criticism. But regardless of the reasons given for the results worked out, the overwhelming numerical weight of authority is on the side of immunity, though the trend of decision seems to be toward qualifying or abandoning the rule. See *Herndon v. Massey, supra;* Annotation, 25 A.L.R. 2d 29; 10 Am. Jur., Charities, Sec. 160 *et seq.;* 14 C.J.S., Charities, Sec. 75; Prosser, Torts (1941), p. 1079 *et seq.;* Zollman, American Law of Charities, Sections 798 *et seq.;* 77 U. of Pa. L. Rev. 191; 19 Michigan L. Rev. 395; 30 N. C. L. Rev. 67; *President and Directors of Georgetown College v. Hughes,* 130 F. 2d 810.

However, in evaluating the weight of authority it must be kept in mind that in a number of jurisdictions the same result as that of qualified

immunity is effected in the mode of applying the doctrine of *respondeat superior,* stress being laid on the inapplicability of this doctrine upon the theory that a charity has performed its whole duty when it tenders to a beneficiary a competent servant and that thereafter the servant becomes the servant of the beneficiary rather than the servant of charity. 10 Am. Jur., Charities, Sec. 10; Zollman, American Law of Charities, Sec. 820. It is noted that in a number of jurisdictions, including England and Canada, nurses, no less than physicians, when acting in professional capacity have been treated as not being the servants of the hospital but independent experts performing services for the patient. Other cases hold that a charitable hospital undertakes only to supply competent personnel, and is not responsible for the improper performance by such personnel of its duties. Annotation, 25 A.L.R. 2d 29, pp. 40, 65, and 170 *et seq.*

An examination of the decisions of this Court dealing with the subject under discussion discloses that the rule of immunity is deeply embedded in the structure of our common law. Since the doctrine was first pronounced, it has been reaffirmed over and over again through the years. It is to be noted that the rule with us applies not only to hospitals, but presumably to a wide variety of institutions, such as orphanages, schools, colleges, churches, and numerous other allied benevolent services. A doctrine so deeply and widely implanted as is this in the structure of our common law, developed and congealed through the years by an unvarying line of judicial decisions, presumably reflecting the tested social values of our communities and the approved sentiments of our people, should not be lightly overturned or whittled away by this Court. The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for most cogent reasons. Such is the gist of the doctrine of *stare decisis.* See 14 Am. Jur., Courts, Sections 60, 61, and 65. We are constrained to the view that this doctrine is applicable to the instant case.

For us to withdraw immunity from charitable institutions at this time, against the existing background of decisions of this Court, would in effect be an act of judicial legislation in the field of public policy. See these decisions from other jurisdictions expressing like views respecting application of the doctrine of *stare decisis* is similar circumstances: *Howard v. South Baltimore General Hospital,* 191 Md. 617, 62 A. 2d 574; *Re Erwin's Estate,* 323 Mich. 114, 34 N.W. 2d 480; *Jones v. St. Mary's Roman Catholic Church,* 7 N.J. 533, 82 A. 2d 187; *Gregory v. Salem General Hospital,* 175 Ore. 464, 153 P. 2d 837; *Bond v. Pittsburgh,* 368 Pa. 404, 84 A. 2d 328; *Miller v. Mohr,* 198 Wash. 619, 89 P. 2d 807;

Foley v. Wesson Memorial Hospital, 246 Mass. 363, 141 N.E. 113; *De Groot v. Edison Institute,* 306 Mich. 339, 10 N.W. 2d 907; *Magnuson v. Swedish Hospital,* 99 Wash. 399, 169 P. 828.

Whether some change in our rule is advisable as to hospitals operated by private and public charities and by political subdivisions of the State is a question of broad public policy to be pondered and resolved by the lawmaking body.

We come now to consider the question whether the plaintiff's status as a paying patient should be treated as exempting her from our rule of immunity so as to render the defendant hospital liable to her for the negligence of its employees.

Here the gist of the plaintiff's position is that where a patient pays or obligates to pay for the services rendered, or is accepted and cared for on that basis, by a charitable hospital, a contractual relation is thereby created between the parties under which the hospital, in consideration of payment or in contemplation thereof, is obligated to exercise due care in taking care of the patient and becomes liable for negligent failure to do so, the theory being that such paying patient is in point of fact a stranger to the charity. This view finds support in a few jurisdictions. See 10 Am. Jur., Charities, Sec. 151, p. 701; *Tucker v. Mobile Infirmary Asso.,* 191 Ala. 572, 68 So. 4.

However, our examination of the authorities on the subject discloses numerous well-considered decisions holding that the immunity of charity from tort liability should not be made to depend upon whether or not the patient or patron assumes the obligation to pay for the services rendered to him by charity. This line of decisions represents what we consider to be the decided weight of authority, both in quality of reasoning and in numerical volume. From this line we cite these as illustrative cases: *Powers v. Massachusetts Homoeopathic Hospital,* 109 F. 294, *cert.* den. 183 U.S. 695, 46 L. Ed. 394, 22 S. Ct. 932; *Downs v. Harper Hospital,* 101 Mich. 555, 60 N.W. 42, 25 L.R.A. 602, 45 Am. St. Rep. 427; *Nicholas v. Evangelical Deaconess Home & Hospital,* 281 Mo. 182, 219 S.W. 643; *Duncan v. Nebraska Sanitarium & Benev. Asso.,* 92 Nev. 162, 137 N.W. 1120, 41 L.R.A. N.S. 973, Ann. Cas. 1913E 1127; *D'Amato v. Orange Memorial Hospital,* 101 N.J.L. 61, 127 A. 340; *Taylor v. Flower Deaconess Home,* 104 Ohio St. 61, 135 N.E. 287, 23 A.L.R. 900; *Gable v. Sisters of St. Francis,* 227 Pa. 254, 75 A. 1087, 136 Am. St. Rep. 879; *Lindler v. Columbia Hospital,* 98 S.C. 25, 81 S.E. 512; *St. Paul's Sanitarium v. Williamson* (Tex. Civ. App.) 164 S.W. 36; *Weston v. Hospital of St. Vincent,* 131 Va. 587, 107 S.E. 785, 23 A.L.R. 907; *Wharton v. Warner,* 75 Wash. 470, 135 P. 235; *Roberts v. Ohio Valley General Hospital,* 98 W. Va. 476, 127 S.E. 318, 42 A.L.R. 968; *Schau v. Morgan,* 241 Wis. 334, 6 N.W. 2d 212; *Ettlinger v. Trustees of Randolph-Macon College*

(C.A. 4th Va.), 31 F. 2d 869; *Higgons v. Pratt Institute,* 45 F. 2d 698; *Bodenheimer v. Confederate Memorial Asso.,* 68 F. 2d 507, *cert.* den. 292 U.S. 629, 78 L. Ed. 1483, 54 S. Ct. 643.

The gist of the rule deducible from these decisions is succinctly stated in 10 Am. Jur., Charities, Sec. 151:

"The fact that patients who are able to pay are required to do so does not deprive a corporation of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not private gain, but contribute to the more effectual accomplishment of the purpose for which the charity is founded."

In *Powers v. Massachusetts Homoeopathic Hospital, supra,* opinion by *Lowell, J.,* it is said:

"The plaintiff was what is sometimes called a 'paying patient,' . . . Upon this ground her counsel has sought to distinguish her case from that of a patient in the hospital who pays nothing. In our opinion, the difference is immaterial. As has been said, the defendant was a charitable corporation; . . . That the ministrations of such a hospital should be confined exclusively to the indigent is not usual or desirable. Those of moderate means from necessity, and not a few rich people from choice, resort to great charitable hospitals for treatment, especially in surgical cases. Throughout the world this is the custom in these institutions, whether they are maintained by individual, religious, or municipal charity. . . . In our opinion, a paying patient in the defendant hospital, as well as a non-paying patient, seeks and receives the services of a public charity.

"That such a hospital in its treatment of a rich patient shall be held to a greater degree of care than in its treatment of a pauper is not to be tolerated. . . ."

In *Downs v. Harper Hospital, supra,* it is stated:

"The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not for private gain, but contribute to the more effectual accomplishment of the purpose for which the charity was founded."

In *D'Amato v. Orange Memorial Hospital, supra,* it is said:

"In our opinion, public policy requires that a charitable institution maintaining a hospital be held not liable for injuries resulting to patients through the negligence or carelessness of its physicians and nurses, even if the injured person were a pay patient; payment for board, medical services, and nursing in such case going to the general fund to maintain the charity."

In *Wharton v. Warner, supra,* it is said:

"The same rule applies where the plaintiff has paid for the services rendered, where the amount received was not for private gain, but to more effectually accomplish the purposes for which the charity was founded."

In *Roberts v. Ohio Valley General Hospital, supra,* it is stated:

"The fact that one is a paying patient does not alter the rule. Such patient is the recipient of the donors' gratuity only in a lesser degree than one who makes no payment. The hospital building, with its equipment, management, and its great possibilities for the alleviation of suffering, was provided by charity. In using the organization made possible and supported by that charity, a paying patient, to that extent, benefits by the charity."

After full consideration of the arguments *pro* and *con,* we are impelled to the conclusion that no exception should be made in our rule of immunity in favor of paying patrons of charitable institutions.

It follows that the judgment below is

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

BARNHILL, J., dissenting: When a person applies for and receives gratuitous accommodations from a hospital engaged in the business of serving charity patients, he has little cause to complain about the quality of service he receives. I can, therefore, concur in the conclusion that an eleemosynary hospital incurs no legal liability, under the doctrine of *respondeat superior,* for injuries suffered by a charity patient as a proximate result of the negligence of one of its nurses who has been selected with due care. But a different situation arises and a different principle applies when a hospital charges and receives pay for services rendered a patient in its care. It thereby assumes an obligation to exercise due care and should be subjected to the same responsibility that is imposed on others.

One who enters the market place and engages in commercial transactions should be held to the same standards exacted of others similarly situated. That he spends most of his time and money in performing acts of charity is no cause to excuse him for his negligence in performing a duty for which he receives a *quid pro quo.*

Is an eleemosynary hospital to be relieved of all legal liability for the negligence of one of its servants who operates one of its automobiles in such a careless manner that he collides with and kills some innocent third party? Is it to be held immune from liability for the negligent acts of all of its servants? If not, then why should it receive such special con-

sideration in respect to one who pays for the services he receives? This I am unable to perceive. For that reason I vote to reverse.

MRS. RACHEL VIRGINIA WILLIAMS, BY HER NEXT FRIEND, C. W. WILLIAMS, v. UNION COUNTY HOSPITAL ASSOCIATION, INC., D.B.A. ELLEN FITZGERALD HOSPITAL.

(Filed 25 March, 1953.)

APPEAL by plaintiff from *Nettles, J.*, at 18 February Term, 1952, of UNION.

Civil action to recover damages for personal injuries sustained by the plaintiff, a patient in the defendant's hospital, when she fell from a bed and injured her hip, due to the alleged negligence of the defendant's employees.

The case was here at the Fall Term, 1951, on plaintiff's appeal from judgment overruling her demurrer to the defendant's further defense. The decision affirming the judgment below is reported in 234 N.C. 536, 67 S.E. 2d 662.

The plaintiff alleged and offered evidence tending to show that she was a paying patient.

It was stipulated by the parties that "the defendant is an eleemosynary institution . . ."

At the close of the plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed, and from judgment based on such ruling the plaintiff appealed, assigning errors.

Covington & Lobdell for plaintiff, appellant.

Jones & Small for defendant, appellee.

JOHNSON, J. The judgment of nonsuit will be upheld on authority of what is said in the opinion filed simultaneously herewith in *Williams v. Randolph Hospital, Inc., ante,* 387, which is precisely decisive of the question raised by the instant appeal.

Affirmed.

PARKER, J., took no part in the consideration or decision of this case.

BARNHILL, J., dissents for the reasons stated in his dissenting opinion in *Williams v. Hospital, Inc., ante,* 387.

GILES R. WILKINS AND BESSIE L. WILKINS v. COMMERCIAL FINANCE COMPANY, INC.

(Filed 25 March, 1953.)

1. Pleadings § 24a—

In order to prevail, plaintiff's proof must correspond substantially with the allegations of his complaint, since proof without allegation is as unavailing as allegation without proof.

2. Trial § 23f—

Objection that there is material variance between the allegations of the complaint and the evidence of plaintiff is properly raised by a motion for a compulsory nonsuit, since in such event there is a failure of proof on the cause of action alleged.

3. Chattel Mortgages and Conditional Sales § 17—

Where mortgagor admits default in the payment of an installment due on the note secured he may not contend that mortgagee unlawfully converted the chattel to its own use because of the repossession and sale of the chattel by the mortgagee in accordance with the terms of the instrument.

4. Fraud § 12: Evidence § 39—Alleged parol promise of mortgagee to procure collision insurance held precluded by written instruments excluding any such agreement.

Plaintiffs alleged that mortgagee promised to procure collision insurance on the automobile when in truth the mortgagee did not intend to do so at the time the representation was made, and that the car was damaged in a collision. Plaintiffs sought to recover on the theory of fraud. The mortgagee alleged and introduced in evidence written memorandum signed by plaintiffs, together with promissory notes and chattel mortgages executed by them, subsequent to the oral negotiations, which together exclude any promise on the part of the mortgagee to provide insurance but stipulated in the chattel mortgage that the mortgagors would keep the car insured, and stipulated in the memorandum that plaintiffs had been told that there was no insurance in force on the car. Plaintiffs admitted the execution of the instruments and did not attack them for fraud. *Held:* It must be conclusively presumed that the writings supersede any prior oral agreements of the parties, and, since they exclude any promise on the part of the mortgagee to provide insurance on the car, there is material variance between plaintiffs' allegations and proof, and compulsory nonsuit was properly entered.

5. Usury § 1—

Usury does not invalidate a contract, but simply works a forfeiture of the entire interest and subjects the lender to liability to the borrower for twice the interest paid. G.S. 24-2.

APPEAL by plaintiffs from *Crisp, Special Judge,* at April Term, 1952, of FORSYTH.

Civil action to recover damages for fraud.

The plaintiffs Giles R. Wilkins and Bessie L. Wilkins are husband and wife. They reside in Winston-Salem. The defendant Commercial Finance Company, Inc., has an office in Winston-Salem, where it makes loans on the security of automobiles and purchases promissory notes and chattel mortgages at discounts from automobile dealers. The C. W. Myers Trading Post, Inc., maintains a place of business in Winston-Salem, where it traffics in used automobiles.

Certain events antedating this litigation are virtually undisputed. They are set out in the numbered paragraphs which immediately follow.

1. The plaintiffs acquired a used Ford car from the C. W. Myers Trading Post, Inc., on 22 April, 1950, in transactions accompanied by four contemporary documents, namely, a bill of sale, a promissory note, a purchase-money chattel mortgage, and a stipulation.

2. The bill of sale was executed by the male plaintiff and the C. W. Myers Trading Post, Inc. When its recitations are recast in the past tense, the bill of sale states that the sale price of the Ford car was $1,815.00; that the plaintiffs paid the C. W. Myers Trading Post, Inc., $915.00 on the sale price, leaving $900.00 due on it; that this unpaid portion of the sale price and unspecified "carrying charges" thereon amounting to $434.40 totaled $1,334.40 and were financed under a contract payable in 24 monthly installments of $55.60 each; and that the contract was sold to the defendant Commercial Finance Company.

3. The promissory note was executed by both of the plaintiffs. They thereby promised "to pay to the C. W. Myers Trading Post, Inc., or order, the sum of . . . $1,334.40 . . . in 24 monthly installments of $55.60 each, on the 22nd of each month, beginning on May 22, 1950," and agreed that a failure on their part to pay any single installment at its maturity would "cause the entire balance to become due and collectible at the option of the holder."

4. The purchase-money chattel mortgage was executed by both of the plaintiffs as mortgagors to the C. W. Myers Trading Post, Inc., as mortgagee. This instrument conveyed the Ford car to the mortgagee as security for the payment of the promissory note mentioned in the preceding paragraph and vested in the mortgagee power to do these things in case of "default . . . in the payment of any installment of said note": (1) To take possession of the Ford car and sell it by public auction for cash "after posting notice of sale in three public places for twenty days"; and (2) to apply the proceeds arising from the sale to the satisfaction of the costs of sale and the note. The purchase-money chattel mortgage stated in express terms that the mortgagors would keep the Ford car insured against any loss which the mortgagee required in such amount and in such company as the mortgagee directed; that the mortgagee was under no duty to secure any type of insurance on the Ford car; that the

mortgagee could assign the chattel mortgage and the note secured by it to any bank, finance company, or individual; and that the mortgage and the note secured by it contained the entire agreement of the parties.

5. The stipulation was penciled on a printed desk calendar sheet, recited that "we have been told we have no insurance of any kind and all papers were filled out before we signed to pay $55.60 a month for 24 months," and was subscribed by both of the plaintiffs.

6. The C. W. Myers Trading Post, Inc., executed an endorsement on the purchase-money chattel mortgage in these words and figures: "The . . . chattel mortgage, together with the note secured thereby, transferred, set over, and assigned to Commercial Finance Co. . . . this 24th day of April, 1950."

7. The plaintiffs paid all installments maturing on the note from 22 May to 22 November, 1950, both inclusive. But they did not pay the installment of 22 December, 1950, or any later installments.

8. The Ford car was substantially damaged in a collision with another motor vehicle on 2 December, 1950. No collision or other insurance was then outstanding upon it.

9. The defendant took possession of the Ford car shortly after the collision. Thereafter, to wit, on 22 March, 1951, the defendant sold the Ford car to a third person by public auction for cash after due advertisement under the power of sale in the purchase-money chattel mortgage, and applied the net proceeds of the sale, *i.e.*, $383.00, to the note.

Subsequent to these events, to wit, on 24 August, 1951, the plaintiffs brought this action against the defendant. The pleadings consisted of a complaint, an answer, and a reply.

The complaint ignores the bill of sale, the promissory note, the purchase-money chattel mortgage, and the stipulation mentioned in the paragraphs numbered 1, 2, 3, 4, and 5. It alleges in detail that on 22 April, 1950, the plaintiffs were induced by the fraud of the defendant to borrow $900.00 from the defendant on the security of their Ford car under a contract whereby the plaintiffs agreed to pay the defendant $1,334.40 for the loan in 24 monthly installments of $55.60 each and whereby the defendant promised to procure and keep in force pending the payment of all of the 24 installments a policy of collision insurance insuring the plaintiffs against loss or damage exceeding $50.00 caused by the collision of their Ford car with any other object; that the fraud of the defendant consisted in promising the plaintiffs to obtain the policy of collision insurance and to maintain it in force according to the contract when the defendant actually had the undisclosed intention not to perform the promise; that the defendant did not, in fact, perform its promise respecting the policy of collision insurance; that the plaintiffs, who believed that the defendant had kept its promise respecting the collision insurance,

paid the defendant $389.20 in satisfaction of the installments maturing on the loan from 22 May until 22 November, 1950, both inclusive; that the Ford car of the plaintiffs was practically demolished in a collision with another vehicle on 2 December, 1950; that the plaintiffs thereupon ascertained for the first time that the defendant had failed to perform its promise respecting collision insurance; that the defendant seized the Ford car against the will of the plaintiffs shortly after the collision and converted the same to its own use; and that the plaintiffs suffered substantial actual damages as the immediate consequence of the fraud of the defendant and its conversion of their car to its use. The complaint prayed judgment against the defendant for actual damages amounting to $1,254.20, and punitive damages totaling $15,000.00.

The answer denied all of the material allegations of the complaint. It averred, moreover, as a further defense and counterclaim that the plaintiffs bought the Ford car from the C. W. Myers Trading Post, Inc., for a time price of $2,249.40 under the bill of sale specified in numbered paragraphs 1 and 2; that the plaintiffs paid $915.00 to the C. W. Myers Trading Post, Inc., on the time price, leaving $1,334.40 unpaid thereon; that the plaintiffs thereupon executed the promissory note for $1,334.40 and the purchase-money chattel mortgage mentioned in numbered paragraphs 1, 3 and 4 to the C. W. Myers Trading Post, Inc., to evidence the unpaid portion of the time price, and to secure its payment; that the defendant subsequently purchased the promissory note and the purchase-money chattel mortgage from the C. W. Myers Trading Post, Inc.; that it was stipulated in the purchase-money chattel mortgage and the stipulation mentioned in the paragraphs numbered 1, 4, and 5 that neither the C. W. Myers Trading Post, Inc., nor the defendant was under any duty to obtain or maintain insurance of any kind on the Ford car; that the defendant sold the Ford car under the power of sale embodied in the chattel mortgage as stated in the paragraph numbered 9 because of default in the payment of the installments maturing in December, 1950, and subsequent months, and applied the net proceeds of the sale, *i.e.*, $383.00, to the note; that the sum of $562.20 is still due on the note. The answer prayed for judgment against the plaintiffs on the counterclaim for $562.20.

The reply denied the material averments of the further answer and counterclaim. It asserted specially that the plaintiffs bought their Ford car from the C. W. Myers Trading Post, Inc., under an oral contract for a cash price of $1,815.00; that they borrowed $900.00 of that sum from the defendant under the circumstances delineated in the original contract; that the several papers mentioned in the answer did not constitute a contract on the part of the plaintiffs with either the C. W. Myers Trading Post, Inc., or the defendant; and that the papers mentioned in the answer

were drawn by the defendant and signed by the plaintiffs after they had made the contract set out in the complaint merely to make it appear that the transaction was a discount or sale rather than a usurious loan at a rate of interest vastly greater than the legal rate.

Both sides introduced evidence on the trial of the action before Judge Crisp and the jury at the April Term, 1952, of the Superior Court of Forsyth County.

The testimony adduced by the plaintiffs and clarifying consistent testimony offered by the defendant disclosed all of the matters set forth in the paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9.

The plaintiffs were permitted by the trial judge to present additional evidence over the objections and exceptions of the defendant tending to show that these events occurred in this order: That the male plaintiff visited the place of business of the C. W. Myers Trading Post, Inc., on the morning of 22 April, 1950, and executed a bill of sale, which recited, in substance, that the plaintiffs were buying the Ford car for a cash price of $1,815.00; that the plaintiffs were short $900.00 of the amount needed to consummate the purchase; that the male plaintiff went from the place of business of the C. W. Myers Trading Post, Inc., to the office of the defendant "to get a loan of $900.00" to enable the plaintiffs to pay the C. W. Myers Trading Post, Inc., the cash price of the Ford car in full; that the defendant, acting through its president, made an oral agreement with the male plaintiff to loan the plaintiffs $900.00 on the security of the Ford car under a contract binding the plaintiffs to pay the defendant $1,334.40 for the loan in 24 monthly installments of $55.60 each and obligating the defendant to procure and keep in force pending the payment of all of the 24 installments a policy of collision insurance insuring the plaintiffs against any loss or damage exceeding $50.00 caused by the collision of the Ford car with any other object; that the president of the defendant instructed the male plaintiff to return to the office of the defendant with the *feme* plaintiff on the afternoon of 22 April, 1950, to the end that both the plaintiffs, who were able to read and write, might sign paper writings embodying a contract conforming to the oral agreement made between the male plaintiff and the defendant; that both of the plaintiffs visited the office of the defendant on the afternoon of 22 April, 1950, in obedience to this instruction, and executed the promissory note, the chattel mortgage, and the stipulation mentioned in the paragraphs numbered 1, 3, 4, and 5 in the presence of the president of the defendant without reading them and thereby ascertaining their contents; that the plaintiffs took this course because they were assured, in substance, by the president of the defendant that the three paper writings conformed to the oral agreement made between the male plaintiff and the defendant, and that one of them, which was written by the president of the defendant on

"a little pad," was "an application for insurance" on the Ford car; that the plaintiffs were not told by the president of the defendant or anyone else that they had "no insurance of any kind"; that the plaintiffs made payments totaling $389.20 on the note because they believed that the defendant was performing the oral promise of its president respecting collision insurance; that the plaintiffs did not discover that the defendant had failed to keep this promise until the Ford car had been practically demolished in the collision of 2 December, 1950; and that the defendant seized the Ford car against the will of the plaintiffs subsequent to the collision and refused their demand for its return.

Judge Crisp dismissed the action on a compulsory nonsuit pursuant to the motion of the defendant made when the plaintiffs rested their case and renewed when all the evidence on both sides was in. The plaintiffs excepted and appealed, assigning errors.

Eugene H. Phillips for plaintiffs, appellants.

William S. Mitchell for defendant, appellee.

ERVIN, J. The assignment of error based on the entry of the compulsory nonsuit is the only one requiring elaboration. The answer to the problem posed by this assignment of error is to be found in this well settled rule of law: "Since a party must succeed, if at all, on the case, claim, or defense set up in the pleadings, regardless of what is disclosed or established by the evidence, proofs, in order to be effectual, must correspond substantially with the allegations of the pleadings. This is true under the codes as well as under the old system of pleading. Proof without allegation is as unavailing as allegation without proof, since, in order to make a case or to entitle a party to relief, both must be present. A party cannot set up one cause of action or defense and succeed on proof of another and different cause of action not pleaded, and, unless cured by amendment, a material variance between the pleadings and the proof is fatal to a claim or defense." 71 C.J.S., Pleading, section 531. See, also, in this connection these relevant decisions: *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182; *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; *Stafford v. Yale,* 228 N.C. 220, 44 S.E. 2d 872; *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470; *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Roberts v. Grogan,* 222 N.C. 30, 21 S.E. 2d 829; *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14, 139 A.L.R. 1147; *Rose v. Patterson,* 220 N.C. 60, 16 S.E. 2d 458. The objection that there is a material variance between the allegations of the complaint and the testimony of the plaintiff is properly raised by a motion for a compulsory

nonsuit. *Suggs v. Braxton, supra; Whichard v. Lipe, supra.* This is so because in such event there is a failure of proof on the cause of action alleged. *Stafford v. Yale, supra.*

It will promote clarity to make these observations at this point: The contention of the plaintiffs that apart from all other considerations the trial judge ought to have left to the jury the question whether or not the defendant unlawfully converted the Ford car to its own use is clearly untenable. Since the plaintiffs admittedly made default in the payment of the installment of 22 December, 1950, and subsequent installments, the defendant had the legal right to detain the Ford and sell it for the satisfaction of the unpaid portion of the debt, even under the version of the dealings of the parties given in the pleadings of the plaintiffs. *Alsbrook v. Shields,* 67 N.C. 333; *Haynes v. Temple,* 198 Mass. 372, 84 N.E. 467.

The plaintiffs bottom their case on the doctrine that the statement of an intention to perform an act, when in truth no such intention exists, constitutes a misrepresentation of a fact, and as such may furnish the basis for an action for fraud if the other essential elements of fraud are present. *Roberson v. Swain,* 235 N.C. 50, 69 S.E. 2d 15; *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364; *Bank v. Yelverton,* 185 N.C. 314, 117 S.E. 299; *Herndon v. R. R.,* 161 N.C. 650, 77 S.E. 683. The gravamen of their complaint is that the plaintiffs and the defendant made a contract whereby the defendant promised to procure and keep in force during a specified period a policy of collision insurance insuring the plaintiffs against loss or damage exceeding $50.00 caused by the collision of their Ford with any other object, and that in making such promise the defendant practiced a fraud upon the plaintiffs in that it actually intended not to perform the promised act.

It is manifest that the testimony adduced by the plaintiffs and the clarifying consistent testimony offered by the defendant negates the cause of action alleged by the plaintiffs if it shows that the contract between the parties is embodied in the promissory note, the purchase-money chattel mortgage, and the stipulation. This is necessarily so for the very simple reason that these writings plainly exclude any promise on the part of the defendant to insure the Ford car for the benefit of the plaintiffs.

This case is much simplified when the judicial gaze is focused steadily on the crucial circumstance that the pleadings of the plaintiffs do not allege that the execution of these documents was procured by fraud, or that, by reason of fraud, they do not express the true intentions of the parties. *Willett v. Insurance Co.,* 208 N.C. 344, 180 S.E. 580; *Hill v. Insurance Co.,* 200 N.C. 502, 157 S.E. 599; *Hardware Co. v. Kinion,* 191 N.C. 218, 131 S.E. 579. When they prepared their complaint, the plaintiffs emulated the ostrich and ignored the very existence of the written

instruments. When they filed their reply, the plaintiffs undertook to decry the legal importance of the writings by the somewhat nonchalant allegation that they did not constitute a contract at all, but were merely manufactured by the plaintiffs and the defendant to make it appear that the transaction between the parties was a discount or sale rather than a usurious loan. We note, in passing, that under G.S. 24-2, usury does not invalidate a contract. It simply works a forfeiture of the entire interest, and subjects the lender to liability to the borrower for twice the amount of interest paid. *Rogers v. Booker,* 184 N.C. 183, 113 S.E. 671.

The evidence under scrutiny indicates that the male plaintiff had oral negotiations with the defendant, which was represented by its president; that the negotiations resulted in an oral agreement whereby the defendant agreed to advance $900.00 to the use of the plaintiffs on the security of the Ford car which they were buying from the C. W. Myers Trading Post, Inc., whereby the plaintiffs consented to pay the defendant $1,334.40 for the advancement in 24 monthly installments of $55.60 each, and whereby the defendant promised to procure and keep in force pending the payment of all of the 24 installments a policy of collision insurance insuring the plaintiffs against loss or damage exceeding $50.00 caused by the collision of the Ford car with any other object; that the plaintiffs executed the promissory note, the chattel mortgage, and the stipulation for the purpose of reducing the oral agreement to writing; and that the plaintiffs were willfully misled into executing these writings without reading them by the false assurance of the president of the defendant that they correctly embodied the oral agreement of the parties.

The pleadings of the plaintiffs do not attack the written instruments for fraud or other invalidating cause. This being true, it must be conclusively presumed under the evidence and pleadings in this particular case that the writings supersede the oral agreements of the parties and express their actual engagements. *Bost v. Bost,* 234 N.C. 554, 67 S.E. 2d 745; *McLawhorn v. Briley,* 234 N.C. 394, 67 S.E. 2d 285; *Potter v. Supply Co.,* 230 N.C. 1, 51 S.E. 2d 908; *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 34; *Home Owners' Loan Corp. v. Ford,* 212 N.C. 324, 193 S.E. 279; *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606; *Bank v. Sternberger,* 207 N.C. 811, 178 S.E. 595, 97 A.L.R. 720; *Oliver v. Hecht,* 207 N.C. 481, 177 S.E. 399; *Winstead v. Manufacturing Co.,* 207 N.C. 110, 176 S.E. 304; *Ray v. Blackwell,* 94 N.C. 10. Since the writings exclude any promise on the part of the defendant to provide insurance on the Ford car for the benefit of the plaintiffs, there is a material variance between the allegations and the proofs. This being true, the trial judge did not err in dismissing the action upon a compulsory nonsuit.

While the evidence is insufficient to support the cause of action presently pleaded by plaintiffs, it does tend to show that the plaintiffs may have a meritorious cause of action against the defendant under the rule that a false assurance as to the contents of a written instrument constitutes a misrepresentation of a fact, and as such may furnish the basis of an action for fraud if the other essential elements of fraud are present. *Butler v. Fertilizer Works,* 193 N.C. 632, 137 S.E. 813; *Grace v. Strickland,* 188 N.C. 369, 124 S.E. 856, 35 A.L.R. 1296; *McCall v. Tanning Co.,* 152 N.C. 648, 68 S.E. 136; *Jones v. Insurance Co.,* 151 N.C. 54, 65 S.E. 602; *Whitehurst v. Ins. Co.,* 149 N.C. 273, 62 S.E. 1067; *Stroud v. Insurance Co.,* 148 N.C. 54, 61 S.E. 626; *Sykes v. Insurance Co.,* 148 N.C. 13, 61 S.E. 610; *Griffin v. Lumber Co.,* 140 N.C. 514, 53 S.E. 307, 6 L.R.A. (N.S.) 463; *Caldwell v. Insurance Co.,* 140 N.C. 100, 52 S.E. 252; 23 Am. Jur., Fraud and Deceit, section 96. Whether the plaintiffs should bring a new action against the defendant upon a complaint conforming to the evidence in this case is a matter for them and their counsel to ponder and decide. If they should take such course, they would do well to note the general rule that ordinarily exemplary, punitive, or vindictive damages are not recoverable in an action for fraud. 37 C.J.S., Fraud, section 144.

The case illustrates anew the oft recurring truth that procedural mishaps befall litigants who shadow box with unrealities in their pleadings.

For the reasons given, the judgment of nonsuit is

Affirmed.

JANIE DAVIS GRIFFIN v. CHARLES M. GRIFFIN.

(Filed 25 March, 1953.)

1. Judgments § 19—

Where it appears that plaintiff joined issue with defendant, asked for affirmative relief and appeared at the hearing of the show cause order outside the county in which the action was pending, and thus submitted to the jurisdiction of the court, plaintiff may not attack the order entered on the ground that the court was without jurisdiction, since it appears upon the face of the record that plaintiff consented to the hearing outside the county.

2. Divorce and Alimony § 19—Probative force of conflicting evidence as to suitability of respective parents to have custody of child is for court.

Affidavits of residents of his community attesting that deponent had known defendant for a period of years, dealt with him, observed his conduct, etc., and stating deponent's opinions that defendant is a person of integrity and a fit and suitable person to have custody of his son and that it would be to the best interest of the son that defendant share his custody,

is held sufficient to support the court's finding that there had been no such moral deterioration in defendant's character as to make it detrimental for his son to visit with him, but that the welfare of the child would be served by visitation with his father, notwithstanding plaintiff's counter affidavits, the probative force of the conflicting evidence being in the exclusive province of the presiding judge, and his findings being conclusive when supported by competent evidence.

3. Appeal and Error § 6c (3)—

An exception to the failure of the court to make certain specific findings in favor of appellant is untenable when the record discloses that appellant made only a general request that the court find the facts and made no request that the court make any specific findings.

4. Divorce and Alimony § 19—

Under G.S. 50-13 the court has discretionary power, upon supporting findings of fact, either to divide custody between the parents for alternating periods or to award custody to one parent subject to visitation privileges in favor of the unsuccessful parent, and therefore a decree providing for the father's access to the child at stated intervals comes within the permissive bounds of the statute regardless whether it be called partial custody or visitation privilege.

5. Same—

While the welfare of the child is the paramount consideration in awarding its custody under G.S. 50-13, the court is given wide discretionary power in reaching decisions in particular cases. Such decree is subject to alteration upon a change of circumstances affecting the welfare of the child.

APPEAL by plaintiff from *Bone, Resident Judge* of the Second Judicial District, at Chambers in Nashville, 18 August, 1952. From WILSON.

Civil action by wife for absolute divorce on the ground of two years' separation, heard below, pending trial of the divorce action, on motion of the defendant father for custody of eleven-year-old son born of the marriage.

The judgment entered below is as follows:

"This cause comes on to be heard before the undersigned in Chambers in Nashville, N. C., on 18 August, 1952, upon the defendant's motion in the cause, under G.S. 50-13, for the custody of Francis Millard Griffin, minor child of the plaintiff and the defendant. After hearing the pleadings, motion, answer thereto, affidavits of both sides and argument of counsel, the court finds:

"1. That this action is one for divorce on the ground of two years separation and for the custody of said child, commenced on April 8, 1952 and is still pending in the Superior Court of Wilson County.

"2. That plaintiff and defendant were married April 17, 1938 and lived together until August 22, 1949, at which time they separated and they

are still living in a state of separation from each other, both residing in Wilson County, N. C.

"3. That the child, Francis Millard Griffin, was born unto plaintiff and defendant on October 11, 1941 and since the separation of plaintiff and defendant has lived with plaintiff who has properly cared for him at her own expense. She has not asked defendant for any contribution to the maintenance of said child and he has made none.

"4. That the plaintiff is a woman of good character and a fit and suitable person to have the custody of said child. This was admitted by counsel for defendant at the hearing.

"5. That for a time said child was unhealthy, physically and to some extent emotionally upset. For these infirmities he has undergone considerable treatment by doctors who have expressed the opinion that much of his trouble was caused by domestic discord between plaintiff and defendant, and that his well-being requires that plaintiff be allowed to retain exclusive custody of him. It is not clear from the affidavits as to what factual history these doctors based their opinions upon nor how they obtained the information constituting the same. The said child is now greatly improved in health and is enjoying a practically normal boyhood.

"6. That for several months prior to the separation of plaintiff and defendant they quarreled frequently. She says that this was caused by his excessive use of intoxicating liquors, his cruelty to her, his association with other women and his dishonest dealings with her property. He says it was due to her mercenary nature, her unfounded jealousy and her nagging disposition. A suit between them involving a controversy over their respective property rights is now pending in the Superior Court of Wilson County. While the court has considered these charges and countercharges in so far as they may throw any light upon the fitness of the parties to have custody of the child, yet, it has not seemed necessary or proper that the court undertake a detailed finding of facts upon these conflicting contentions of the parties relating to their grievances against each other. The defendant did not request any findings of facts and the plaintiff did not ask the court to find any specific fact or facts but did make a general request that the court 'find the facts,'

"7. That certain affidavits of plaintiff tend to show that the defendant prior to and since the separation has displayed bad temper, used intoxicating liquors to excess and engaged in indiscretions with other women. The defendant is a licensed attorney at law practicing his profession in the town of Wilson, N. C. and the affidavits of several of his fellow-members of the Bar, public officials and other prominent citizens of Wilson County show that he enjoys a good reputation personally and professionally and the court after careful consideration of the affidavits on

both sides is unable to find that there has been such moral deterioration on the part of the defendant as to make it detrimental to his son for him to be allowed to visit his father.

"8. That it is for the best interest of the said child that his custody be awarded to the plaintiff with reasonable provision for his visitation with defendant.

"9. That the relationship of the parties and the circumstances are such that visitation and association with the said child by the defendant at the home of plaintiff would be impracticable and unsatisfactory to all parties concerned. The rights of defendant and the welfare of the child would be served by a provision whereby the defendant might see and associate with his child at some place other than the home of plaintiff.

"NOW, THEREFORE, it is by the court ordered, adjudged and decreed:

"1. That the custody of the child, Francis Millard Griffin, be awarded to the plaintiff, subject to the provision hereinafter contained with respect to his visitation with defendant.

"2. That on the first Saturday in each calendar month, commencing with September 1952, the defendant, not earlier than the hour of nine (9) o'clock A. M., shall be allowed to take the said child and keep him until five (5) o'clock P. M. on the next succeeding day (Sunday) at which latter time he shall return said child to the home of plaintiff. On each Sunday that the said child is with the defendant he, the said defendant, shall take said child to Sunday School and Church services.

"3. That during the first 10 days of the month of July in each year, commencing with July 1953, the defendant shall be allowed to keep the said child with him, taking him from the home of plaintiff not earlier than nine (9) o'clock A. M. on the first day of the month and returning him to the home of plaintiff not later than five (5) o'clock P. M. on the 10th day of the month."

From judgment entered the plaintiff appealed, assigning errors.

Chas. B. McLean and Gardner, Connor & Lee for plaintiff, appellant.

Lucas & Rand, Cooley & May, Lamb & Lamb, and Vernon F. Daughtridge for defendant, appellee.

JOHNSON, J. The plaintiff urges that the judgment is invalid for the reason that the hearing was conducted and the judgment was rendered outside of the county wherein the action was and is pending. The plaintiff points to the fact that the action was pending in Wilson County, whereas the hearing involving the custody of the child was conducted and the judgment was signed in Nashville, Nash County.

Conceding, as we may, that a judge of the Superior Court is without authority to hear a motion or make an order substantially affecting the

rights of the parties outside of the county in which the action is pending, unless specially authorized to do so by statute or by express consent of the parties (*Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658; *Bisanar v. Suttlemyre,* 193 N.C. 711, 138 S.E. 1), even so, in the case at hand it appears upon the face of the record that the plaintiff consented to the hearing outside of the county.

These facts are disclosed by the record: After the plaintiff wife instituted her action for absolute divorce in Wilson County, the defendant husband by petition and motion in the cause, under G.S. 50-13, asked for the custody of the child. Thereupon Judge Walter J. Bone, Resident Judge of the Second Judicial District, signed an order directing the plaintiff to appear before him at the courthouse in Nashville on 16 August, 1952, and show cause why the defendant should not be awarded the custody of the child. The plaintiff was duly served with a copy of the order to show cause and with copy of the petition and motion. She filed answer denying the defendant's material allegations and asserting that he was not entitled to custody. She further asked that the court award her "the exclusive . . . custody . . . of the child." By agreement of the parties, the hearing on the show-cause order was continued until 18 August, 1952. On that day the matter came on regularly before Judge Bone, in Nashville, and, after hearing evidence offered by each side, he rendered the judgment from which the plaintiff appeals.

It thus appears that the plaintiff, without challenging the authority of Judge Bone to hear and determine the matter, voluntarily joined issue with the defendant and by answer and motion of her own asked by way of affirmative relief for the custody of the child, and this she was awarded, subject to privileges of part-time custody or visitation granted to the defendant.

Besides, the record contains a stipulation signed by counsel representing both sides reciting, among other things, that "the court was properly organized and that the parties were duly before the court."

It is manifest that the plaintiff consented to the hearing before Judge Bone and is bound by the judgment rendered. Decision here is controlled by what was said in *Heuser v. Heuser,* 234 N.C. 293, 67 S.E. 2d 57. See also *Collins v. Highway Commission, ante,* 277; and *Pate v. Pate,* 201 N.C. 402, 160 S.E. 450. The decisions in *Patterson v. Patterson, supra, Bisanar v. Suttlemyre, supra,* and *Jeffreys v. Jeffreys,* 213 N.C. 531, 197 S.E. 8, cited and relied on by the plaintiff, are factually distinguishable.

Next, the plaintiff challenges the sufficiency of the evidence to support the findings of fact upon which the court awarded the defendant part-time custody or visitation privileges. These are the findings which the plaintiff by specific exceptions insists are without supporting evidence:

1. "That the court is unable to find that there has been such moral deterioration on the part of the defendant as to make it detrimental to his son for him to be allowed to visit his father." (Assignment of Error No. 5, based on Exception No. 4.)

2. ". . . that the best interest of the child would be served by visitation with the defendant." (Assignment of Error No. 6, based on Exception No. 5.)

3. ". . . that the rights of the defendant and the welfare of the child would be served by a provision whereby the defendant might see and associate with the child . . ." (Assignment of Error No. 7, based on Exception No. 6.)

The record discloses substantial competent evidence in support of each of these findings. It suffices to direct attention to certain affidavits offered in evidence by the defendant (R. pp. 132 to 157), made by residents of his community. These deponents attest that over a period of years they have known the defendant, dealt with him, observed his conduct, his habits and his demeanor, and they give as their opinions that he is a person of integrity, fit and suitable to have custody of his 11-year-old son, and that it will be for the best interest of the son that the father share his custody and that the son be allowed to spend a portion of his time with his father.

It is true that the plaintiff offered counter affidavits made by a large number of persons who gave opinions diametrically in conflict with those expressed by the defendant's deponents. The question of deciding the probative force of this conflicting evidence rested exclusively with the presiding judge. The rule is well established with us that findings of fact by the trial court in a proceeding to determine the custody of a minor child ordinarily are conclusive when based on competent evidence. *Gafford v. Phelps,* 235 N.C. 218, p. 223, 69 S.E. 2d 313; *McEachern v. McEachern,* 210 N.C. 98, 185 S.E. 684.

The plaintiff also challenges this portion of Finding of Fact No. 5 as not being supported by evidence: "It is not clear from the affidavits as to what factual history these doctors based their opinions upon nor how they obtained the information constituting the same." (Assignment of Error No. 3, based on Exception No. 2.) When interpreted in context with the rest of the fifth finding, it may be doubted that the sentence to which the exception relates is a finding of fact. It would seem to be more of an expression of the court's evaluation of the probative force of the medical testimony as bearing on the health of the child as a factor to be considered in determining the question of divided custody or visitation privileges. But be that as it may, the exception would seem to be without substantial merit, especially so in view of this related finding, to which

no exception is taken: "The said child is now greatly improved in health and is enjoying a practically normal boyhood."

Nor is there any merit in plaintiff's contention that the court failed to find facts favorable to her. The record discloses that she made only a general request that the court "find the facts." The court complied with this request. There was no request for any specific finding. If the plaintiff desired specific findings of fact, she should have requested them. It is too late for the plaintiff on appeal to complain of failure of the court to find specific facts, when no specific request therefor was made at the hearing. *Mfg. Co. v. Lumber Co.*, 177 N.C. 404, p. 406, 99 S.E. 104. See also *Thomson-Houston Electric Light Co. v. Henderson Electric and Gas Light Co.*, 116 N.C. 112, 21 S.E. 951.

Other exceptions relating to the sufficiency of the evidence are either broadside or are otherwise without merit.

The plaintiff also insists that the visitation privileges awarded the defendant amount in point of fact and in law to part-time custody of the child and that the findings of fact do not support the judgment in this respect. Here the plaintiff points to the finding of fact that the court "is unable to find that there has been such moral deterioration on the part of the defendant as to make it detrimental to his son for him to be allowed to visit his father."

This, the plaintiff insists, being a negative finding in respect to the father's fitness to have custody of the child during the visitation periods, is insufficient to support the award. However, a perusal of the judgment discloses that there is more to it than that. Judge Bone further finds in effect that it is for the best interest of the child that reasonable provision be made for his visitation with the father, and that the welfare of the child will be served by making provision whereby the defendant may "see and associate with his child at some place other than the home of the plaintiff." The latter finding is related to and based on this preceding finding, to which no exception is taken: "That the relationship of the parties and the circumstances are such that visitation and association with the said child by the defendant at the home of the plaintiff would be impracticable and unsatisfactory to all parties concerned. . . ." (Finding No. 9.)

The statute, G.S. 50-13, under which the hearing was conducted, provides: "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or

mother, *as may be thought best;* or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: . . ." (Italics added.)

Thus it is noted that this statute in express terms authorizes the apportionment of custody for alternate periods between parents. And in applying the statute in cases where one parent is awarded general custody, the ordinary and accepted procedure is for the court, in deference to the natural rights of the unsuccessful parent, to include in the decree a provision permitting the parent deprived of custody to have privileges of visitation under such conditions as the circumstances of the particular case may warrant, provided such visitation privileges may be carried out without jeopardizing the welfare of the child. *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144. See also 39 Am. Jur., Parent and Child, Sec. 14; 67 C.J.S., Parent and Child, Sec. 13, p. 683; 27 C.J.S., Divorce, Sec. 312; Nelson, Divorce and Annulment, Second Ed., Vol. 2, Sec. 15.17.

Therefore, since the controlling statute, G.S. 50-13, confers upon the trial court discretionary power either to divide custody between contending parents for alternating periods, or to award general custody to one parent subject to visitation privileges in favor of the unsuccessful parent, it would serve no useful purpose to extend this opinion with a discussion of the technical differences and refinements between divided custody and access or visitation privileges, nor is it necessary that we attempt to mark out the bounds and limits of these privileges. It is enough to say that in the instant case the decree providing for the father's access to the child at stated intervals—whether it be called partial custody or visitation privilege—comes within the permissive bounds of our statute. And the findings of fact made by the court below, when considered in the aggregate, support the decree.

Moreover, in applying the provisions of G.S. 50-13, the decisions of this Court, while emphasizing that the welfare of the child is always to be treated as the paramount consideration, to which even parental love must yield, recognize that wide discretionary power is necessarily vested in the trial court in reaching decisions in particular cases. *Gafford v. Phelps, supra; Walker v. Walker,* 224 N.C. 751, 32 S.E. 2d 318; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136; *Sanders v. Sanders,* 167 N.C. 317, 83 S.E. 489; *Setzer v. Setzer,* 129 N.C. 296, 40 S.E. 62. See also 17 Am. Jur., Divorce and Separation, Sec. 675.

It is to be noted that the judgment determines only the present rights of the parties respecting custody of the child. The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884. *Cf. Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153.

It follows from what we have said that the judgment below is Affirmed.

WILLIAM S. STEVENS v. SOUTHERN RAILWAY COMPANY AND NORTH CAROLINA RAILROAD COMPANY.

(Filed 25 March, 1953.)

1. Negligence § 11—

In order to bar recovery, plaintiff's negligence need not be the sole proximate cause of his injury, but it is sufficient for this purpose if it be a contributing cause.

2. Negligence § 19c—

When plaintiff's own evidence discloses negligence on his part constituting the proximate cause, or one of the proximate causes, of his injury, nonsuit is properly entered.

3. Railroads § 4—Evidence held to disclose contributory negligence on part of motorist barring recovery for crossing accident.

Where plaintiff's own evidence discloses that defendant's tracks could be seen for a distance of 100 feet before reaching the grade crossing, that there was nothing to prevent plaintiff from seeing defendant's engine for at least 90 feet before it reached the crossing, and plaintiff testifies that the first time he saw the engine it was 8 feet away, and the evidence discloses that plaintiff's truck ran into the side of the engine 30 or 40 feet back from its front after its front had cleared the crossing, *held* the evidence shows contributory negligence on the part of plaintiff barring recovery as a matter of law, notwithstanding his evidence that there were no signs warning a motorist that he was approaching defendant's grade crossing.

4. Same—

The fact that a railroad crossing is unmarked by warning signs or signals and that the motorist is unfamiliar with the surroundings, does not relieve the motorist of the duty to keep a proper lookout and to see indications that he is approaching a crossing which are obvious to anyone reasonably using his ordinary powers of observation.

APPEAL by plaintiff from *Stevens, J.*, at October Term, 1952, of WAYNE.

Civil action to recover for personal injuries allegedly resulting from actionable negligence of defendant, Southern Railway Company, lessee of North Carolina Railroad Company, when its train and an automobile truck operated by plaintiff collided at a grade crossing of the truck lane of U. S. Highway 117, which by-passes the city of Goldsboro, and the two-tracks line of railroad from Goldsboro to Raleigh.

Plaintiff alleges in his complaint, summarily stated, the following: (1) That on 29 December, 1949, an automobile truck transporting goods, wares and merchandise, operated by him and traveling in a southerly direction along truck lane 117 of the U. S. Highway System which by-passes the city of Goldsboro, and train No. 13 of defendant Southern Railway Company proceeding westerly along one of the two tracks of the said line of railroad came into collision at a grade crossing of said truck lane and said line of railroad, to his injury and damage.

(2) That, at said time and place, defendant Southern Railway Company was operating its said train in a careless, heedless and negligent manner (a) in that, knowing the truck lane or road crossed the railroad tracks, it negligently failed to erect and maintain stop signs, or any sign or signal for warning the traveling public of the presence of, and approach to its tracks and trains traveling thereon; (b) and in that it operated one of its engines and trains over said road crossing without ringing any bell, or blowing any horn, or giving any signal of its approach, when it knew, or should have known, in the exercise of ordinary care, that a large number of motor vehicles traveled along said lane or road and over said crossing and tracks; and (c) in that it negligently permitted a dense thicket of bushes and trees to grow in such close proximity to its tracks that a person traveling south and using the lane or road could not see a train approaching from Goldsboro going west, until he was upon the railroad track,—as the direct and proximate result of which plaintiff sustained serious and permanent injuries to his great damage.

Defendants, answering, deny in material aspect the allegations of the complaint. They admit, however, that they maintain two tracks which cross the by-pass highway, and extend westwardly from the city of Goldsboro, and that on 29 December, 1949, it was operating its passenger train No. 13 over and along said tracks in a westerly direction, and that just prior to the collision thereinafter referred to, the automobile truck, property of Frederick V. Perry, was proceeding southwardly along the by-pass highway, and was being operated by either William S. Stevens or Ed S. Abell, Jr.; but in this connection defendants expressly deny that defendant's engine or train ran into the motor vehicle involved in this action.

Defendants further admit that there were no gates, lights, barricades or bells maintained at said crossing by the defendants.

And for a first further answer and defense, and in bar of plaintiff's alleged right to recover against them, defendants aver in detail that the track of defendants was clear and visible to a traveler on said by-pass highway from various points for various distances eastward from the crossing; that the automobile truck driven by plaintiff, or in which he was riding, was approaching said crossing from the north, and the driver,

without looking or listening drove it into the engine of defendants when it had passed over approximately 50 feet of said crossing; that if it should be ascertained that William S. Stevens, the plaintiff, was the driver of said automobile truck, which carelessly and negligently ran into the side of the engine, defendants aver that in approaching and entering upon said crossing, the driver (a) drove the automobile truck in a careless, negligent, reckless, and inattentive manner without exercising any care to listen for signals or to look for the approach of said train; (b) failed to heed signals and warnings of the approach of said train and entered upon said crossing when he knew, or, by the exercise of due care, should have known of the approach of said train; and (c) drove said automobile truck for a considerable distance, while approaching said crossing, through a zone of unobstructed vision wherein he could, by the exercise of reasonable care, have discovered the approach of said train before driving into the side of defendant's engine as it was passing over said crossing; and defendants "set up and plead the aforesaid contributory negligence on the part of William S. Stevens (if it should be determined that he was driving said vehicle) in bar of his right to recover in this action."

Upon trial in Superior Court, plaintiff offered evidence tending to show these facts: A collision between an automobile truck, belonging to Frederick V. Perry and operated by plaintiff, and an engine and passenger train of defendant Southern Railway Company occurred about 4:30 o'clock on afternoon of 29 December, 1949, at a grade crossing on a truck lane or dirt road of the U. S. Highway System, by-passing the city of Goldsboro, and plaintiff sustained personal injury for which he seeks compensation.

The bed of the road had been put there for the purpose of a route around the city of Goldsboro, and had been leveled and prepared for paving, and opened to the public "to settle and pack down," and had been so opened and in use by vehicular traffic for two or three months.

The by-pass road ran in general north-south direction, and the railroad in general east-west direction. The truck was traveling from north to south, and the train was moving from east to west on the north track of the double track railroad. The engine was from 15 to 20 feet high and 85 to 90 feet long, with tender and cars attached. The road at the intersection was about 40 feet wide.

Plaintiff was driving on his right side of the road. And the truck collided with the side of the engine. The point of impact on the engine was just beneath the engineer's seat about 30 feet, as estimated by plaintiff, or 40 feet, in opinion of an officer, from the front of the engine. And, at the time of the impact, as plaintiff testified, "I would say the front of the engine had passed the western edge of the intersection, say 20 feet."

But when he first saw it "the front of the engine was along the center." And, in this connection, on cross-examination, these pertinent questions were asked of, and answered by plaintiff as shown:

"Q. When the front of this engine reached the center of this intersection going west, it then traveled a distance of 40 feet before it was struck by your truck, wasn't it? A. Yes, sir. Q. So that when the front of this engine was in the intersection and the engine itself extended back westward (manifestly, should be eastward) and a car attached to it, wasn't it? A. Yes, sir. Q. You were then 40 feet north of that intersection? A. Yes, sir."

Plaintiff described the collision and attendant circumstances in this manner, quoting: "I was taking the short cut to avoid the town of Goldsboro, and was driving, not exceeding 25 miles an hour. I was watching the road, wasn't looking from one side to the other, and was carrying on a conversation with a friend, Ed Abel, who was riding with me. The first thing I knew, within eight feet of me, I saw this locomotive. On a dirt road, as heavy as a big panel truck was, it would have been impossible to have stopped. I put on all the brakes I could, and swerved it as hard as I possibly could to the right . . . trying to dodge or keep from getting hit right on the track; then I heard a great big noise, a growling hum, and the next thing I remember I came to in the hospital in Goldsboro . . . As I approached the point . . . there was no stop sign to show that there was a railroad; there was no gong . . . no watchman, there was nothing to warn me . . . The railroad was at grade, that is level with the highway . . . It was a fair day, but the road was just as dusty as it could be because of traffic. The railroad tee-irons were bound to be covered with dust, and they were. I didn't see the tee-irons . . . The tops of the tee-irons were on a level with the dirt road. I had not been along the truck lane going southwardly over the point where I saw the engine until this day. I did not know that the railroad crosses the highway, the truck lane, at that point or anywhere along there. As I approached the point across the truck lane . . . the train did not by any whistle give any warning of its approach . . . there was no bell rung, there were no lights, blinker lights, or any kind of lights that warned the public of the presence of the railroad; there was no watchman there . . ."

Then on cross-examination plaintiff detailed his familiarity with the neighborhood around and in Goldsboro in the vicinity of the intersection. He also testified in pertinent part: ". . . In my opinion the train was not going over 25 miles an hour . . . The road from a point approximately 200 feet north of the intersection is nearly straight, but there are plenty of obstructions . . . trees and bushes. The trees and bushes . . . are possibly 90 feet northeast of the intersection," and "I would say 15 feet" north of the northern rail of the railroad track.

Then plaintiff testified in substance that when within 200 feet north of the intersection there was nothing to obstruct view of the intersection, or of an engine the front of which had reached the eastern edge of the intersection.

Then plaintiff, referring to a photograph on which the point "x" represents location of trees northeast of the intersection above referred to, and the point "B" a point on the railroad track east of and 120 feet from the intersection, testified that drawing a straight line between those two points "all that I can see there" that would obstruct one's view is a little tree about 3 or 4 inches in diameter.

And there is testimony that the area northeast of the intersection is depressed three or four feet, and that if a man driving on the dirt road in southerly direction reached a point 90 feet from the intersection and looking to his left, there is nothing to obstruct his view or to keep him from seeing an engine or train that is within the area from point "B" to the crossing except a little rubbish there,—two or three feet high. And there is evidence of greater visibility when nearer the track.

Plaintiff also testified that in approaching the intersection from the north the tee-irons could not be seen, and he also testified that they could be seen 40 to 50 feet away. Ed Abell testified: "You can see the railroad for some distance back before you get to the first iron . . ." And, again, "If a person looks on both sides of the highway he could see the railroad for some distance back . . . I would say he could see it approximately 100 feet, I don't know. I have observed this picture, and if you look on both sides . . . you could see it (referring to the track) for a distance of 100 feet." There is other testimony to like effect.

There is also evidence that there were eight or ten coal cars on the south track, east of, and within seven, eight or ten feet of the eastern intersection of the highway, and railroad; that these cars were 8, 10 or 15 feet high and 35 or 40 feet long, extending east four or five hundred feet from the crossing; and that "any one going south and within 150 feet of the intersection could clearly see them."

Motion of defendants, entered at the close of plaintiff's evidence, for judgment as of nonsuit was allowed. And from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

J. Faison Thomson & Son and N. W. Outlaw for plaintiff, appellant.

Taylor & Allen, Lindsay C. Warren, Jr., and W. T. Joyner for defendant Southern Railway Company, appellee.

WINBORNE, J. The pivotal question before this Court challenges the ruling of the trial court in granting motion for judgment as of nonsuit at the close of plaintiff's evidence. If it be conceded that there is suffi-

cient evidence to take the case to the jury on the issue as to negligence of defendant, in any of the respects alleged, the evidence indicates clearly and inescapably that plaintiff was negligent and that his negligence was at least a contributing cause of any injury and damage he may have sustained when the automotive truck operated by him ran into the side of defendant's train as it passed over the intersection of the road on which plaintiff was proceeding and the railroad tracks of defendant.

The plaintiff thus proves himself out of court. His negligence need not be the sole proximate cause of the injury. It is enough if it contributes to the injury. See *Bailey v. R. R.*, 223 N.C. 244, 25 S.E. 2d 833, and cases cited.

In this connection, decisions of this Court uniformly hold that "a railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided an injury, a failure to use them constitutes contributory negligence and will be so declared by this Court," as stated by *Brown, J.*, in *Coleman v. R. R.*, 153 N.C. 322, 69 S.E. 251. See also *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137.

And in the *Godwin case, supra, Stacy, C. J.*, wrote: "We have said that a traveler has the right to expect timely warning . . . but the failure to give such warning would not justify the traveler in relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout . . ." See cases cited.

But the plaintiff in the case in hand says and contends that he did not know there was a railroad crossing at the place of collision in question. In this connection, we find in Blashfield's Cyc. of Automobile Law and Practice, Vol. 3, p. 214, Sec. 1814, this clear statement of the applicable principle of law in such cases: "The mere fact, however, that the driver is unfamiliar with the locality generally or does not know by recollection, as distinguished from observation, the character of the neighborhood, does not authorize him to drive heedlessly in disregard of the possible presence of crossings and then claim the benefit of the protection given those who are ignorant of the presence of a crossing. If, as he proceeds, his senses furnish him with sufficient information to apprise him of the existence of a crossing, he, although theretofore unconscious of its existence, is under the same duties in approaching it as any traveler who is independently acquainted with its existence.

"Moreover, he is not relieved from the responsibility of exercising his senses and avoiding a collision with a train thereon by reason of his ignorance of the train's existence, if its presence is made to appear by such indications and signs of there being a crossing near at hand as to make it obvious to anyone reasonably using his ordinary powers of observation.

It is no excuse that his attention is so occupied in the operation of his automobile as to withdraw his attention from the unmistakable signs of a railroad crossing open and apparent to any driver in his situation who is watching the road ahead."

Among the cases cited in support of the above text are: The case of *Gelbin v. N. Y., N. H., & H. R. Co.*, 62 Fed. 2d 500, in which *Manton, J.*, of Circuit Court of Appeals, Second Circuit, declared: "If the decedent was advised of the existence of the crossing as he proceeded, the degree of care imposed upon him was that of a wayfarer who did know of the crossing."

And the case of *Piscitello v. N. Y., N. H. & H. R. Co.*, 116 Conn. 638, 166 A. 61, which is strikingly similar in factual situation to case in hand. There *Avery, J.*, speaking for the Supreme Court of Errors of Connecticut, after relating the facts, had this to say: "A traveler on a highway, approaching a railroad crossing, is not relieved from the responsibility of exercising his senses and avoiding collision with a train thereon by reason of his ignorance of the existence of such a crossing if the presence of the railroad is obvious to anyone reasonably using ordinary powers of observation," citing several cases from Connecticut and other states.

These principles are applicable to facts of case in hand. When so applied it is patent that as plaintiff proceeded along the by-pass or truck lane, that is, the highway, he was required to see and hear what a reasonably prudent person would see and hear under the circumstances.

His evidence discloses that: It was a fair day. The highway from a point approximately 200 feet north of the intersection was nearly straight. Within that distance there was nothing to obstruct the view of the intersection, or of an engine the front of which had reached the eastern edge of the intersection. The tee-irons in the track in the intersection could be seen 40 to 50 feet away. On both sides of the highway the railroad could be seen for a distance of 100 feet. There were coal cars on the south track east of, and within 7 to 10 feet of the eastern side of the intersection. From a point 90 feet north of the intersection there was nothing to obstruct plaintiff's view or to keep him from seeing an engine or train from the east, within 120 feet of the intersection. From points nearer the intersection visibility to the east was greater. When plaintiff first saw the engine, the front of it was in the center of the intersection. It was 8 feet away, and his truck ran into the engine after the front of it was 20 feet west of the intersection. And the point of impact was 30 to 40 feet back of the front of engine. Under these circumstances portrayed by plaintiff's evidence, it is patent that he was not exercising due care under the circumstances. And it is so held.

Authorities cited by plaintiff have been given due consideration, and are not in conflict with this ruling.

Other assignments of error have been given due consideration, and in them prejudicial error is not made to appear.

Affirmed.

MRS. WILLIE E. WALSTON AND HUSBAND, CHARLIE WALSTON, v. W. H. APPLEWHITE & COMPANY.

(Filed 25 March, 1953.)

1. Execution § 23½—

The failure of the sheriff to serve a copy of the advertisement of sale upon the judgment debtor ten days before the sale, G.S. 1-339.54, entitles the judgment debtor to set aside the sheriff's deed to the purchaser in a direct proceeding or by motion in the cause, provided the land is purchased at the execution sale by the judgment creditor or his attorney, or any other person affected with notice of the irregularity, although it is not ground to set aside the sale if the property is purchased at the sale by a stranger to the proceeding.

2. Same—

Evidence that title to the property was in one of plaintiffs, that it was sold under execution and bought in by the judgment creditor, together with her testimony that she was not served with copy of advertisement as required by G.S. 1-339.54, is sufficient to overrule nonsuit in her action against the creditor to set aside the sheriff's deed.

3. Same—

While recitals in the sheriff's deed pursuant to execution sale are *prima facie* correct, they are secondary evidence only, and before being admitted in evidence for this purpose the loss or destruction of the original record or records involved in the controversy must be clearly proven.

4. Adverse Possession § 13g: Estates § 9g—

Ordinarily the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of the land until the expiration of the life estate, but the remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest.

5. Execution § 23½—

While gross inadequacy of the purchase price is not alone sufficient to upset an execution sale, when coupled with any other inequitable element, it may be considered by a court of equity upon the issue.

APPEAL by plaintiffs from *Stevens, J.*, August-September Term, 1952, of WAYNE.

This is a direct action instituted on 20 April, 1951, to set aside a deed executed by the Sheriff of Wayne County, North Carolina, to W. H.

Applewhite Company, Inc. (hereinafter called Applewhite & Company), on 8 June, 1931. The pertinent parts of the allegations of the complaint, answer, and the evidence offered below, necessary to an understanding of the questions involved in this appeal, are set forth below.

1. It is alleged in the complaint that Mrs. Willie E. Walston is the owner in fee and subject to the right of dower of Mrs. Jeanette Coley (now Mrs. Jeanette Day and hereinafter so called), is entitled to the possession of a certain tract of land in Wayne County, described in the complaint by metes and bounds, containing 30.1 acres. It is also alleged that the plaintiff Charles Walston (designated as Charlie Walston in the title of the action), is the owner in fee and entitled to the possession of a certain tract of land in Wayne County, described in the complaint by metes and bounds, and containing 5.9 acres.

2. That, on 12 June, 1931, the defendant caused to be filed and recorded in the office of the Register of Deeds of Wayne County, a paper writing purporting to convey the remainder interest of the plaintiffs in the tracts of land referred to herein, subject to the life estate of Mrs. Jeanette Day, the mother of Mrs. Willie E. Walston.

3. That the aforesaid paper writing purporting to be a deed is void and should be canceled of record as provided in G.S. 41-10, for that:

(a) The grantee in the purported deed, to wit: the defendant Applewhite & Company, was the judgment creditor of Mrs. Willie E. Walston; and the purchaser at the execution sale, under an execution issued on said judgment.

(b) The judgment was rendered on 2 February, 1925; execution thereon was issued on 27 April, 1931, and was returnable by its terms prior to 8 June, 1931; the purported sale under the execution was had on 1 June, 1931, and the above paper writing purporting to be a deed, was executed without authority of law.

(c) On information and belief, the plaintiffs allege the Notice of Sale under execution was not published as required by statute.

(d) Although these plaintiffs lived a short distance from the lands in controversy, and although their address was well known, neither the Sheriff of Wayne County, nor any other person, mailed to or served on the plaintiffs a copy of the advertisement relating to the sale of the real estate of the plaintiffs, as provided by G.S. 1-330 (now G.S. 1-339.54).

(e) Although the interest of the plaintiffs in the lands referred to herein, at the time of the purported sale, was reasonably worth $5,000, the plaintiff in that proceeding (who is now defendant in this proceeding) purchased both tracts of land for the sum of $250.00.

(f) By reason of the outstanding allotment of dower of Mrs. Jeanette Day, which outstanding dower has not fallen in, the plaintiffs did not

discover either the issuing of the execution or the purported sale of the property until March, 1951.

The defendant filed an answer in which it denies that the plaintiffs own any interest in the lands in controversy pleading its ownership by virtue of the execution sale referred to in the complaint, and the Sheriff's deed executed pursuant thereto, to it as grantee, as the last and highest bidder for the property at said sale in the sum of $250.00. It alleges that the defendant Applewhite & Company secured the judgment referred to herein on 2 February, 1925, against Willie E. Walston, in the sum of $1,099.26, with interest thereon from 24 November, 1924, until paid; that said judgment was duly docketed in the office of the Clerk of the Superior Court of Wayne County; that writ of execution was issued thereon while said judgment was in full force and effect and that the said sale was in all respects valid.

The defendant also alleges in its answer that it has been in possession of the tract of land claimed by plaintiff Charles Walston, under known and visible lines and boundaries and under colorable title for more than seven years next preceding the commencement of this action, and pleads such possession under color of title in bar of plaintiffs' right to recover. Defendant likewise alleges that it has been in possession of the tract of land claimed by the plaintiff Mrs. Willie E. Walston, subject to the right of dower of Mrs. Jeanette Day, under known and visible lines and boundaries, and under colorable title for more than seven years next preceding the commencement of this action, and expressly pleads such possession in bar of plaintiffs' right to recover. The defendant also pleads the three, seven, and ten year statutes of limitation in bar of any recovery by either plaintiff.

The plaintiffs offered evidence tending to show title to the 30.1 acres of land claimed by Mrs. Willie E. Walston, subject to the outstanding dower interest therein of Mrs. Jeanette Day, as alleged in the complaint; and of a fee simple title in Charles Walston of the 5.9 acre tract of land as alleged in the complaint.

The plaintiffs offered in evidence for the purpose of attack, the deed from the Sheriff of Wayne County to the defendant. They offered in evidence the Judgment Docket, Book 14, at page 107, which discloses that Applewhite & Company obtained a judgment against Willie E. Walston, 2 February, 1925, for $1,099.26, etc. There appears in connection with this docket entry the following statement: "Upon payment of same it shall be cancelled together with Judgt. #1835 vs C. Walston." There likewise appears on this docket the following entry: "Execution issued April 27, 1931 (due no fee advanced by Clerk)." The plaintiffs likewise introduced in evidence Judgment Docket 14, at page 53, #1835, which discloses that a judgment was obtained by the defendant Applewhite &

Company against Charles Walston at the August Term, 1924, for $1,277.86, etc. There is no entry on this docket showing that execution has been issued on this judgment.

The plaintiffs also introduced in evidence certain leases which disclose that since 1 January, 1939, the defendant has been leasing both of the tracts of land described in the complaint from Mrs. Jeanette Day, and each of these instruments contain the following statement: "It is understood and agreed that the said Jeanette F. Day is the owner of a life estate only in said lands."

Mrs. Willie E. Walston testified: "I did not know of the issuance of an execution against me and my property. No execution was ever served on me. No copy of a Notice of Sale and no Notice of any intent to sell the land in June, 1931, was mailed to me or served on me. The first time that I knew that W. H. Applewhite & Company purported to have a deed to my . . . interest in my father's land was the past March going on two years"; that she and her husband moved to Pitt County in January, 1931; she left a forwarding address at the post office and received her mail regularly thereafter at Fountain, N. C. This witness further testified that after the institution of this action her husband had a stroke and is unable to testify.

Evidence was offered tending to show that the tracts of land involved in this action were worth from $4,500 to $6,000 in 1931.

At the close of the plaintiffs' evidence, the defendant moved for judgment as of nonsuit and the motion was allowed. The plaintiffs appeal and assign error.

J. Faison Thomson & Son and J. Russell Kirby for plaintiffs, appellants.

Bland & Bland and Paul B. Edmundson for defendant, appellee.

DENNY, J. We have set out the pleadings and the evidence rather fully in our statement of facts for the reason we are unable to reconcile them with certain contentions argued in the respective briefs.

It will be observed that the plaintiffs do not allege in their complaint that the 5.9 acre tract of land, which they allege is owned in fee by Charles Walston, is subject to the dower of Mrs. Jeanette Day. Yet in their brief they do so contend. On the other hand, the defendant contends in its brief, that Charles Walston's tract of land is not subject to the dower of Mrs. Jeanette Day, and alleges in its answer that it has been in possession of this tract of land under color of title for more than seven years next preceding the commencement of this action. Furthermore, the defendant alleges in its answer that it obtained the judgment against Mrs. Willie E. Walston, as set forth in the statement of facts herein, and caused

execution to be issued thereon, and at the execution sale became the purchaser of the land. But the answer does not allege the existence of any judgment or the issuance of an execution which would authorize the sale of the real estate of Charles Walston. However, the defendant in its answer does set out certain recitals contained in the deed from the Sheriff of Wayne County to the defendant and among them appears this statement: "That whereas a certain writ of execution issued out of the Superior Court of Wayne County in favor of W. H. Applewhite Company, Inc., plaintiff and against Willie Etta Walston and Charlie Walston, was to the Sheriff directed," etc.

Even so, the Judgment Docket, introduced in evidence, where the defendant's judgment against Charles Walston was docketed at the August Term, 1924, of the Superior Court of Wayne County, does not show that execution was issued thereon at the time the execution was issued on the judgment against his wife, Willie E. Walston, or at any other time.

Moreover, as to whether the Charles Walston 5.9 acre tract of land is subject to the dower of Mrs. Jeanette Day, it seems the parties themselves are uncertain as to the status of the land in this respect. But, there can be no doubt as to the conduct of the defendant in dealing with the property. According to the evidence, the defendant has occupied both tracts of land involved in this controversy since 1 January, 1939, under leases from Mrs. Jeanette Day, the life tenant. And in order to get possession of these tracts of land, so long as Mrs. Jeanette Day lives, it would appear to be necessary, if the defendant wanted possession, to lease the property from her since the Sheriff's deed to the defendant expressly states that it conveys "all the estate, right, title and interest of the said Willie Etta Walston and Charlie Walston, Judgment Debtors . . ., the same being a remainder interest in fee after the life estate of the mother of Willie Etta Walston, whereof they were seized or possessed on the date of docketing of said Judgment (not judgments) in said County, . . ."

Therefore, the question we must decide is whether the court below, in light of the plaintiffs' allegations and evidence in support thereof, committed error in sustaining the defendant's motion for judgment as of nonsuit.

The plaintiffs offered sufficient evidence to establish title to the 30.1 acre tract of land in Mrs. Willie E. Walston, subject to the dower of her mother, Mrs. Jeanette Day; and to a fee simple title to the 5.9 acre tract in Charles Walston, and that they are the owners thereof as alleged, unless the title thereto has been divested by the execution sale referred to herein.

Mrs. Walston, one of the plaintiffs, testified that the Sheriff of Wayne County did not serve on her a copy of so much of the advertisement as related to the real property of the plaintiffs herein, and that she did not

receive a copy of such advertisement through the mail before the purported execution sale on 1 June, 1931, as required by G.S. 1-330 (now G.S. 1-339.54). This evidence is admissible and sufficient to carry the case to the jury on the question of notice. It was not controverted in the trial below by an official return made by a sheriff, as was the case in *Commissioners v. Spencer,* 174 N.C. 36, 93 S.E. 435, and similar cases cited by the appellee.

In *Williams v. Dunn,* 163 N.C. 206, 79 S.E. 512, *Walker, J.,* in speaking for the Court on the identical question now before us, said: "The law requires a sheriff to advertise a sale under execution and to serve a copy of the advertisement upon the defendant ten days before the sale. Revisal, secs. 641, 642 (now G.S. 1-339.54). A failure to comply with this provision of the statute, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can it be assailed collaterally, but in such a case the defendant may, on motion, or by direct proceeding, have the sale vacated." *Bank v. Gardner,* 218 N.C. 584, 11 S.E. 2d 872.

If the purchaser at an execution sale is a stranger to the proceeding, he is not bound to look further than to see that the one selling the property is an officer, and that he is empowered to do so under an execution issued by a court of competent jurisdiction. *Oxley v. Mizle,* 7 N.C. 250; *Mordecai v. Speight,* 14 N.C. 428; *McEntire v. Durham,* 29 N.C. 151; *Burton v. Spiers,* 92 N.C. 503; *Williams v. Dunn, supra; Phillips v. Hyatt,* 167 N.C. 570, 83 S.E. 804. But this rule does not apply where the purchaser at the execution sale is the judgment creditor, or his attorney, or any other person affected with notice of an irregularity. In such case, the sale may be set aside at the instance of the defendant in the execution, by a direct proceeding brought for that purpose in the county where the judgment was obtained, or by motion in the cause. *Burton v. Spiers, supra; Rosenthal v. Roberson,* 114 N.C. 594, 19 S.E. 667; *Crockett v. Bray,* 151 N.C. 615, 66 S.E. 666; *Williams v. Dunn, supra; Craddock v. Brinkley,* 177 N.C. 125, 98 S.E. 280; *Walker v. Odom,* 185 N.C. 557, 118 S.E. 2; McIntosh, North Carolina Practice and Procedure, section 991, page 1122. This last cited authority in section 734, page 852, says: "If the plaintiff in the judgment is the purchaser, and his title is questioned, he should show a proper judgment and execution under which he acquired title, while a stranger to the judgment is required to show only the execution. . . . The execution issues from the court and should be found there, or some entry of record, showing its issue and return."

It is the rule with us that the recitals in a deed executed by a sheriff pursuant to an execution sale, are *prima facie* correct, but they are secondary evidence only and before being admitted for that purpose the loss or destruction of the original record or records involved in the contro-

versy, must be clearly proven. *Bd. of Education v. Gallop,* 227 N.C. 599, 44 S.E. 2d 44; *Thompson v. Lumber Co.,* 168 N.C. 226, 84 S.E. 289; *Person v. Roberts,* 159 N.C. 168, 74 S.E. 322; *Isley v. Boon,* 109 N.C. 555, 13 S.E. 795. *Cf. Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26, and *Jones v. Percy, ante,* 239.

Ordinarily the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of the land until after the expiration of the life estate. *Narran v. Musgrave,* 236 N.C. 388, 73 S.E. 2d 6; *Caskey v. West,* 210 N.C. 240, 186 S.E. 324; *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717. However, such remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest. *Harris v. Bennett,* 160 N.C. 339, 76 S.E. 217; *Loven v. Roper,* 178 N.C. 581, 101 S.E. 263; *Narron v. Musgrave, supra.*

In the instant case, whether the statute of limitations began to run against Charles Walston in 1931, will depend primarily on whether or not his land is subject to the dower of Mrs. Jeanette Day, and the sale on 1 June, 1931, as to him, *was made under proper and valid execution, after due advertisement and notice as provided by law.*

It would seem, in light of the evidence offered in the trial below, with respect to the value of the plaintiffs' property in 1931, that the consideration paid by the defendants was inadequate under the then prevailing economic conditions. But inadequacy in price alone is not sufficient to avoid a sale. "But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Weir v. Weir,* 196 N.C. 268, 145 S.E. 281.

Applying the principles of law set forth herein and the authorities cited, in our opinion, the court below committed error in sustaining the motion for judgment as of nonsuit.

The parties may desire to recast their pleadings in certain respects before entering upon another trial. That, however, is a matter for them and their counsel to decide.

The judgment below is

Reversed.

VANDERBILT TIRE & RUBBER CORPORATION v. A. F. BOWEN, TRADING AS IDEAL OIL COMPANY, AND FRED E. WEAVER, TRADING AS SHELL SUPER SERVICE STATION.

(Filed 25 March, 1953.)

Frauds, Statute of, § 5—

Testimony tending to show that plaintiff furnished goods to one person on the strength of another person's unconditional promise to pay for them and on the strength of such other person's credit, is sufficient to make such other person's liability to plaintiff for the unpaid portion of the sale price a question for the jury.

APPEAL by defendant A. F. Bowen, trading as Ideal Oil Company, from *Godwin, Special Judge,* and a jury, at August Term, 1952, of JOHNSTON.

Civil action by seller to recover the sale price of goods.

For ease of narration, the plaintiff Vanderbilt Tire & Rubber Corporation is called the plaintiff, and the defendants A. F. Bowen, trading as Ideal Oil Company, and Fred E. Weaver, trading as Shell Super Service Station, are designated by their respective surnames.

The complaint alleged that the plaintiff sold certain automobile tires and tubes to the defendants jointly and prayed judgment against both of them for the unpaid portion of the sale price. The answers averred that the plaintiff sold the tires and tubes to Weaver alone under contracts to which Bowen was not a party.

The plaintiff offered testimony at the trial tending to show that the tires and tubes were furnished by it to Weaver on the credit of Bowen and on the strength of Bowen's unconditional promise to pay for them, and that the remainder due on the purchase price was $372.09. The defendants presented evidence indicating that Weaver was the sole buyer of the goods in controversy.

These issues were submitted to the jury: (1) In what amount is the defendant A. F. Bowen, t/a Ideal Oil Company, indebted to the plaintiff? (2) In what amount is the defendant Fred E. Weaver, t/a Shell Super Service Station, indebted to the plaintiff?

The jury answered the first issue "$372.09," and the second issue "nothing." The trial judge entered judgment "that the plaintiff have and recover of the defendant A. F. Bowen, t/a Ideal Oil Company, the sum of $372.09, together with the costs of this action," and the defendant Bowen appealed, assigning errors.

A. M. Noble for plaintiff, appellee.

E. J. Wellons and O. L. Duncan for defendant A. F. Bowen, trading as Ideal Oil Company, appellant.

ERVIN, J. The assignments of error raise these questions:

1. Did the court err in refusing to dismiss the action upon a compulsory nonsuit as to the defendant Bowen after all the evidence was in?

2. Did the court commit prejudicial error in its charge to the jury?

The trial judge rightly refused the motion of the defendant Bowen for an involuntary nonsuit. The testimony tending to show that the goods were furnished by plaintiff to Weaver on Bowen's credit and on the strength of Bowen's unconditional promise to pay for them was sufficient to make Bowen's liability to plaintiff for the unpaid portion of the sale price a question for the jury. *Noland Co., Inc., v. Jones,* 211 N.C. 462, 190 S.E. 720; *Brown v. Benton,* 209 N.C. 285, 183 S.E. 292; *Beck v. Halliwell,* 202 N.C. 846, 163 S.E. 747; *Tarkington v. Griffield,* 188 N.C. 140, 124 S.E. 129; *Taylor v. Lee,* 187 N.C. 393, 121 S.E. 659; *Ford v. Moore,* 175 N.C. 260, 95 S.E. 485; *Whitehurst v. Padgett,* 157 N.C. 424, 73 S.E. 240; *Peele v. Powell,* 156 N.C. 553, 73 S.E. 234; *Sheppard v. Newton,* 139 N.C. 533, 52 S.E. 143; *White v. Tripp,* 125 N.C. 523, 34 S.E. 686; *Morrison v. Baker,* 81 N.C. 76; *Neal v. Bellamy,* 73 N.C. 384.

The exceptions to the charge require no elaboration. One of them is addressed to a statement of contentions legitimately arising on the evidence. The others challenge instructions embodying sound legal propositions.

Since the trial was free from legal error, the judgment of the lower court will be upheld.

No error.

STATE v. RAY R. MILLER.

(Filed 25 March, 1953.)

1. Criminal Law § 62a—

Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty, and when the indictment does not so charge, the court is without power in law to impose a judgment in excess of that prescribed for a first offense.

2. Narcotics § 2—

Where, in a prosecution for violation of G.S. 90-88 and G.S. 90-108 the indictment does not allege that either of the offenses charged was a second or subsequent offense, the court is without power to impose a punishment in excess of that prescribed by G.S. 90-111 for a first offense, and sentence in excess thereof upon the court's finding that defendant had theretofore

been repeatedly convicted of violations of the Uniform Narcotics Drug Act, must be vacated. G.S. 15-147.

3. Same—

Punishment for violation of the Uniform Narcotics Drug Act is for a misdemeanor rather than a felony. G.S. 90-111, G.S. 14-1.

4. Criminal Laws §§ 62a, 83—

Where the court imposes a sentence in excess of the limit prescribed by law, the prisoner is not entitled to a discharge or to a new trial, but the judgment will be vacated and the cause remanded for proper sentence, with allowance for the time already served.

PETITION for *certiorari.*

The petitioner, Ray R. Miller, who is hereinafter called the defendant, was arraigned at the March Term, 1951, of the Superior Court of Buncombe County upon a two-count indictment. The first count charged him with unlawfully possessing narcotic drugs contrary to G.S. 90-88, and the second count charged him with unlawfully possessing implements adapted for the use of habit-forming drugs by subcutaneous injections for the purpose of administering habit-forming drugs in violation of G.S. 90-108. The indictment did not allege that either of the offenses charged was a second or subsequent offense.

The defendant entered a general plea of guilty. Judge J. C. Rudisill, who presided, thereupon found "as a fact that this defendant has been indicted four or five times heretofore for violation of the drug act," and pronounced judgment as follows:

1. "It is . . . the judgment of the court on the first count . . . for the unlawful possession of narcotics . . . that the defendant be confined in the State's Prison at Raleigh for a term of not less than four nor more than five years."

2. "On the second count, it is the judgment of the court that the defendant be confined in the State's Prison at Raleigh for a period of five years. This sentence is to take effect at the expiration of the sentence imposed herein on the first count . . . and not to run concurrent therewith, and is suspended for a period of five years on condition that the defendant be of good behavior, that he do not use, possess, or in any way deal in narcotics of any kind for said suspended period."

The defendant is now serving the sentence imposed upon him on the first count. He brings this cause before us without the assistance of counsel on a petition for *certiorari* alleging that the judgment pronounced against him on each count exceeds the limit permitted by law for the offense charged.

R. Brookes Peters, Laurence J. Beltman, and E. W. Hooper for Walter F. Anderson, Director of Prisons, State of North Carolina, respondent.

ERVIN, J. G.S. 90-88 and G.S. 90-108 constitute parts of the Uniform Narcotic Drug Act, which is codified as Article 5 of Chapter 90 of the General Statutes. G.S. 90-111 provides that "any person violating any provision of this article shall, upon conviction, be punished for the first offense by a fine not exceeding one thousand ($1,000.00) dollars or by imprisonment for not exceeding three years, or both; and for any subsequent offense by a fine not exceeding three thousand dollars ($3,000.00) or by imprisonment for not exceeding five years, or both."

Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty. G.S. 15-147; *S. v. Fowler,* 193 N.C. 290, 136 S.E. 709; *S. v. Walker,* 179 N.C. 730, 102 S.E. 404; *S. v. Dunlap,* 159 N.C. 491, 74 S.E. 626; *S. v. Davidson,* 124 N.C. 839, 32 S.E. 957. Since the indictment did not allege that either of the offenses charged was a second or subsequent offense, the court was without power in law to impose a judgment on either count in excess of that prescribed by G.S. 90-111 for a first offense.

It is to be observed, moreover, that persons violating the provisions of the Uniform Narcotic Drug Act are not punishable "by either death or imprisonment in the State's Prison." G.S. 90-111. This being true, they must be punished as misdemeanants rather than as felons. G.S. 14-1.

Despite these considerations, the defendant is not entitled to either a discharge or a new trial. His plea of guilty is valid. In consequence, the judgment on each count is set aside, and the cause is remanded to the Superior Court of Buncombe County for proper sentence on each count. When the court below pronounces judgment anew, it will give the defendant credit for the time he has served in execution of the judgment on the first count which is hereby vacated. *In re Sellers,* 234 N.C. 648, 68 S.E. 2d 308.

To the end that this decision may be effectuated without delay, the Clerk of this Court will certify a copy of this opinion to the solicitor of the solicitorial district embracing Buncombe County, and the Director of the State Prison will deliver the defendant into the custody of the Sheriff of Buncombe County.

Error and remanded.

PAUL H. HARRIS v. S. C. BURGESS AND R. S. BURGESS.

(Filed 25 March, 1953.)

1. Appeal and Error § 38—

The burden is upon appellant not only to show error but also to make it appear that the result was materially affected thereby to his hurt.

2. Evidence § 18—

An unsigned contract executed at the time is competent to corroborate one party's testimony as to what the oral agreement between them was.

3. Trial § 17—

Where evidence is competent for a restricted purpose, its general admission will not be held for error in the absence of a request by the adverse party that its admission be restricted.

4. Trial § 14—

An objection "to the above line of questions" without request that any of the questions or answers, which had been admitted without objection, be stricken, cannot be sustained.

5. Trial § 39—

The verdict of the jury may be interpreted and given significance by reference to the pleadings, evidence and charge of the court.

APPEAL from *Patton, Special Judge,* September Term, 1952, of CALDWELL. No error.

Action to establish plaintiff's right as a partner with defendants in the business conducted under the name of Smoky Mountain Fibre Company. Defendants denied there was a partnership and alleged the only contract between them was one of employment.

Plaintiff offered evidence tending to support his plea that the parties had entered into a contract of partnership, and that defendants had breached the agreement and refused to permit plaintiff to share in the partnership.

On the other hand, the defendants' testimony tended to show that there was no contract of partnership but that plaintiff was employed at an agreed salary plus a bonus in the event profits were derived from the business, and that plaintiff had been fully paid according to the contract.

The issues were submitted to the jury and answered as follows:

"1. Did the plaintiff and defendants enter into a partnership contract as alleged in the complaint? Answer: No.

"2. If not, did plaintiff and defendants enter into an employment contract as alleged in defendants' further answer? Answer: No."

Other issues not material to the appeal were not answered.

From judgment on the verdict in favor of the defendants, the plaintiff appealed.

L. M. Abernethy and Claude F. Seila for plaintiff, appellant.
Folger Townsend and O. L. Anderson for defendants, appellees.

DEVIN, C. J. The plaintiff has brought forward in his assignments of error several exceptions noted during the trial to rulings of the court in the admission and rejection of testimony. We have examined each of these exceptions and find them insufficient to warrant setting aside the verdict and judgment and awarding a new trial. The burden is upon the appellant not only to show error but also to make it appear that the result was materially affected thereby to his hurt. *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342.

Plaintiff excepted to the admission in evidence of an unsigned proposed contract, which it had been testified was drawn up at the time, setting out the terms of the agreement as contended by defendants. The exception is without merit as the paper was competent to corroborate the defendants' testimony as to what the oral agreement was. There was no request that the restricted purpose of the testimony be stated to the jury. Rule 21.

Plaintiff also assigns error in that the defendants in their cross-examination of the plaintiff were permitted to show that after he had been denied share in the business as partner plaintiff, in application for unemployment compensation, stated his last place of employment was with Smoky Mountain Fibre Company. This evidence, which was admitted without objection, was competent in contradiction of plaintiff's testimony and his contention that his relation to the company was that of partner. While the cross-examination was somewhat prolonged and the objectionable phrase "rocking chair money" was used in some of the questions, there was no objection by plaintiff to any of the questions or answers until after a number of questions about the matter had been propounded and answered, it was noted, "Plaintiff objects to the above line of questions." There was no request that any of the questions or answers which had been admitted without objection be stricken. We perceive no just ground of complaint on this score.

The other exceptions to other matters of evidence not herein discussed, we think, present no substantial ground for disturbing the result.

Plaintiff also noted exception to portions of the judge's charge to the jury, but none of them can be sustained.

The verdict on the second issue would seem to negative also the defendants' contention that the contract between the parties was one of employment. But the second issue was addressed to the defendants' pleading

which attempted to set up a counterclaim against the plaintiff. Apparently, for the purpose of negativing the counterclaim, the jury answered the issue "No." The defendants have not appealed. The plaintiff cannot complain. The rule is that the verdict may be interpreted and given significance by reference to the pleadings, evidence and charge of the court. *White v. Price, ante,* 347; *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493.

The determinative issue was one of fact, whether the agreement between the parties was for a partnership or for employment. The jury, after hearing all the evidence and the charge of the court, decided the parties did not enter into a contract of partnership. The trial judge approved. This must write finis to the plaintiff's claim.

In the trial we find

No error.

STATE v. HALLIE SCOTT.

(Filed 25 March, 1953.)

1. Crinminal Law §§ 56, 67a—

Motion for arrest of judgment for defect appearing upon the face of the record proper may be made in the Supreme Court on appeal, and even in the absence of such motion, the Supreme Court will examine the whole record and arrest the judgment *ex mero motu* for such defect.

2. Criminal Law § 56—

A motion for arrest of judgment must be based upon matter appearing in the record, or upon an omission from the record of some matter which should appear therein.

3. Same: Indictment and Warrant § 9—

The indictment charged defendant with assault upon "George Rogers" in one place and upon "George Sanders" in another. *Held:* The indictment on its face is void, and the judgment is arrested, vacating the verdict and sentence entered thereon.

APPEAL by defendant from *Sharp, Special Judge,* at September Term, 1952, of CRAVEN.

Criminal prosecution upon a bill of indictment properly found by the grand jury at the September Term, 1952, of the Superior Court charging that the defendant Hallie Scott, on 19 July, 1952, did unlawfully, willfully and feloniously assault George Rogers with a deadly weapon, to wit, a pistol, with felonious intent to kill and murder the said George Sanders, inflicting serious injuries not resulting in death upon the said George Sanders. On the back of the bill of indictment George Rogers was listed

as a State's witness. The name of George Sanders does not appear on the back of the bill of indictment as a State's witness.

The defendant entered a plea of not guilty, and upon trial the jury returned for their verdict that the defendant is guilty of an assault with a deadly weapon. The court sentenced the defendant to serve 18 months upon the public roads. The defendant assigned as error the action of the court in entering the above judgment. The record proper was filed in this Court, but there is no statement of the case on appeal, nor any brief for the defendant. In this Court the defendant moves in arrest of judgment on the ground that the indictment is void.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

PARKER, J. It is well settled that a motion for the arrest of a judgment of the Superior Court in a criminal action tried in that court may be made in the Supreme Court. It is the duty of this Court to examine the whole record, and if it sees that the judgment should be arrested, it will *ex mero motu* direct that it be done. The motion must be based upon matter appearing in the record, or upon an omission from the record of some matter which should appear therein. *S. v. Baxter,* 208 N.C. 90, 179 S.E. 450; *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85; *S. v. McKeon,* 223 N.C. 404, 26 S.E. 2d 914; *S. v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678; *S. v. Foster,* 228 N.C. 72, 44 S.E. 2d 447. A valid indictment is an essential of jurisdiction. *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700.

At common law it is of vital importance that the name of the person against whom the offense was directed be stated with exactitude. 27 Am. Jur., Indictments and Informations, Sec. 80, and cases cited. "A variance . . . in the name of the person aggrieved is much more serious than a mistake in the name . . . of the defendant, as the latter can only be taken advantage of by the plea in abatement, while the former will be ground for arresting the judgment when the error appears on the record, or for acquittal, when a variance arises on the trial." Wharton's Criminal Procedure, 10th Ed., Vol. 1, Indictment, Sec. 158.

In *S. v. Henderson,* 68 N.C. 348, the victim was described in the indictment as N. S. Jarrett and also as Nimrod S. Jarrett. The Court stated in that case that this was an informality in setting forth the name of the person injured, since it is a common practice with most persons to write their Christian names sometimes in full and sometimes by the initials only. The Court further stated "we are well aware that the English authorities have not gone to this extent." This case is clearly not in point. *Ruffin, C. J.,* says for the Court in *S. v. Angel,* 29 N.C. 27: "The pur-

pose of setting forth the name of the person who is the subject on which an offense is committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if accused a second time."

The indictment in the instant case charges the victim of the assault in one place as George Rogers, and in another place as George Sanders. If this conviction were allowed to stand, and if the defendant was indicted and tried thereafter for an assault upon George Rogers or George Sanders, he could not have the benefit of the conviction on this indictment because it does not state with exactitude the victim.

The indictment on its face is void, and the judgment is arrested. The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State may proceed against the defendant upon a sufficient bill of indictment. *S. v. Sherrill,* 82 N.C. 695.

Judgment arrested.

STATE v. RUSSELL BUCK.

(Filed 25 March, 1953.)

Criminal Law § 53i—

An instruction that the jury had the "right to consider" defendant's evidence of good character upon the question of his guilt or innocence, and also "ought to consider it" as corroborative evidence, *held* not prejudicial, it appearing that the jury was given to understand that it was their duty to consider the character evidence in both aspects.

APPEAL by defendant from *Grady, Emergency Judge,* January Term, 1953, of PITT. No error.

The defendant was indicted for assault with deadly weapon, to wit, a rifle and shotgun, upon the person of the State's witness. The jury returned verdict of guilty, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Albion Dunn for defendant, appellant.

PER CURIAM. The several assignments of error brought forward in defendant's appeal, based upon exceptions noted to ruling of the court during the trial, have been duly considered and found to be without substantial merit.

The defendant assigned error in the charge of the court in that, in referring to evidence of good character of the defendant the court charged that the jury had the "right to consider" this evidence in passing upon his guilt or innocence, and that the jury also "ought to consider it" as corroborative evidence. It was argued that a distinction was thus made with respect to the consideration to be given character evidence on the question of guilt or innocence, and that to be given it as corroborative.

The portion of the charge to which exception was noted was as follows:

"He (defendant) has offered in evidence the good character of him and his son. That is to be considered first upon the question of guilt or innocence. A man charged with crime has the right to show that he is a man of good character. The jury has the right to consider that in passing upon the guilt or innocence. You also ought to consider it as corroborative evidence."

We think it sufficiently appears that the jury was given to understand that it was their duty to consider character evidence in both aspects. The court charged this evidence "is to be considered" by the jury both as substantive and corroborative evidence. We think no harm has resulted to the defendant from the manner in which this instruction was stated. It was said in *S. v. Taylor,* 236 N.C. 130, 71 S.E. 2d 924, that "the use of the word 'may' instead of 'should' in this excerpt from the charge is not prejudicial." See also *S. v. Moore,* 185 N.C. 637, 116 S.E. 161.

There was plenary evidence to sustain the verdict of guilty of assault with deadly weapon. The State's witness was shot in the face from a blast from a shotgun.

In the trial we find

No error.

STATE v. AGNEW MOTT WILLIAMS, JR.

(Filed 25 March, 1953.)

Criminal Law § 56—

Where defendant has filed no case on appeal, the only matter before the Supreme Court is the record, and defendant cannot set up matters not appearing therein in support of his motion for arrest of judgment.

APPEAL by defendant from *Sharp, Special Judge,* September Term, 1952, of CRAVEN. No error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

No counsel for defendant.

PER CURIAM. The record in this case reveals that the defendant appealed from the judgment in the Recorder's Court of the City of New Bern on a warrant charging reckless driving in violation of G.S. 20-140; that in the Superior Court he entered plea of not guilty; that the jury returned verdict of guilty; that on the verdict judgment was rendered imposing sentence. The defendant gave notice of appeal and has docketed the record in this Court, but has filed no case on appeal nor has he filed a brief. The only matter before us is the record. An examination of the record fails to reveal error. The matters attempted to be set up in a motion in arrest of judgment are not before us and cannot be considered on this record. "Judgment in a criminal prosecution may be arrested, on motion duly made, when, and only when, some fatal error or defect appears on the face of the record." *S. v. McKnight,* 196 N.C. 259, 145 S.E. 281; *S. v. Bittings,* 206 N.C. 798 (803), 175 S.E. 299; *S. v. Brown,* 233 N.C. 202 (206), 63 S.E. 2d 99.

On the record we find

No error.

STATE v. AGNEW MOTT WILLIAMS, JR.

(Filed 25 March, 1953.)

Constitutional Law § 32: Criminal Law § 56—

Where a prosecution for a misdemeanor is transferred to the Superior Court from the Recorder's Court upon defendant's demand for a jury trial, initial trial in the Superior Court upon the original warrant is a nullity and the judgment will be arrested on appeal to the Supreme Court.

APPEAL by defendant from *Sharp, Special Judge,* at September Term, 1952, of CRAVEN.

Criminal prosecution upon warrant issued out of Craven County Recorder's Court charging that on 5 June, 1952, defendant did unlawfully operate a motor vehicle on the public highways of North Carolina while his license was suspended, contrary to the form of the statute, etc.

In the Recorder's Court a jury trial was demanded. Whereupon, the case was transferred to the Superior Court for initial trial, and was there tried upon the warrant issued as above stated.

Verdict: Guilty.

Judgment: Imprisonment.

Defendant appeals therefrom to Supreme Court, and here moves in arrest of judgment on authority of *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

PER CURIAM. The Attorney-General for the State concedes that this case is not distinguishable from the case of *S. v. Thomas, supra,* as to bill of indictment being required to confer jurisdiction on the Superior Court, and in this respect confesses error in the judgment from which appeal is taken and prays that this case be remanded to the Superior Court of Craven County for trial upon a bill of indictment which may subsequently issue. Hence, judgment is arrested, and the case so remanded.

Judgment arrested.

STATE v. DANIEL BRYANT.

(Filed 25 March, 1953.)

1. Criminal Law §§ 73d, 78c, 80b (5)—

The want of a case on appeal is not ground for dismissal, since the appeal itself constitutes an exception to the judgment and presents the case for review of alleged error appearing on the face of the record.

2. Criminal Law § 56—

To afford grounds for relief on a motion in arrest of judgment, it must be made to appear that the record is in some respect fatally defective and insufficient to support the judgment entered.

3. Same: Criminal Law § 77a: Searches and Seizures § 2—

A search warrant constitutes no part of the record, and therefore motion in arrest of judgment does not present the questions whether a search warrant issued by a magistrate was returnable before the judge of the municipal court or whether it is therefore void.

APPEAL by defendant from *Frizzelle, J.,* November Term, 1952, of CRAVEN.

Criminal prosecution under a warrant charging that defendant did unlawfully have in his possession a quantity of nontax-paid liquor for the purpose of sale, heard in the Superior Court on appeal from the municipal court of the City of New Bern.

There was a verdict of guilty. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. The Attorney-General moves to dismiss for that the defendant served no case on appeal and there is no "case agreed" or case on appeal settled by the judge appearing in the record. But an appeal will not be dismissed for failure of appellant to serve a case on appeal. The appeal itself constitutes an exception to the judgment and presents the case for review of alleged error appearing on the face of the record. *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496.

No error appears on the face of the record. To afford grounds for relief on a motion in arrest of judgment, it must be made to appear that the record is in some respect fatally defective and insufficient to support the judgment entered. *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663; *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85; *S. v. Gaston,* 236 N.C. 499. The record does disclose that a magistrate issued a search warrant returnable before the judge of the municipal court of the city of New Bern. We may concede, without deciding, that such warrant is unauthorized by statute and was void. Even so, there is nothing in the record that indicates any information discovered by authority of this warrant was offered in evidence against defendant. Furthermore, the search warrant constitutes no proper part of the record. *S. v. Gaston, supra.*

The other questions the defendant seeks to present are not properly before us for consideration or decision.

The judgment entered is

Affirmed.

STATE v. CECIL ARNOLD GASKINS.

(Filed 25 March, 1953.)

Criminal Law § 67b—

The denial of defendant's motion in the Superior Court to remand the cause to the Recorder's Court of the county is not a judgment final in its nature, and an appeal therefrom is premature and will be dismissed. G.S. 15-180.

APPEAL by defendant from *Stevens, J.,* January Term, 1953, CRAVEN.

A warrant, charging that defendant did unlawfully (1) operate a motor vehicle upon the public highways of the State while under the influence of liquor, and (2) have in his possession a quantity of nontax-paid liquor, issued out of the county court of Craven County. When the case was called for trial, the defendant demanded a trial by jury. Thereafter, at the January, 1953, Craven County Superior Court, the defendant appeared and moved to remand the cause to the recorder's court. The solicitor agreed not to send a bill of indictment until the court first ruled on the motion. The motion was denied and defendant appealed.

STATE *v.* BROWN.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. In criminal cases a defendant may appeal to the Supreme Court only from a conviction or from some judgment that is final in its nature. G.S. 15-180; *S. v. Blades,* 209 N.C. 56, 182 S.E. 714; *S. v. Hiatt,* 211 N.C. 116, 189 S.E. 124; *S. v. Inman,* 224 N.C. 531, 31 S.E. 2d 641. The order denying defendant's motion to remand is purely interlocutory. It is in no sense final. Appeal therefrom was premature, *S. v. Hiatt, supra,* and must be dismissed.

Appeal dismissed.

STATE v. JOE BROWN.

(Filed 25 March, 1953.)

Criminal Law § 56: Indictment and Warrant § 11½—

Where a defendant charged with a felony pleads guilty to a misdemeanor, his motion in arrest of judgment for defect in the indictment charging the felony cannot be sustained, since sentence in such case is based upon defendant's voluntary plea and not upon the indictment.

APPEAL by defendant from *Sharp, Special Judge,* September Term, 1952, of CRAVEN.

Criminal prosecution upon a warrant issued out of Craven County Recorder's Court charging that on or about 1 May, 1952, the defendant committed an assault upon Beatrice Rhodes, a female, he being a man over eighteen years of age; that said assault was made with a deadly weapon, to wit: a knife, with intent to kill, and did inflict serious injury.

The defendant appeared in the Recorder's Court and through his counsel waived a preliminary hearing and was bound over to the Superior Court.

A bill of indictment was returned against the defendant at the September Term, 1952, of the Superior Court of Craven County, charging him with the same offense set out in the warrant. The bill was marked "A True Bill" and signed by the foreman of the grand jury. To this bill the defendant entered a plea of guilty to an assault on a female.

The defendant was sentenced for a period of twenty-four (24) months to be confined in the common jail of Craven County and assigned to work on the roads of the State under the supervision of the State Highway and Public Works Commission.

The defendant moved in arrest of judgment on the ground that the bill of indictment is void on its face for failure to show clearly what action the grand jury took. The motion was denied and the defendant excepted and appealed to this Court.

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

PER CURIAM. There is nothing on the record before us to indicate any vagueness or irregularity by the grand jury in returning the bill of indictment as "A True Bill." Moreover, where a defendant is charged with a felony and pleads guilty to a misdemeanor, his motion in arrest of judgment for defect in the indictment charging the felony cannot be sustained. The sentence in such cases is based upon the defendant's voluntary plea and not upon the indictment for a felony. *S. v. Ray,* 212 N.C. 748, 194 S.E. 472; *S. v. McKeon,* 223 N.C. 404, 26 S.E. 2d 914.

The judgment below is

Affirmed.

STATE v. JACK L. TEMPLETON.

(Filed 25 March, 1953.)

1. Burglary and Unlawful Breakings § 14—

The maximum imprisonment for felonious breaking or entering is a period of ten years. G.S. 14-54.

2. Criminal Law §§ 62a, 83—

Where the minimum term prescribed by the judgment is within the statutory maximum for the offense, but the maximum term prescribed by the judgment is in excess of the statutory maximum, the sentence may not stand, but the prisoner is not entitled to a discharge or to a new trial, but the judgment will be vacated and the cause remanded for proper sentence, with allowance for the time already served.

PETITION for *certiorari.*

At the February Term, 1952, of the Superior Court of Catawba County, the petitioner was tried before Sink, J., and a jury, upon a three-count bill of indictment charging him with (1) felonious breaking and entering, (2) larceny of property not exceeding $100.00 in value, and (3) the receiving of stolen goods not exceeding $100.00 in value, knowing them to have been unlawfully stolen, taken and carried away.

The jury returned a general verdict of guilty. Upon this verdict the judgment of the court on the count of breaking and entering was that the

defendant "be confined in the State's Prison at Raleigh, North Carolina, for not less than seven nor more than twelve years to be assigned to such labor as he may be found physically fitted to perform . . ."

Upon the larceny count, the judgment directs "that the prisoner be confined in the common jail of Catawba County for a period of eighteen months, be assigned to work on the roads as provided by law . . ., the capias and commitment to issue at any time within five years from this date, to wit, the 6th day of February, 1952, upon the defendant's escaping or attempting to escape from the sentence of imprisonment hereinabove imposed for breaking and entering or for violating any other laws of the State of North Carolina, during said period."

The judgment is silent respecting the count for receiving stolen goods, etc.

The petitioner is now in the custody of the Warden of the State's Prison by virtue of commitment issued pursuant to the foregoing judgment. He brings his cause before this Court on petition for *certiorari,* contending that the seven to twelve years sentence on the count of breaking and entering is in excess of the maximum limit permitted by law.

R. Brookes Peters, Laurence J. Beltman, and E. W. Hooper for Walter F. Anderson, Director of Prisons, State of North Carolina, respondent.

PER CURIAM. The respondent concedes, and rightly so, that the maximum imprisonment prescribed by statute, G.S. 14-54, upon conviction for felonious breaking or entering is a period of ten years.

Accordingly, while the minimum term prescribed by the judgment under review is for a term of seven years, the maximum imprisonment allowable under the judgment is a period of twelve years, which is in excess of the maximum provided by the controlling statute.

This invalidity of the judgment works neither a discharge of the prisoner nor a new trial, but rather a remand of the cause to the Superior Court of Catawba County for the entry of a proper judgment. *In re Sellers,* 234 N.C. 648, 68 S.E. 2d 308; *In re Ferguson,* 235 N.C. 121, 68 S.E. 2d 792; *S. v. Miller, ante,* 427.

To the end that decision here reached may be complied with, the respondent Director of the State's Prison will deliver the defendant into the custody of the Sheriff of Catawba County prior to the convening in that county of the next term of Superior Court for the trial of criminal cases after the certification of this opinion. The court below in pronouncing sentence will give the defendant credit for the time served under the judgment on the first count which is hereby vacated.

Error and remanded.

A. T. PERRY AND WIFE, JESSIE PERRY, v. C. F. STANCIL.

(Filed 8 April, 1953.)

1. Constitutional Law § 4—

Questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.

2. Same—

In construing a constitutional provision, the prime purpose of the established canons of judicial construction is to give effect to the intent of its framers and the people adopting it.

3. Same—

A literal meaning will not be accorded words of a constitutional provision when to do so would contravene the dominant purpose or intent clearly apparent when the words are read in context.

4. Constitutional Law § 6—

An amendment to the Constitution must be construed to ascertain the intent, and to this end the courts must consider the conditions as they existed at the time of its adoption and the purpose sought to be accomplished or the remedy sought to be provided.

5. Husband and Wife § 12c—

The limitation of Art. X, sec. 6, of the Constitution that the conveyance by a married woman of her separate estate must be with the written assent of her husband applies to conveyances executed by her to third parties, but does not apply to a conveyance executed by her to her husband.

APPEAL by defendant from *Bone, J.*, at Chambers, 19 December, 1952, MARTIN. Affirmed.

Controversy without action to adjudicate the rights of the respective parties under a contract to convey real property.

Maggie Perry was, on 11 November 1942, the wife of A. T. Perry. On that day she executed a deed conveying, or purporting to convey a $6/7$ undivided interest in a tract of land which was a part of her separate estate to her said husband. He owned the other $1/7$ interest. She alone signed the deed and the husband did not assent thereto in writing. He did, as grantee, accept the deed and thereafter, with joinder of his said wife, convey the larger part of the land described in the deed to third parties. The due execution of the deed was acknowledged by Maggie Perry, and the notary public taking the acknowledgment made the certificate required by G.S. 52-12.

Maggie Perry died on or about 9 July 1950, and on 10 November 1952, A. T. Perry and his present wife contracted to convey to defendant the *locus* which is a part of the land described in the deed from Maggie Perry

to A. T. Perry. Defendant declined to accept deed therefor and pay the agreed purchase price for the asserted reason that plaintiffs cannot convey a marketable fee simple title to said premises as they had contracted to do.

Thereupon the parties agreed upon the facts and instituted this proceeding to have the court judicially determine the question. The court below, being of the opinion the deed from Maggie Perry to A. T. Perry conveyed "a fee simple, merchantable, indefeasible title" to the land described therein, entered judgment decreeing specific performance of the contract to convey. Defendant excepted and appealed.

Clarence W. Griffin and Wheeler Martin for plaintiff appellees.
Charles H. Manning for defendant appellant.

BARNHILL, J. The framers of the Constitution of 1868 inserted therein the following provision:

"The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." Constitution of 1868, Art. X, sec. 6.

The controversy between the parties to this action arises out of conflicting contentions respecting the meaning of that part of this section of the Constitution which permits a married woman "with the written assent of her husband" to convey her real property "as if she were unmarried" and presents this question for decision: Does this limitation upon the right of a married woman to convey real property apply to a deed from a wife to her husband; in other words, is a deed executed by a married woman without the written assent of her husband, conveying real property which is a part of her separate estate, to her husband void for want of his written assent?

Defendants argue that this limitation upon the right of a married woman to convey her property is simply expressed in clear and unambiguous language; that it does not contain any exception or any language susceptible of the interpretation that an exception was intended or that it is less comprehensive in scope than it, upon its face, appears to be. They stressfully contend, therefore, that there is no room for construction and no justiciable question is presented.

But "few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension." Crawford, Stat. Constr., 276, sec. 174; *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C.

203, 69 S.E. 2d 505; "An inhibition or prohibition usually extends no farther than the reason on which it is founded. *Cessante ratione, cessat ipsa lex.*" *In re Yelton:* Advisory Opinion, 223 N.C. 845, 28 S.E. 2d 567.

We must, therefore, examine the language used in the light of well recognized and established canons of judicial construction to ascertain whether it is less comprehensive in meaning and effect than it appears to be.

Questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments, 11 A.J. 658, and "the fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it," 11 A.J. 674. The heart of the law is the intention of the lawmaking body. *Trust Co. v. Hood, Comr. of Banks,* 206 N.C. 268, 173 S.E. 601; *Supply Co. v. Maxwell, Comr. of Revenue,* 212 N.C. 624, 194 S.E. 117; *S. v. Emery,* 224 N.C. 581, 31 S.E. 2d 858. And in arriving at the intent, we are not required to accord the language used an unnecessarily literal meaning. Greater regard is to be given to the dominant purpose than to the use of any particular words, *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651; *Trust Co. v. Schneider,* 235 N.C. 446, 70 S.E. 2d 578, for "the letter of the law is its body; the spirit, its soul; and the construction of the former should never be so rigid and technical as to destroy the latter." *Machinery Company v. Sellers,* 197 N.C. 30, 147 S.E. 674; *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278; *Opinions of the Justices,* 204 N.C. 806, 172 S.E. 474. "The letter killeth, but the spirit giveth life."

Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished. Inquiry should be directed to the old law, the mischief, and the remedy. The court should place itself as nearly as possible in the position of the men who framed the instrument. 11 A.J. 675; *Ex parte Bain,* 121 U.S. 1, 30 L. Ed. 849.

A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided. 11 A.J. 676; *Missouri v. Illinois,* 180 U.S. 208, 45 L. Ed. 497; *Maynard v. Board of Canvassers,* 47 N.W. 756; *S. v. Kees,* 114 S.E. 617.

Applying these general principles here, it is apparent that to determine the nature and extent of the remedy the framers of the Constitution sought to provide in adopting Art. X, sec. 6, of the Constitution, we must examine briefly the history of the law respecting the rights of a married

woman and the prior concept of her capacity to transact business relating to her separate estate. Only thus may we ascertain the intent and purpose of the section. It was intended to remedy some prevailing condition or protect some existing right. What that condition or right was depends upon the then status of a married woman respecting her separate estate, and the prevailing concept of the people as to her capacity to engage in business transactions with particular respect to her capacity to convey real property.

At common law the personal property of a woman, upon her marriage, vested absolutely in the husband. *O'Connor v. Harris,* 81 N.C. 279; *Arrington v. Yarbrough,* 54 N.C. 72. Likewise, upon marriage, the husband at once became seized of an estate in the land of his wife during coverture which gave him the right of possession and control. He could appropriate all the rents and profits to his own use and could sell and convey the land for a period not exceeding the coverture. Upon the birth of issue capable of inheriting the wife's land, his estate was enlarged so that he immediately became the owner for the period of his natural life and he could convey his life estate therein without the joinder of his wife. *Taylor v. Taylor,* 112 N.C. 134; *Richardson v. Richardson,* 150 N.C. 549, 64 S.E. 510. The personal estate of the wife as well as his interest in her real property was subject to levy under execution to satisfy his debts. 1 Mordecai's Law Lectures, 2d Ed. 291; Anno. 133 A.L.R. 634-5.

On the other hand, while the wife retained the fee, she could not convey it during coverture even with the husband's consent, except by a fine. 1 Mordecai's Law Lectures, 2d Ed., 291; 1 Powell on Real Property, 430; 3 Vernier, Amer. Family Laws, 293. And a deed from the wife to the husband was void. *Sims v. Ray,* 96 N.C. 87; *Sydnor v. Boyd,* 119 N.C. 481. The fiction of the unity of husband and wife rendered all contracts between them a nullity. Furthermore, the people of that day entertained the fiction that the husband was the dominant member of the household and any transaction between the two affecting her property was had at his dictation, and the law presumed that contracts between them affecting her real estate were executed under his coercive influence. Consequently, any instrument executed by her was without force or effect.

In the early days of our history these common law rules prevailed in North Carolina. However, as our civilization has progressed, the limitations thus placed upon the property rights of a married woman have been gradually but surely removed. *Houston v. Brown,* 52 N.C. 161; *Wilson v. Arentz,* 70 N.C. 670; *Morris v. Morris,* 94 N.C. 613.

In 1837 the General Assembly adopted enabling statutes which modified the common law rules in three respects:

(1) It provided that a conveyance of the land of the wife should be jointly executed and acknowledged by the husband and wife, and the wife

should be privily examined as to her voluntary assent thereto, and that such conveyances should be "valid in law" to convey her interest in the land therein described "whether in fee simple, right of dower or other estate, as if done by fine and recovery, or any other means or ways whatsoever." 1 Rev. Stat. 1836-7, ch. 37, sec. 9; Rev. Code 1854, ch. 37, sec. 8.

(2) It vested the wife with the right to have and retain property acquired by her *after the rendition of a decree of divorce a mensa,* and provided that said property "shall not be liable to the power, dominion, control, or debts of her husband . . ." Rev. Stat., ch. 39, sec. 11; Rev. Code 1854, ch. 39, sec. 13. This section likewise vested her with the right, after a decree of divorce *a mensa,* to sue and be sued without joining her husband and made her liable "upon contracts and injuries thereafter made and done, as though she were a *feme* sole."

(3) It withdrew from the husband the right to lease the lands of his wife for a term of years or for life without the joinder of the wife, "she being thereto privily examined," or to alien the rents longer than during the coverture. 1 Rev. Stat., ch. 43, sec. 9.

It is to be noted that these statutes made no change in the law respecting the right of the husband in the personal property of the wife which she owned at the time of her marriage or acquired during coverture, but before the date of a decree of divorce *a mensa,* or in his right to the rents and profits derived from her real estate.

In 1848 the Legislature enacted another statute similar in content to 1 Rev. Stat., ch. 43, sec. 9, but which went even further in removing the common law rights of a husband in the property of his wife. This Act, ch. XLI, Laws 1848-9, after providing that the land of a married woman shall not be leased by the husband for the term of his own life or any less term of years "except by and with the consent of his wife . . . to be ascertained and effectuated by privy examination . . ." prohibits the sale under execution against the husband of any interest he may possess in the lands of his wife. Rev. Code 1854, ch. 56, sec. 1; ch. 37, secs. 8 and 11; *Houston v. Brown, supra.*

So then, it appears that when the constitutional convention of 1868 came to consider what provisions, if any, should be incorporated in the fundamental law for the protection of property rights of married women, the General Assembly had (1) modified the common law rule so as to deprive the husband of the power to convey the lands of his wife for the term of his life "or any less term of years" without the voluntary joinder of his wife, the voluntariness of her consent to be evidenced by her privy examination; and (2) freed her land and the rents and profits therefrom of any claim of his creditors. But the concept that a married woman was incapable of engaging in business transactions with her husband by reason of his dominant influence over her and that any deed she might exe-

cute conveying property to him was executed under his coercion and therefore void still prevailed and was enforced as a part of the law of the land. *Walker v. Long,* 109 N.C. 510.

These are circumstances or conditions which existed at the time. They must be accorded prime consideration when we come to construe the language used. Indeed they, in effect, control decision here.

Although the language, literally construed, is sufficiently comprehensive to include a conveyance from a married woman to her husband, to so hold would require us to (1) assume the framers of the Constitution intended to invalidate and repeal a presumption which had been recognized and enforced since the earliest days of English history, (2) do violence to the then legal presumption that a married woman was incapable of dealing voluntarily and at arm's length with her husband respecting her real estate, (3) write into the section by judicial construction an intent to validate transactions then deemed to be void, and (4) accord the language a meaning that is, under the circumstances, contrary to logic and common sense. Obviously, to require the husband to join in the execution of a deed to him from his wife and thus become both grantor and grantee, when his acceptance of the deed and the benefits accruing to him thereunder is the best evidence of his assent, is but to require an act without sense or reason.

In the absence of an express provision to that effect, we should be slow in adopting the conclusion that it was the intention of the framers of the Constitution to enact so radical a change in the law; because if such was the intention, it is reasonable to presume it would have been declared in direct terms and not be left as a matter of inference. *Roberts v. Manufacturing Co.,* 169 N.C. 27, 85 S.E. 45.

It is true Art. X, sec. 6, did work a radical change in the rights of a married woman respecting her personal estate, but the intent so to do is expressed in clear and unambiguous language. The language used fails to disclose clearly a like intent in respect to her right to make a contract with her husband affecting her separate real estate.

In this connection we must bear in mind that the presumption a wife is subject to the coercive influence of her husband, even as to conveyances to third parties, persisted in this State until 1945. The privy examination of the wife was devised as a method of rebutting this presumption, and a deed or other instrument executed and acknowledged by her without her privy examination was void. *Richardson v. Richardson, supra.* And this requirement that the wife be privily examined by the person taking her acknowledgment was not repealed until 1945. Ch. 73, Session Laws 1945.

Contrariwise, if we construe the language to relate only to conveyances to third parties, then it meets the test of logic and reason, requires no vain

or useless act, and accords with the concepts of the people of that day and the law as it then existed.

We conclude, therefore, that the limitation upon the right of a married woman to convey her real property, contained in Art. X, sec. 6, of the Constitution, applies only to conveyances executed by her to third parties, that is, persons other than her husband.

The conclusion that this was the intent of those who wrote and adopted Art. X, sec. 6, of the Constitution is fortified and confirmed by later action of the General Assembly in the same era.

In 1871, having authorized a conveyance of land by a married woman "with the written assent of her husband," the General Assembly set about the business of devising a method of rebutting the presumption that the wife, when dealing with her husband, always acted under his coercive influence and thereby granting a married woman the right to contract with her husband. As a result, ch. 193, P.L. 1871-2 (now G.S. 52-12) was adopted. This act was designed to give validity to transactions invalid at common law and to prevent fraud. *Kearney v. Vann,* 154 N.C. 311, 70 S.E. 747; *Caldwell v. Blount,* 193 N.C. 560, 137 S.E. 578; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624. Under the terms thereof, a deed from wife to husband is valid, provided it is duly proven as required by law, and the certifying officer finds and concludes that the contract is not unreasonable or injurious to her, and incorporates such finding and conclusion in his certificate. *Sims v. Ray, supra; Rea v. Rea,* 156 N.C. 529, 72 S.E. 573. If the Constitution had already stricken the shackles which denied the wife the right to contract with her husband, then why this Act? If under the provisions of the Constitution a married woman was free to convey her land to her husband "with his written assent," why impose—indeed, could the Legislature impose—additional and more restrictive conditions? In any event, the enactment of this statute shortly after the adoption of Art. X, sec. 6, clearly indicates the people then did not construe the language of the Constitution as defendants would have us construe it. *Reade v. Durham,* 173 N.C. 668, 92 S.E. 712.

For the reasons stated the judgment entered in the court below is

Affirmed.

WALTER T. WASHINGTON AND PAULINE CHAVIS v. J. G. McLAWHORN AND WIFE RUBY McLAWHORN, JESSIE MITCHELL AND WIFE NELLIE MITCHELL, J. G. McLAWHORN, JR., INDIVIDUALLY, AND AS ADMINISTRATOR OF J. G. McLAWHORN; ALSO HIS WIFE ANNIE BELLE McLAWHORN, CECIL McLAWHORN AND WIFE MILDRED McLAWHORN, ELIZABETH McLAWHORN RADFORD AND HUSBAND J. CLIFTON RADFORD, HAZEL McLAWHORN DANDY AND HUSBAND ROBERT DANDY.

(Filed 8 April, 1953.)

1. Taxation § 40g—

Where the complaint alleges that land was sold by a commissioner pursuant to a tax foreclosure in which all the heirs at law of the deceased tax debtor were made parties, *held* the allegations disclose that the court had jurisdiction, and the tax foreclosure cannot be collaterally attacked.

2. Judgments § 25—

A void judgment is no judgment, and may always be treated as a nullity.

3. Same—

An irregular judgment is not subject to collateral attack but may be assailed only by a motion in the cause.

4. Estoppel § 5—

An equitable estoppel arises as the result of voluntary conduct of one party which would render it unconscionable for him to assert a right or remedy against another party who has relied in good faith upon such conduct and has been led thereby to change his position for the worse.

5. Taxation § 40g—

Allegations to the effect that a county, after receiving tax deed to certain property, did not claim ownership of the land, that it reconveyed to other tax debtors, upon the payment of the taxes, other lands purchased by it at other tax foreclosures at about the same time, and did not assert ownership of the land in controversy in a subsequent suit involving title, although it was a party in such suit, without allegation of the tax debtors that they had offered to pay the taxes or that they had been led to believe the county would waive the taxes, *is held* insufficient to state an estoppel against the county.

6. Estoppel § 10—

A county is not subject to an estoppel to the same extent as an individual or a private corporation, and a county is subject to be estopped only in instances in which an estoppel will not impair the exercise of the governmental powers of the county.

7. Adverse Possession § 16—

Where the only color of title set up in the complaint is a deed executed less than seven years before the institution of the action, the complaint cannot state a cause of action for the acquisition of title by adverse possession under color of title. G.S. 1-38.

8. Pleadings § 15—

A demurrer does not admit any legal inferences or conclusions of law asserted by the pleader.

APPEAL by plaintiffs from *Stevens, J.*, August-September Term 1952. WAYNE.

This is a civil action in which the plaintiff Walter T. Washington alleges that he is the owner and entitled to the immediate possession of five-sevenths of the lot of land described in the complaint and also of the dower interest of Mary E. Winn in one-seventh of the land; and the plaintiff Pauline Chavis alleges that she is the owner and entitled to the immediate possession of one-seventh of the said lot of land.

The material allegations of the complaint and amended complaint are summarized as follows: the numbers of this summary do not correspond with the numbers of the aforesaid pleadings. The amended complaint in substance alleges the death of J. G. McLawhorn, and who his heirs at law are, and that they be made parties defendants. This is a summary of the complaint.

First. On 1 January 1873, W. G. Hollowell and wife conveyed to Georgina Sasser by deed a tract of land containing one acre more or less, and described in the complaint, situate in Goldsboro Township, Wayne County. The deed is registered in Book 86, p. 588, in the Register of Deeds' office, Wayne County.

Second. On .....day of....., 18....., Georgina Sasser married Hillary Washington. The issue of said marriage was the plaintiff Walter T., Arnold, Penny H., John, Mary E., Phoebe A., and Paul.

Third. Mary E. Washington married Levy Winn, who is dead, leaving him surviving his widow Mary E., and one child Leo, who is of age.

Fourth. Paul Washington married. He and his wife are dead leaving one child, Pauline Chavis, a widow, who is of age and one of the plaintiffs.

Fifth. The land has never been divided and all the parties interested are tenants in common.

Sixth. On 30 November 1929, Wayne County instituted a tax suit against all the aforesaid heirs at law of Georgina Washington and Susie Borden, Guardian of Hillary Washington, alleging taxes due on the land in the amount of $70.41. As a result of this action, on 15 February 1933, E. A. Humphrey, Commissioner, conveyed to Wayne County the said tract of land, which deed is recorded in the public registry of Wayne County in Book 223, p. 46. That Wayne County never claimed the ownership of the land. That about the time said action was instituted, Wayne County instituted numerous tax suits, and received numerous tax deeds in said suits, but because the considerations in the deeds were out of all proportion to the value of the lands and irregularity in the proceed-

ings Wayne County has never claimed such lands, and has permitted the owners of the lands so conveyed to pay the taxes recited in the deeds and reconveyed the lands to the owners or canceled the deeds of record.

Seventh. That since the execution of the deed to the County on 15 February 1933, "the plaintiffs and the defendants have been in the adverse possession of the aforesaid parcel of land under known and visible lines under color of title; the County of Wayne not claiming it, and therefore such adverse possession for more than 18 years precludes the County from any right, title or interest therein."

Eighth. Georgina Sasser Washington and her husband Hillary Washington died prior to 11 February, 1937. On 11 February, 1937, the City of Goldsboro instituted a suit against Georgina Washington and husband to sell said land for past-due taxes. That none of the heirs at law of Georgina Washington were made parties. On the.....day of....., 1937, an order was made in said suit appointing Dortch Langston a Commissioner, and authorizing a sale of the land; "but a search of the records fails to disclose any sale thereunder; it is recorded in Book of Tax Sales No. 2, p. 200." The County of Wayne was made a party defendant, and filed answer in which it made no claim of being owner of the land, but alleged the same taxes were past due that were alleged past due in the action brought by the County on 30 November, 1929, thereby indicating the County made no claim of ownership of the land conveyed to it by Humphrey in said action, and "the County is estopped either from claiming the land or asserting the validity of the deed therefor."

Ninth. The City of Goldsboro and the County of Wayne claiming ownership of the land advertised the land for sale, and at the sale J. G. McLawhorn became the last and highest bidder in the amount of $100.00. On 7 July, 1947, the City and County executed and delivered to him a deed for the land, which is recorded in the public registry of Wayne County. The plaintiffs allege that neither the City nor County had any interest in the land.

Tenth. Georgina Washington died on 21 August, 1918, and Hillary Washington on.....day of....., 19....., prior to the institution of the action by the City; that none of their heirs were named defendants, and as to them the action is a nullity and void; and the plaintiffs ask that the papers in said suit be made a part of their complaint.

Eleventh. On 10 June, 1923, the plaintiff conveyed his interest in said land to Levy Winn by deed properly recorded.

Twelfth. On 30 October, 1945, J. G. McLawhorn and wife Ruby, executed and delivered a portion of the land containing by estimation one-half of an acre, more or less (this paragraph of the complaint does not allege what was executed and delivered); the next paragraph of the

complaint alleges the deed from the City and County to J. G. McLawhorn was void, as neither owned said land.

Thirteenth. The deed from J. G. McLawhorn and wife to Jessie Mitchell and wife is void, because the grantors had no title.

Fourteenth. On.....day of June, 1951, Arnold Washington and wife, Penny H. Lindsay and husband, John Washington and wife, Mary E. Winn, a widow, and Phoebe A. Clay and husband conveyed to Walter T. Washington by deed properly recorded all of their rights, title, etc., to the land.

Fifteenth. That the plaintiff Walter T. Washington is the owner of five-sevenths of the land, and of the dower interest of Mary E. Winn in one-seventh of the land; and Pauline Chavis is the owner of one-seventh of said land, and that the court declare them the owners of such title and interests, and entitled to the immediate possession of the land.

The original summons was served on Ruby McLawhorn, Jessie Mitchell, and Nellie Mitchell, and not served on J. G. McLawhorn, who was dead. Whereupon by order of court the children and heirs at law of J. G. McLawhorn, with their respective husbands or wives and the administrator of J. G. McLawhorn, were made parties defendants—the administrator being a son.

Leo Winn, who is alleged in the complaint to be over 21 years of age, is not a party. The County of Wayne is not a party. The City of Goldsboro is not a party.

The defendants demurred on two grounds: first, a misjoinder of causes of action; and second, that the plaintiffs' complaint does not state facts sufficient to constitute a cause of action and that the matters and things alleged as an estoppel against the County of Wayne are insufficient to constitute an estoppel.

The trial court sustained the demurrer on both grounds.

From the judgment sustaining the demurrer, the plaintiffs appealed to the Supreme Court, assigning error.

George E. Hood and N. D. White for plaintiffs, appellants.
Herbert B. Hulse and George R. Britt for defendants, appellees.

PARKER, J. The plaintiffs allege that on 30 November 1929, Wayne County instituted a suit against all the heirs at law of Georgina Sasser Washington, who died on 21 August 1918, and the guardian of her husband, for past-due taxes on the land described in the complaint, and as a result of the action E. A. Humphrey, Commissioner, on 15 February 1933, conveyed the said lot of land to Wayne County by deed registered in Book 223, p. 46, in the Register of Deeds' office of the county. The plaintiffs further alleged that the County of Wayne, though it had a deed

for the land, never claimed the ownership thereof. That about the same time the County instituted numerous tax suits and secured tax deeds, but in all these suits has never claimed the lands, permitting the former owners to pay the taxes and reconveying the land or canceling the deeds of record. That on 11 February 1937, the City of Goldsboro instituted an action to sell this land for taxes; that the defendants were the County of Wayne and Georgina S. Washington and husband, both of whom at the time were dead. The complaint further alleges that in its answer the County made no claim to own the land conveyed to it by Humphrey, Commissioner, but asserted that the same taxes due to it on this land in 1929 was still due it, and that Wayne County is estopped either from claiming the land or asserting the validity of its tax deed from Humphrey, Commissioner.

The complaint further alleges a search of the records fails to disclose a sale of said land in the City's suit, but that the City and County advertised the land for sale; that J. G. McLawhorn bid it in, and the City and County executed and delivered to him a deed for the land on 7 July 1947, which is properly recorded. On 30 October 1945, J. G. McLawhorn and wife conveyed by deed, properly recorded, a portion of said land to Jessie Mitchell and wife. According to the complaint the deed from McLawhorn to Mitchell antedated by nearly two years the deed from the City and County to McLawhorn.

The complaint alleges that since the County of Wayne received a deed for said lot from Humphrey, Commissioner, on 15 February 1933, the plaintiffs and the defendants have been in the adverse possession of said land. In the prayer for relief in the complaint a like statement appears.

Construing the complaint and amended complaint liberally there are no factual averments and no relevant inferences to be deduced that the orders and judgment in the suit brought by the County of Wayne, and the deed of Humphrey, Commissioner, to the County of Wayne on 15 February 1933, or any of them, are void, so that the judgment may be collaterally attacked. The complaint alleges that all the heirs at law of Georgina Washington and the guardian of her husband were made parties. That gave the court jurisdiction. A void judgment is no judgment, and may always be treated as a nullity. *Moore v. Packer,* 174 N.C. 665, 94 S.E. 449; *Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283; *Holden v. Totten,* 224 N.C. 547, 31 S.E. 2d 635. If the judgment in this suit by the County is irregular, it can only be assailed by a motion for the purpose in that suit. *Moore v. Packer, supra; Harrell v. Welstead, supra.* It cannot be collaterally attacked as an irregular judgment.

Therefore, according to the allegations of the plaintiffs' pleadings the deed of Humphrey, Commissioner, conveyed to Wayne County a valid legal title to the lot of land, and the heirs at law of Georgina Washington

were divested of all title and interest in said land. However, the complaint alleges that the County is estopped to assert the validity of its deed from Humphrey, Commissioner. The plaintiffs do not allege any estoppel against J. G. McLawhorn, or his heirs at law, nor any estoppel against Jessie Mitchell and his wife, who bought a part of the land from McLawhorn. The County of Wayne is not a party to this action.

"Equitable estoppel is defined as 'the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy.'" *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489. See also *Oil Co. v. Jenkins,* 212 N.C. 140, 193 S.E. 33; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889.

There are no allegations in the complaint that the plaintiffs have been led in any way by the County to change their position for the worse; no allegation that they offered to pay the taxes and the County put them off, nor that they were led to believe the County would waive the taxes. The allegations liberally construed fail to allege an estoppel.

Counties are subdivisions of the State, established for the more convenient administration of justice and to assure a large measure of local self-government. *R. R. v. Mecklenburg County,* 231 N.C. 148, 56 S.E. 2d 438. A county is not subject to an estoppel to the same extent as an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in government. However, an estoppel may arise against a county out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such an estoppel will not impair the exercise of the governmental powers of the county. 19 Am. Jur., Estoppel, pp. 818 and 819. In *Henderson v. Gill, Comr. of Revenue,* 229 N.C. 313, 49 S.E. 2d 754, the facts were these. The plaintiffs, who were florists, grew flowers upon their own lands and sold these flowers and also flowers purchased from wholesalers. The sale of flowers grown by them on their own land was not exempt from the North Carolina sales tax. A collector of the Department of Revenue advised the plaintiffs that sales of flowers grown on their own land were not subject to the North Carolina sales tax. Subsequently, the Department of Revenue forced payment of sales tax on such sales and plaintiffs entered suit to recover the tax paid under protest. Plaintiffs were unable to collect sales tax from the purchasers of the flowers grown on their lands on these past transactions. The plaintiffs contended that the defendant was estopped to collect this tax. The Court said: "These facts, however potent in creating an estoppel in ordinary transactions between

individuals, do not estop the State in the exercise of a governmental or sovereign right."

In *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897, the Court said: "A municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." (Citing numerous authorities.)

The collection of taxes by a county is the exercise of a governmental right, and in the collection of taxes the County of Wayne cannot be estopped under the facts alleged in this action to assert the validity of the title it received to this land by virtue of the deed of Humphrey, Commissioner. A contrary decision would lead to chaos and endless disputes in the collection of county taxes.

The plaintiffs further allege that they and the defendants have been in the adverse possession of this land "under color of title for more than 18 years, and this precludes the county from claiming any ownership thereof."

According to the allegations of the complaint, the plaintiff Walter T. Washington on the ..... day of June, 1951, received a deed from his living brothers and sisters purporting to convey to him their interest in said land. That is the only color of title he has, and it takes 7 years adverse possession under color of title to make such possession a perpetual bar against all persons not under disability. G.S. 1-38. According to the complaint, Pauline Chavis has no color of title. There is no allegation in the complaint of adverse possession for 20 years by the plaintiffs under G.S. 1-39 and G.S. 1-40.

A demurrer does not admit any legal inferences or conclusions of law asserted by the pleader. *McKinney v. High Point, ante,* 66, 74 S.E. 2d 440.

Construing liberally the complaint and amended complaint as a whole, it appears and we so hold that the plaintiffs have no title, right or interest in the parcel of land, and the complaint and amended complaint do not state facts sufficient to constitute a cause of action. On that ground the demurrer must be sustained.

When the City of Goldsboro, on 11 February, 1937, instituted suit for unpaid taxes on the parcel of land, the heirs at law of Georgina S. Washington had no title or interest in the land, and there was no need to make them parties. We are not required to pass on the validity of that proceeding.

The allegation in the complaint that since 15 February, 1937, the plaintiffs and the defendants have been in the adverse possession of this land, without further averment, is unusual.

Affirmed.

A. B. SCHROADER, TRADING AND DOING BUSINESS AS SCHROADER POULTRY FARMS, v. RAILWAY EXPRESS AGENCY, INC.

(Filed 8 April, 1953.)

1. **Courts § 12—**

In interstate commerce, the contract between the shipper and carrier consonant with the Federal statutes, or valid regulations of the Interstate Commerce Commission, attach and govern the rights of the parties concerning the shipment.

2. **Carriers § 9—**

A shipper's prepaid receipt for a shipment in interstate commerce is a bill of lading.

3. **Evidence § 4—**

Our courts take judicial notice of the regulations of the Interstate Commerce Commission.

4. **Carriers § 11—**

Under the provisions of U.S.C.A., Title 49, sec. 20, the liability of a carrier for loss of or damage to a shipment of chicks in interstate commerce, when the shipper does not declare a greater valuation, is limited to $50.00 or to 50c per pound for shipments in excess of 100 pounds, and therefore when there is no evidence that the shipper declared a greater valuation, an instruction on the issue of damages to the effect that the damages would be the fair market value of the chicks at the time of their delivery to the carrier, is reversible error.

5. **Same—**

A shipment of chicks is not "ordinary livestock" within meaning of Interstate Commerce Act, 49 U.S.C.A. §20 (11).

APPEAL by defendant from *Phillips, J.*, at November Term, 1952, of HENDERSON.

This is a civil action to recover damages for deaths and injuries to chicks transported by the defendant, a common carrier, for the plaintiff from Hendersonville, North Carolina, to J. D. Jewell, Inc., Gainesville, Georgia.

The plaintiff is in the hatchery business. On 23 July 1951, he delivered 24 bundles containing 4,900 chicks, weight 588 pounds, to the defendant consigned to J. D. Jewell, Inc., Gainesville, Georgia. The plaintiff testified the value of the chicks was $13.00 per hundred. The chicks were placed in standard summer size boxes, and when received by the defendant were in as perfect condition as chicks can be. They were delivered to the defendant between 9:00 and 12:00 o'clock, as they were to leave on the 12:00 o'clock train. When the plaintiff paid the defendant for transporting said chicks, he received a Shipper's Prepaid Receipt. There was posted at that time in the defendant's office the tariff rates and regula-

tions of the Interstate Commerce Commission. The plaintiff did not declare the value of the shipment, but paid the express charges the defendant demanded. The defendant introduced in evidence the Shipper's Prepaid Receipt, the pertinent part of which reads as follows: "Note—the company will not pay over $50.00 in case of loss, or 50c per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid." This receipt shows that the plaintiff did not declare any greater value, nor pay for any greater value than the basic uniform receipt. The plaintiff on cross-examination testified he did not know if this receipt was the original of which he was given copy, because his signature was not on it, but it was the proper quantity and the proper date. He further said he paid what the agent required. The defendant's agent at Hendersonville testified that the receipt introduced in evidence was the original receipt given to the plaintiff, and returned by plaintiff with his claim for damages. When the plaintiff returned the receipt, the top was torn off.

It is about 160 to 175 miles by railroad from Hendersonville, North Carolina, to Gainesville, Georgia. The report of loss showed the chicks reached Gainesville about 24 hours after they were shipped. Chicks will live in these boxes about 72 hours in good health. Upon arrival at Gainesville about one-fourth of the chicks were dead, and the consignee refused to accept them. The defendant through its agent at Gainesville notified the plaintiff by telegram "chicks for Jewell refused account of condition, advise disposition." The plaintiff notified the defendant what to do with the chicks by wire. The plaintiff filed a claim for loss with the defendant for $735.00. The plaintiff received by mail from the defendant a joint inspection report stating among other things the chicks will be sold. The plaintiff has not received back any of the chicks, nor has the defendant paid him anything, though it "offered to pay."

The jury found by its answer to the issues submitted to it that the defendant contracted with the plaintiff to transport by express these chicks from Hendersonville, North Carolina, to the consignee in Gainesville, Georgia; that said shipment was damaged by the negligence of the defendant in transit, and awarded damages in the amount of $637.00.

The Shipper's Prepaid Receipt introduced in evidence is as follows:

"Shipper's Prepaid Receipt—To Destination Office, Gainesville, Georgia.

Consignee	Enter Date Shipped
J. D. Jewell, Inc.	July 23, 1951.
Street Address or	Receipt Number
Non-Agency Destination	85-25-23

Name of Forwarding Office

(1443-L) Hendersonville, N. C. (S) Declared Value Value Charges

Piece-s Article Description Weight 20

24 bdls. of chickens (49 boxes) Express Charges 27 28

Tax 82

Total 28 30

Shipper

Schroaders Poultry Farm Class: Paid: Beyond C. O. D.

Shipper's Street Address Prepaid: (Original) Scale: or Rate Verified by

Shipper's Prepaid Receipt

C. O. D. Service Charge Write in Yes or No

Note—The Company will not pay over $50, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

(Form 5088)

Railway Express Agency Incorporated

Received shipment described hereon, subject to the Classifications and Tariffs in effect on the date hereof, value herein declared by Shipper to be that entered in space hereon reading 'Declared Value,' which the Company agrees to carry upon the terms and conditions printed hereon, to which the Shipper agrees and as evidence thereof accepts this Receipt.

Number Pieces Hour

Steve 24 11 AM

For the Company."

From the judgment on the verdict in favor of the plaintiff, the defendant excepted and appealed, assigning errors.

Paul K. Barnwell for plaintiff, appellee.
L. B. Prince for defendant, appellant.

PARKER, J. The defendant assigns as Error No. 4 all of the court's charge on the third issue of damages. On this issue the court charged as follows: "Now, as to damages for livestock the Court instructs you as follows: Where the livestock is retained by the defendant, then the Court instructs you that the measure of damage would be the reasonable or fair market value of such livestock at the time they were shipped." Then the court summed up the contentions of the plaintiff in 11 lines, which in substance was that the fair market value of the livestock was $13.00 a hundred, that he shipped 4,900 chicks, that that would amount to $637.00, and such should be your answer to the third issue. Then the court in 10 lines stated what he called contentions for the defendant substantially as follows: That the jury should not be bound by the plaintiff's estimate of the fair market value of the chicks, that they were worth less than the plaintiff testified and that plaintiff's claim was exorbitant. Then the court defined fair market value, and concluded its charge as follows: "Now, what the amount is the plaintiff has satisfied you, if you answer the second issue Yes, the amount that the plaintiff has satisfied you from the evidence, and the greater weight thereof, that the fair and reasonable market value of the chicks was at the time they were received by the defendant would be your answer to the third issue."

There is no evidence as to what the defendant did with the chicks. In its charge on the third issue, the court did not refer to the limit of liability set forth in the Shipper's Prepaid Receipt, of 50c per pound on the 588 pounds of chicks totaling $294.00, unless a greater value is declared and a greater value paid by the plaintiff to the defendant for the shipment. There is no evidence that the plaintiff declared a greater value and paid a greater value for this shipment to the defendant.

This was an interstate shipment of chicks. The requisite stipulations of the contract between the plaintiff and the defendant as prescribed by the Federal Statutes, or valid Regulations of the Interstate Commerce Commission, attach and govern the rights of the parties concerning the shipment. *R. R. v. Mugg,* 202 U.S. 242, 50 L. Ed. 1011; *Peanut Co. v. R. R.,* 166 N.C. 62, 82 S.E. 1; *Bryan v. R. R.,* 174 N.C. 177, 93 S.E. 750; *McRary v. R. R.,* 174 N.C. 563, 94 S.E. 107; *Aman v. R. R.,* 179 N.C. 310, 102 S.E. 392.

The defendant, when it received this shipment, was required to issue to plaintiff a receipt or bill of lading therefor. U.S.C.A., Title 49, Transportation, Sec. 20, Par. (11). "A bill of lading is said to be both a contract and a receipt. It is a receipt for the goods shipped, and a contract to transport and deliver the same as therein stipulated." *Griggs v. York-Shipley, Inc.,* 229 N.C. 572, 50 S.E. 2d 914.

The defendant issued to the plaintiff a Shipper's Prepaid Receipt for the chicks and an agreement to carry them from Hendersonville, North Carolina, to Gainesville, Georgia, 23 July 1951. This receipt is a bill of lading. *Aman v. R. R., supra.* The relationship may be created without any written bill of lading. In case of interstate shipments, if there is no written bill of lading, the contract as prescribed by the Federal Statutes or valid Regulations of the Interstate Commerce Commission will attach and govern the rights of the parties. *McRary v. R. R., supra.*

U.S.C.A., Title 49, Transportation, Sec. 20, Par. (11), providing that the provisions of said section respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability shall be void, do not apply to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper, in which case such declaration shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared, and shall not, so far as it relates to values, be held to be a violation of Sec. (10) of this title; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions, surrounding the transportation. The said section of the above statute provides that "the term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

We take judicial notice of the Regulations of the Interstate Commerce Commission. *S. v. R. R.*, 169 N.C. 295, 84 S.E. 283; Stansbury's N. C. Evidence, Sec. 12.

The material parts of the Official Express Classification No. 34 I. C. C. No. 7600, Rule 13 Valuation Charges, which were in force and effect when this shipment was made, are in substance as follows: Rates named in tariffs governed by this Classification, except as to ordinary livestock, are dependent upon and vary with the declared or released value of the property, and, except as to articles provided for in Rule 13 (b)—which does not apply to live property—and except as to live animals, livestock and other live creatures provided for in Rule 13 (c), are based upon property declared to be of, or released to, a value not exceeding $50.00 for any shipment of 100 pounds or less, or not exceeding 50c per pound actual weight for any shipment in excess of 100 pounds. When the

declared or released value exceeds that above stated, the charges are 11c greater for each $100.00 or fraction thereof in excess of the value stated above. Rates applicable to livestock (cattle, swine, sheep, goats, horses and mules) chiefly valuable for breeding, racing, show purposes, or other special uses, other live animals named herein, live birds, live pigeons, live poultry, reptiles and wild animals not named herein, are based upon the following maximum values: Birds, when not to exceed (10) such birds, comprise one shipment, maximum value $5.00. When more than (10) such birds comprise one shipment, the maximum value per shipment will be $50.00 if weight is 100 pounds or less, or 50c per pound actual weight, if weight is in excess of 100 pounds, but the maximum value so ascertained may not exceed $5.00 per bird. In this Classification the maximum value is set forth for many different kinds of livestock, for instance: Bulls $100.00; Dogs $50.00; Goats, hogs, sheep $25.00; Cows, oxen and steers $75.00; Horses and mules $200.00. The rule further provides when the declared value exceeds the maximum value stated, the express charges will be increased as set forth in this rule.

Webster's New International Dictionary defines birds as: The young of a feathered vertebrate (a bird in sense 2), as a chick, eaglet, duckling; a nestling. Manifestly, this shipment of chicks was not "ordinary livestock" as particularly set forth in U.S.C.A., Title 49, Transportation, Sec. 20, Par. (11), as contended for by the plaintiff.

The plaintiff is bound by the terms of the Shipper's Prepaid Receipt though he did not sign it, and the said receipt became the written agreement of the parties. *American Railway Express Co. v. Lindenburg,* 260 U.S. 584, 67 L. Ed. 414. In that case it is said: "The receipt which was accepted showed that the charge made was based upon a valuation of $50.00 unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission (citing authorities). Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing (citing authorities). In *Kansas City Southern R. Co. v. Carl, supra,* this Court said: 'To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward under valuations, and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies.'" See also *American Railway Express Co. v. Daniel,* 269 U.S. 40, 70 L. Ed.

154, and *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 81 L. Ed. 20, to the same effect.

The Court said in *American Railway Express Co. v. Levee*, 263 U.S. 19, 68 L. Ed. 140: "Coming to the merits, the limitation of liability was valid, whatever may be the law of the state in cases within its control (citing authorities). The effect of the stipulation could not have been escaped by suing in trover, and laying the failure to deliver as a conversion, if that had been done (citing authorities). No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States cannot be evaded by the forms of local practice."

On the third issue, "What amount of damages, if any, is the plaintiff entitled to recover of the defendant?" the court should have charged the jury that the Shipper's Prepaid Receipt is the contract between the plaintiff and the defendant for the transportation by express by the defendant of the chicks from Hendersonville, North Carolina, to Gainesville, Georgia; and as there is no evidence that the plaintiff declared a greater value and paid a greater value for such shipment, the limitation of liability in the Shipper's Prepaid Receipt is binding upon the plaintiff and that if the jury awarded damages to the plaintiff in no event could they award damages in excess of 50c per pound, actual weight, for such shipment. All the evidence tends to show that the actual weight of the shipment was 588 pounds.

The court's charge on the issue of damages is error and the defendant's assignment of Error No. 4 is sustained.

The other assignments of errors are not considered, as they may not arise in the retrial of this case.

For error in the charge as indicated a new trial is necessary. It is so ordered.

New trial.

CHRISTINE McCRARY BOWLES v. LOUIS GRANT BOWLES.

(Filed 8 April, 1953.)

1. Husband and Wife § 12d (1)—

An essential requisite to a deed of separation is that it be reasonable, just and fair to the wife, having due regard to the circumstances of the parties at the time it was made.

2. Husband and Wife § 12d (2)—

A separation agreement is to be construed to ascertain and effectuate the intent of the parties as expressed in the language of the instrument, taking into consideration the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

3. Same—

The separation agreement in controversy provided that the husband should pay taxes, insurance premiums and cost of major repairs for a particular residence and that the wife should have the privilege of living there, with further provision that if she should desire to live elsewhere she should be paid the net proceeds from the rental thereof, "excluding the cost of major repairs and upkeep, property taxes and payments on insurance . . ." *Held:* The wife upon moving her residence elsewhere, is entitled to receive the net rents from the property, and the husband is not entitled to deduct therefrom the cost of major repairs, property taxes and insurance premiums.

APPEAL by plaintiff from *McLean, Special Judge,* December Special Term, 1952, of IREDELL.

Submission of controversy without action upon an agreed statement of facts to determine the amount of rent the plaintiff shall receive under a deed of separation between the plaintiff and the defendant from a house in Statesville, North Carolina, while she and her children are living away from Statesville. Reversed.

The agreed case may be summarized as follows:

First. On 7 June, 1945, the plaintiff and the defendant were husband and wife, and living at 444 West End Avenue, Statesville, North Carolina. They were the parents of three minor children.

Second. On 30 March, 1946, the plaintiff and the defendant entered into a separation agreement, called in the instrument a deed of separation, which is properly recorded in the public registry of Iredell County, and a copy attached to the agreed case.

Third. By the terms of the separation deed a property settlement was made, and the plaintiff received the custody of their three minor children.

Fourth. According to the deed of separation the home located at 444 West End Avenue, Statesville, North Carolina, was conveyed by deed by the plaintiff and defendant to their three minor children in fee simple with general warranties. The deed of conveyance is dated 12 April, 1946, and is properly recorded. The deed is subject to the following condition: "This deed subject to the right of Christine McCrary Bowles, one of the grantors herein, to live in the house on the above described lot for the duration of her natural life, as provided for in deed of separation entered into between the grantors, Louis G. Bowles and his wife, Christine McCrary Bowles."

Fifth. The pertinent part of paragraph three of the separation deed is as follows (the party of the first part is the defendant in this proceeding and the party of the second part is the plaintiff here): as to the home place at 444 West End Avenue, Statesville, the party of the first part "will pay the property taxes thereon, keep the same adequately insured against loss by fire, and make such reasonable and necessary repairs to

the said residence and buildings thereon that may be required to keep it in good order and condition, ordinary wear and tear excepted, and it is understood and agreed between the parties hereto that the party of the second part shall have the right to occupy and maintain the said home and property as a residence for herself and for the children, free from interference of the party of the first part, during the term of her natural life; however, in the event the party of the second part should move away and give up the said residence and live elsewhere with the children, in that event the party of the first part, during her and their absence, shall have the management, control and rental of the same during the time she and they are living elsewhere, with the understanding and agreement that during the time she and the children are living elsewhere that the net proceeds from the rental thereof, excluding the cost of major repairs and upkeep, property taxes and payments on insurance against loss by fire, shall be paid over to the party of the second part in lieu of actual occupancy itself."

Sixth. From the date of the separation deed until about 15 September, 1952, the plaintiff and her three children occupied this home place continuously with the exception of a few months. About 15 September, 1952, the plaintiff with her two younger children—the oldest having married—rented an apartment and moved to Lexington, North Carolina, to be nearer the Baptist Hospital at Winston-Salem, where her son is receiving treatment. The plaintiff with her two younger children desires to live away from Statesville, and to receive the rental from the home place as provided in paragraph three of the separation deed.

Seventh. The defendant, with the consent of the plaintiff, through a real estate agent has rented the home place in Statesville for $75.00 a month.

Eighth. "That a controversy has arisen between the plaintiff and the defendant as to the interpretation and meaning of paragraph 3 of the separation agreement as above set forth, the plaintiff contending that while she is living away from the said property that she is to receive the net rental therefrom, and that the defendant is not relieved of the burden of paying the property taxes, the insurance premiums and to make necessary and reasonable repairs to the property to keep it in good order and condition; the defendant contending that while the plaintiff lives away from the said property he is not responsible for the property taxes, insurance premiums and repairs, but that these items should come out of the rental from the said property."

The court rendered judgment that the defendant be, and he is authorized to manage the home place at 444 West End Avenue, Statesville, and collect the rents therefrom and to pay from said rents the major repairs,

upkeep, taxes and insurance and pay the balance to the plaintiff; and taxed the plaintiff with the costs.

From the judgment signed, the plaintiff appealed to the Supreme Court, assigning error.

Land, Sowers, Avery & Ward for plaintiff, appellant.
Scott, Collier & Nash for defendant, appellee.

PARKER, J. Separation agreements between husband and wife have not always been recognized as valid in North Carolina. *Collins v. Collins,* 62 N.C. 153; *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327, Ann. Cas., 1913 D, 261. This view has been modified from time to time. The authorities are generally agreed upon the requisites for a valid deed of separation. One essential requisite is that "the agreement of separation must be reasonable, just, and fair to the wife—having due regard to the condition and circumstances of the parties at the time it was made." *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148.

"Questions relating to the construction, . . . of separation agreements between a husband and wife are governed, in general, by the rules and provisions applicable in the case of other contracts generally." 17 Am. Jur., Divorce and Separation, Sec. 732.

"The cardinal rule to be applied in determining the effect of property settlement agreements is to ascertain the intention of the parties as expressed in the agreement, and to carry out such intention as nearly as may be done without violence to the language used." 27 C.J.S., Divorce, Sec. 301.

"The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Jones v. Casstevens,* 222 N.C. 411, 23 S.E. 2d 303." *Electric Co. v. Ins. Co.,* 229 N.C. 518, 50 S.E. 2d 295. See *Wall v. Williams,* 93 N.C. 327, where this Court in construing a contract for support, gave the word *support* a liberal construction.

Webster's New International Dictionary defines *exclude* as follows: "To shut out; to hinder from entrance or admission; to refuse participation, enjoyment, consideration, or inclusion to; as, to exclude the light; to exclude one nation from the ports of another; to exclude nonessentials from an argument; . . . Keep out what is already outside."

The meaning of the word *exclude* has frequently been construed in connection with G.S. 1-593 "the time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Sunday or a legal holiday, it must be excluded." In construing this statute this Court has decided in many

cases that *exclude* means to shut out; to refuse consideration in the computation of time. *Barcroft v. Roberts,* 92 N.C. 249; *Burgess v. Burgess,* 117 N.C. 447, 23 S.E. 336; *Lumber Co. v. Rowe,* 151 N.C. 130, 65 S.E. 750; *Adcock v. Fuquay Springs,* 194 N.C. 423, 140 S.E. 24; *Pettit v. Trailer Co.,* 214 N.C. 335, 199 S.E. 279.

In *Lumber Co. v. Rowe, supra,* the Court says: "The Court adjourned for the term 5 June 1908. Under the consent order plaintiff was required to serve his case within thirty days. Excluding the 5th, plaintiff was required to serve his case on 5 July. That day being Sunday, service on the 6th is legal."

The agreed case states that the defendant with the consent of the plaintiff, through a real estate agent, has rented the house for $75.00 a month. It is a fact known to all that rental agents charge commissions to collect rent for the owners of property. The $75.00 a month paid to the rental agent is gross rent; when he deducts his commission, and pays over the rest of the rent collected to the defendant, it is net rent. Giving the word *exclude* its ordinary and usual meaning it is clear that the defendant cannot deduct or take out from the net rent the cost of major repairs and upkeep, property taxes and payments on insurance against loss by fire, but must pay over the net rent received by him to his wife without any such deductions, and we so hold. The defendant had separated from his wife; had given her custody of their three minor children; had made a property settlement with his wife; had provided for the support and advanced education of his children and had conveyed to his children his home place, with a provision that his wife should live there during her life. While his wife with her children lived at this home, the defendant bound himself by the deed of separation to pay on it the property taxes, to keep it adequately insured against loss by fire, and to make such reasonable and necessary repairs as may be required to keep it in good order, ordinary wear and tear excepted. All through the deed of separation runs the clear intent of the defendant to provide support for his minor children, to give them an advanced education, and to provide for them and his wife during her life, whether subsequently divorced or not, a home in Statesville; or if his wife with her children lives elsewhere the net rent of the Statesville home without any deduction from the net rent of the cost of major repairs and upkeep, property taxes and payments on fire insurance, so that his wife might pay the rent on a home elsewhere. His wife has moved to Lexington to be nearer to the Baptist Hospital in Winston-Salem, where the defendant's son is receiving treatment. To hold that the defendant can take from the net rent received by him from the real estate agent the cost of major repairs and upkeep, property taxes and payments on fire insurance on said home place would do violence to the word *exclude* used in the deed of separation, and con-

struing the deed of separation as a whole would not effectuate the clear intent of the parties.

The plaintiff's assignments of errors to the court's conclusion of law, and the signing of the judgment are upheld, and the court's conclusion of law and the judgment below are

Reversed.

SHAVER MOTOR COMPANY, INC., ET AL., v. THE CITY OF STATESVILLE.

(Filed 8 April, 1953.)

1. Highways § 8f—Expense of improving highway within city under facts of this case held expense of Highway Commission.

Chap. 217, Public Laws of 1941, as amended by Chap. 290, Session Laws of 1947, were repealed 15 March, 1951, by Sec. 4, Chap. 260, Session Laws of 1951, known as the Powell Act, and therefore from and after 15 March, 1951, until 30 June, 1951 (when allocations under the Powell Act became authorized) no unencumbered allotment to the credit of a city or town could be expended legally pursuant to the 1941 statute as amended. An expenditure for the widening and improving of a portion of a State highway within the limits of a municipality, pursuant to an agreement between the Commission and the municipality entered into the latter part of June, 1951, constitutes an expense of the Commission and not of the municipality. G.S. 136-18 (g).

2. Same—

Under the provisions of Chap. 217, Public Laws of 1941 as amended, the State Highway and Public Works Commission retained control of funds allotted to municipalities for the maintenance and improvement of State highways within their limits, and such funds at all times were highway and not city funds, and the fact that a municipality lets a contract for such improvements with the approval of the Commission is immaterial upon the question of whether highway or city funds are expended under such contract.

3. Municipal Corporations § 30—

A municipality may not levy an assessment against abutting property owners to pay any cost of an expense for widening and improving a street constituting a part of a State highway when the funds expended therefor are highway funds and not municipal funds. The fact that the city lets the contract for such improvements after authorization and approval by the State Highway and Public Works Commission and pays for such improvements out of general funds is immaterial when the city is reimbursed for such expenditure by the Commission.

APPEAL by defendant from *McLean, Special Judge,* December Term, 1952, of IREDELL.

This is a proceeding instituted by the Shaver Motor Company, Inc., and 57 other firms, corporations, and individuals for the purpose of having declared null and void assessments which the defendant has attempted to levy against 88 lots owned by them, which lots abut on Salisbury Road within the corporate limits of the City of Statesville.

In June, 1951, the City of Statesville, hereinafter called the City, and the State Highway and Public Works Commission, hereinafter called the Commission, engaged in negotiations which resulted in agreement on a project whereby the Commission would widen and pave a portion of Salisbury Road, a street which constitutes a part of U. S. Highway No. 70, from the intersection of Salisbury Road with East Front Street to the eastern limits of the City; and the City would construct curb and gutter with adequate drainage along both sides of said street.

On 22 June, 1951, the City submitted to the Commission three bids it had obtained for the construction of the curb and gutter as proposed. Thereafter, on 27 June, 1951, the City was authorized by the Commission to proceed with the project in accordance with the proposal of Gilbert Engineering Company, which concern was the low bidder. At the same time, the City was advised that it would be reimbursed by the Commission for the cost of the work upon its completion and the submission of an invoice covering the cost thereof.

The work was completed at a cost of $27,419.35, and the City paid the contractor therefor out of its general street fund. Invoice covering the cost of the project was furnished to the Commission and the City was reimbursed in full by voucher dated 5 September, 1951.

The City then undertook, in accordance with the provisions of its Charter, to assess one-half the cost, less certain items it deemed should be deducted therefrom, against the 88 lots abutting on the improved portion of the street. The property owners duly protested the action of the City, filed their objections to the assessments and appealed to the Superior Court as provided in the Charter of the City for appeals from such assessments.

When the cause came on for hearing in the Superior Court, all parties being represented by counsel, a trial by jury was waived and it was agreed that his Honor should hear the evidence, find the facts, draw his conclusions of law and enter judgment in accord therewith.

From the facts found, the court held that the procedure followed by the City in making the assessments, and the various notices given in connection therewith, were in accord with the provisions of the Charter of the City, but further held that since the cost of constructing the curb and gutter in question was paid for by the Commission out of funds appropriated by the General Assembly for use in cities and towns, and the City having been reimbursed for all the money it expended on the

project for which the assessments were purported to have been levied, the assessments were made without authority of law and are null and void and of no effect. Judgment was entered accordingly and the defendant appealed therefrom, assigning error.

Zeb V. Long, Jr., Zeb V. Turlington, and William R. Pope for defendant, appellant.

Land, Sowers & Avery for plaintiffs, appellees.

DENNY, J. It is apparent from the record and briefs submitted in this Court that the parties and the court in the hearing below were under the impression that Chapter 217 of the Public Laws of 1941, as amended by Chapter 290 of the Session Laws of 1947, codified as G.S. 136-36 through G.S. 136-41, was in full force and effect in June, 1951. As a matter of fact, G.S. 136-36 through G.S. 136-41 were expressly repealed on 15 March, 1951, by Section 4 of Chapter 260 of the Session Laws of 1951, better known as the Powell Act.

The Powell Act, which became effective from and after its ratification on 15 March, 1951, did not purport to authorize the allocation of any funds until from and after 1 July, 1951. And the bill contains its own formula for the allocation of funds appropriated or made available pursuant to its provisions.

The 1949 General Assembly appropriated two and one-half million dollars to the State Highway and Public Works Commission for the biennium ending 30 June, 1951, for the maintenance, repair, improvement, construction, reconstruction or widening of highways and streets in cities and towns. It is well to keep in mind that the appropriation of this sum was made to the Commission and not to the cities and towns. However, it was to be expended in the manner authorized and directed in Chapter 217 of the Public Laws of 1941, as amended by Chapter 290 of the Session Laws of 1947.

The above Act as amended did not authorize the funds allocated or apportioned to the several cities and towns pursuant to its provisions by the Commission to be turned over to the cities and towns to become a part of their general fund for street improvement purposes. The funds were always held under the control of the Commission, and the power of the governing body of each city or town with respect thereto was limited to the duty to recommend for approval of the Commission the use of such funds as were allocated to such city or town. The duty to select the project or projects on which these funds would be expended rested with the Commission. And it was the duty of the Commission to perform the work or see that it was done in accordance with its specifications; to

disburse the funds to cover the cost thereof, and to charge such cost against the funds allocated or apportioned to such city or town.

In determining how the funds should be used, the Commission was directed by Section 3 of Chapter 217 of the Public Laws of 1941, G.S. 136-38, to expend them as follows: "That all of such funds so allocated to cities and towns shall be used first for the maintenance, repair, improvement, construction, reconstruction, or widening of the streets within said cities and towns which form a part of the state highway system until such streets shall be in a condition satisfactory to the State Highway and Public Works Commission and to the governing body of said city or town, after which, if there is any balance of funds remaining in the allotment to any city or town, such balance shall be used for the maintenance, repair, improvement, construction, reconstruction, or widening of streets which form important connecting links to the state highway system or the county highway system or farm to market roads. Should any balance then remain in the allotment to any city or town, such balance shall be used for the maintenance, repair, improvement, construction, reconstruction or widening of any street or streets as may be designated by the governing body of such municipality." And as further evidence that these funds were at all times considered to be highway and not city funds, the above section further provided that if any balance should remain in the allotment to any city or town at the end of a fiscal year, such balance should accrue to the credit of such city or town to be added to its allotment for the ensuing fiscal year.

The Act authorized the Commission in its discretion to contract with the city or town having adequate facilities to do the work of maintaining, repairing, improving, constructing, reconstructing, or widening its streets. Even so, the city, under such contract, had to do the work according to the specifications of the Commission and to account to the Commission quarterly "for the use of the funds in such work."

The Charter of the City of Statesville authorizes it to assess one-fourth of the cost of street improvements against the abutting property, "provided, the city shall, out of its general fund, pay the remainder of said cost and for all street intersections so improved, . . ."

It becomes necessary, therefore, to determine whose funds were used to pay for the curb and gutter project involved in this litigation.

In our opinion, from and after 15 March, 1951, until 30 June, 1951, no unencumbered allotment to the credit of a city or town could be expended legally pursuant to the provisions of Chapter 217 of the Public Laws of 1941, as amended. Therefore, since the curb and gutter project involved in this appeal was not agreed upon by the State Highway and Public Works Commission and the City of Statesville until the early part of June, 1951, unencumbered funds to the credit of the City of Statesville

when the Act was repealed, were not subject to commitment thereafter for the construction of projects pursuant to the provisions of the repealed Act. Consequently, we hold that any construction work in connection with the widening, paving and improving that portion of U. S. Highway No. 70, within the city limits of the City of Statesville, as hereinbefore set out, and for which the Commission provided the funds, necessarily constituted an expense of the Commission and not of the City of Statesville. G.S. 136-18 (g). And we think this same conclusion would have been reached if Chapter 217 of the Public Laws of 1941, as amended, had not been repealed.

It is the declared policy of the State, according to the preamble of the Powell Act, "That all streets in cities and towns which are now, or hereafter may be, a part of, continuation of, or a connecting link between highways, shall be declared a part of the State Public Roads System, and shall be wholly constructed, reconstructed and maintained by the State Highway and Public Works Commission out of the State Highway Funds."

Furthermore, the fact that the City of Statesville let the contract for the curb and gutter project under consideration was merely incidental. Under the circumstances it was only authorized to act in co-operation with and for the Commission with its approval. We know of no statute which authorizes a city or town to let such a contract except for and on behalf of the Commission with its approval, unless the cost of the project is to be borne by the city or town from its own funds.

The cases of *Gunter v. Sanford,* 186 N.C. 452, 120 S.E. 41, and *Gastonia v. Cloninger,* 187 N.C. 765, 123 S.E. 76, relied upon principally by the appellant, are distinguishable and not controlling on this appeal.

The judgment of the court below will be upheld.

Affirmed.

ELLEN WATTS TRAVIS, ADMINISTRATRIX ESTATE OF FLOYD WATTS, DECEASED, v. WILLIAM ROSCOE DUCKWORTH AND EARL M. BOWMAN.

(Filed 8 April, 1953.)

1. Automobiles § 24½e—

Under the provisions of G.S. 20-71.1 proof of ownership by a defendant of a vehicle involved in a collision while being driven by another constitutes *prima facie* evidence that at the time and place of the collision the vehicle was being operated by the owner's employee with his authority, consent and knowledge, and is therefore sufficient to carry the case to the jury upon the issue of *respondeat superior.*

2. Constitutional Law § 8a: Evidence § 6—

The General Assembly has the power to declare that certain related facts shall be regarded as *prima facie* evidence of the ultimate fact at issue, and hence constitute sufficient basis for the submission of the issue to the jury.

3. Automobiles § 24½e—Defendant employer held entitled to peremptory instruction on issue of respondeat superior.

Plaintiff offered evidence that the vehicle involved in a collision with the car of his intestate was owned by defendant. But the evidence further disclosed that the driver of defendant's vehicle detached the trailer thereof and left it at a point on his authorized route, and that when the accident occurred he was driving the detached tractor on a journey of some 75 miles to a city off his route on a purely personal errand, without the knowledge or consent of his employer. *Held:* While the provisions of G.S. 20-71.1 preclude nonsuit, defendant employer was entitled to an instruction that if the jury found the facts to be as the evidence tended to show, to answer the issue of *respondeat superior* in the negative.

APPEAL by defendant Bowman from *Moore, J.*, January Term, 1953, of CATAWBA. New trial.

Action to recover damages for injury and death of plaintiff's intestate alleged to have been caused by the negligence of the defendants in the operation of a motor tractor.

It was admitted that defendant Bowman was the owner of the tractor involved in the injury complained of, and that with the trailer attached it was being used by him in the transportation of produce from Florida to points north and return, and that the defendant Duckworth was regularly employed by defendant Bowman to operate the tractor-trailer in the owner's business. The tractor-trailer bore Florida vehicle registration number 170165.

The evidence disclosed that on 9 January, 1952, the defendant Duckworth driving the tractor-trailer of his codefendant, and proceeding south, arrived in Charlotte about 1:30 p.m. Duckworth parked the trailer in Charlotte, detached the tractor, and, driving the detached tractor, set out for Morganton—75 miles west—for the purpose of visiting his wife and children who resided there and to secure fresh clothing before continuing his journey south with the tractor-trailer. En route to Morganton and near Newton in Catawba County, the tractor driven by Duckworth was involved in an accident which cost the life of plaintiff's intestate.

Defendant Duckworth did not appeal from the judgment based on the verdict of the jury that the death of the intestate was due to his negligence in the operation of the tractor. As to defendant Bowman, the jury for their verdict found that at the time of the accident and death of the plaintiff's intestate defendant Duckworth was "acting within the scope of his employment and in the furtherance of the business of defendant Bowman," and awarded damages in a substantial sum.

From judgment on the verdict the defendant Bowman appealed.

G. Andrew Warlick and Theodore F. Cummings for plaintiff, appellee.
Mull, Patton & Craven for defendant Bowman, appellant.

DEVIN, C. J. The defendant Bowman's appeal presents the question whether the evidence offered was sufficient to support the finding and judgment that defendant Duckworth, the driver of the offending tractor, at the time and place of the injury and death of plaintiff's intestate, was acting within the scope of his employment by defendant Bowman and in the furtherance of his employer's business. Appellant contends that his motion for judgment of nonsuit should have been allowed, or that in any event he was entitled to have the court give a peremptory instruction to the jury in his favor as prayed.

The plaintiff, however, invokes the provisions of Chap. 494, Session Laws 1951, as sufficient under the evidence and admissions here to withstand defendant's motion for judgment of nonsuit and to carry the case to the jury. This statute, now codified as G.S. 20-71.1, provides that (a) in all actions to recover damages for injury to the person or death arising out of an accident in which a motor vehicle is involved, "proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that the 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 shall, for the purpose of any such action, "be *prima facie* evidence of ownership and that such motor vehicle was 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." This suit was instituted within one year after the cause of action accrued and thus came within the terms of the statute.

The evident purpose of this statute was to require that proof of ownership of an offending motor vehicle should be regarded as *prima facie* evidence that it was being operated at the time of the accident by the authority of the owner, doubtless in view of the decision of this Court in *Carter v. Thurston Motor Lines, Inc.*, 227 N.C. 193, 41 S.E. 2d 586, and that, in the absence of proof of ownership, proof of motor vehicle registration in the name of a person would be *prima facie* evidence that the motor vehicle was being operated by one for whose conduct such person is legally responsible.

It must be conceded that proof of ownership by defendant Bowman of the motor vehicle involved in the injury complained of, by force of the statute, must be regarded as *prima facie* evidence that at the time and

place of the injury caused by it the motor vehicle was being operated by his employee with the authority, consent and knowledge of defendant Bowman, and hence sufficient to carry the case to the jury on the question of the legal responsibility of defendant Bowman for the operation of the tractor on the occasion of the injury and death of plaintiff's intestate.

While the courts originally established the rules of evidence, they recognize the power of the Legislature to declare that proof of certain related preliminary facts shall be regarded as *prima facie* evidence of the ultimate fact at issue, and hence as affording sufficient basis for the consideration of the jury. *Hunt v. Eure,* 189 N.C. 482, 127 S.E. 593; *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766; Stansbury, sec. 203.

But there is here a dearth of any evidence, other than that afforded by the statute, to show that at the time and place of the accident defendant Duckworth was acting within the scope of his employment and about his employer's business. Without the knowledge, consent or approval of defendant Bowman, Duckworth parked the trailer in Charlotte, detached the tractor, and undertook to drive it 75 miles away on an errand of his own. The evidence seems clearly to indicate such a deviation from the scope of the driver's employment and so substantial a departure from the course of the employer's business as should relieve the latter from liability for a tort committed by the employee while on this errand. He was engaged in an activity in his own interest and not connected with the business of his employer. There was no evidence competent against Bowman to show that Bowman had given permission or knew of Duckworth's driving the tractor to Morganton on this occasion. Duckworth testified that on a former occasion he had driven the tractor to Morganton but that Bowman had objected and forbidden him the use of the tractor except for the employer's business.

"The rule is well settled that the master is responsible for the tort of his servant which results in injury to another when the servant is acting in the course of his employment, and is at the time about the master's business. And it is equally well settled that the master is not liable if the tort of the servant which causes the injury occurs while the servant is acting outside the legitimate scope of his authority, and is then engaged in some private matters of his own *Hinson v. Chemical Corp.,* 230 N.C. 476, 53 S.E. 2d 448.

"A servant is acting in the course of his employment, when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment, if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no

longer answerable for the servant's conduct," Tiffany on Agency, p. 270, quoted with approval in *Robertson v. Power Co.*, 204 N.C. 359, 168 S.E. 415, and *Hinson v. Chemical Corp., supra.*

This rule has been applied in numerous decisions of this Court in exoneration of the liability of employers for torts committed by employees who have departed from the course of their employment, and who were at the time engaged in pursuits of their own. *Parrott v. Kantor,* 216 N.C. 584, 6 S.E. 2d 40; *Creech v. Linen Service Corp.,* 219 N.C. 457, 14 S.E. 2d 408; *Rogers v. Black Mountain,* 224 N.C. 119, 29 S.E. 2d 203; *Temple v. Stafford,* 227 N.C. 630, 43 S.E. 2d 845; *McIlroy v. Motor Lines,* 229 N.C. 509, 50 S.E. 2d 530; *Hinson v. Chemical Corp.,* 230 N.C. 476, 53 S.E. 2d 448. An incidental divergence, however, such as appeared in *Duncan v. Overton,* 182 N.C. 80, 108 S.E. 387, would not be sufficient to relieve the employer from liability for the tort of his employee while engaged in the general scope of his agency or employment.

While the motion of defendant Bowman for judgment of nonsuit was properly denied, we think, upon the evidence offered in the trial, the defendant was entitled to have the court instruct the jury if they found the facts to be as the evidence tended to show to answer the second issue "No."

For failure to charge the jury to this effect as prayed there must be a new trial as to defendant Bowman, and it is so ordered.

Other exceptions noted and brought forward in appellant's assignments of error are not discussed as they may not arise on another hearing.

New trial.

STATE v. ERNEST BRIGHT.

(Filed 8 April, 1953.)

1. Criminal Law §§ 42f, 52a (2)—

Testimony introduced by the State as to an exculpatory statement made by defendant does not bind the State if other evidence offered by it points to a different conclusion and raises a reasonable inference to the contrary, and therefore in such circumstance such testimony does not justify nonsuit.

2. Homicide § 25—

Where the State's evidence establishes that defendant's hand was on the trigger of the pistol when it was discharged, inflicting fatal injury to defendant's wife, the introduction by the State of testimony of a statement made by defendant that the pistol was accidentally discharged while he and his wife were scuffling does not justify nonsuit when there is also circumstantial evidence contradicting defendant's contention of death by

misadventure, such as the absence of powder burns, the location and direction of the fatal wound, and the conduct of defendant after the fatal shooting.

3. Criminal Law §§ 52a (3), 53c—

While the court should charge that circumstantial evidence must be inconsistent with the defendant's innocence in order to be sufficient to sustain conviction, in passing upon defendant's motion to nonsuit, the question for the court to determine is whether there is any substantial evidence to support the State's case, it being for the jury to determine under proper instructions as to the *quantum* and intensity of proof, whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt.

4. Criminal Law § 53b—

A correct instruction defining reasonable doubt and charging that a reasonable doubt might grow out of the evidence or the insufficiency of the evidence in the case, will not be held for error because of a further instruction that if, after weighing the evidence, the minds of the jurors are left in such condition that they cannot say that they have an abiding faith to a moral certainty of defendant's guilt, that they have a reasonable doubt, otherwise not.

5. Homicide § 27b—

The failure of the court, in one instance, to charge that the presumption arising from a killing with a deadly weapon obtains only upon proof that the killing was intentional will not be held for prejudicial error when in other portions of the charge the correct rule is categorically stated and it is apparent from the entire charge that there could be no misapprehension on this point on the part of the jury.

6. Homicide § 27h—

Where there is no evidence of culpable negligence and defendant's defense is based upon death by misadventure, the question of involuntary manslaughter does not arise, and the court properly omits to charge thereon.

7. Criminal Law § 78e (1)—

An exception that the court in charging the jury failed to comply with G.S. 1-180 is untenable.

8. Criminal Law § 31b—

A physician may testify as to the result of his personal examination of deceased.

9. Criminal Law § 81c (3)—

The admission of testimony over objection cannot be held prejudicial when substantially the same testimony is admitted without objection.

APPEAL by defendant from *Burney, J.*, August Term, 1952, of DUPLIN. No error.

The defendant was indicted for the murder of his wife, Inez Bright, but before the trial the Solicitor announced he would not ask for verdict

of murder in the first degree but for verdict of murder in the second degree or manslaughter as the evidence might warrant.

There was evidence for the State tending to show that the defendant brought his wife in an automobile to the home of Dr. Matthews about 1:30 a.m., and called him out. The defendant, his wife and another woman were in the automobile. They said she had been shot. About the time the doctor began his examination, defendant's wife died. The doctor testified from his examination the bullet had entered just below the left breast and apparently came out just below the right hip, and that in his opinion the wound that passed through her body caused her death. No powder burns were observed about the wound or on her body or clothing. She had on a slip and bathrobe, and there were no bullet holes in either, but the defendant stated he had changed her clothes. The doctor called the officers and the defendant told them it was an accident. He said he and his wife were tussling over a gun on the bed and the gun went off; that his hand was on the trigger when the gun fired; that they were scuffling over it. The coroner testified the defendant told him he had his hand on the trigger when it fired; that he and his wife were on the bed tied up, scuffling, at the time the gun went off; that later he found the bullet had gone through her body. At the defendant's home the officers found the bed had been torn up, chairs slightly disarranged, and some garment on the foot of the bed "with right much blood on it." The pistol was lying on the dresser, an empty cartridge shell on the floor.

The defendant offered no evidence.

There was verdict of guilty of manslaughter, and from judgment imposing sentence the defendant appealed.

Attorney-General McMullan, Assistant Attorney-General Love, and Gerald F. White, Member of Staff, for the State.

J. Faison Thomson & Son and Johnson & Johnson for defendant, appellant.

DEVIN, C. J. Defendant assigns error in the denial of his motion for judgment of nonsuit urged chiefly on the ground that the State's evidence was characterized and given significance by the defendant's exculpatory statement, as testified by the State's witness, that the fatal wound was the result of an accident. While this statement was material and competent to be considered on the motion to nonsuit, it may not be regarded as conclusive if there be other evidence tending to throw a different light on the circumstances of the homicide. The State was not bound by that statement if other evidence offered pointed to a different conclusion and raised the reasonable inference from all the testimony that the shooting of the deceased was intentional and unlawful. *S. v. Baker,* 222 N.C. 428, 23

S.E. 2d 340; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Phillips,* 227 N.C. 277, 41 S.E. 2d 766; *S. v. Jernigan,* 231 N.C. 338, 56 S.E. 2d 599; *S. v. Hendrick,* 232 N.C. 447 (456), 61 S.E. 2d 349; *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564. The motion to nonsuit was properly denied.

There was evidence that the deceased was shot and killed by the discharge of a pistol; that the bullet entered the left breast and passed downward through her body and caused her death, and that admittedly the defendant's hand was on the trigger when the pistol was discharged. There was also evidence of other circumstances contradictory of defendant's contention that it was an accident, such as the absence of powder burns, the location and direction of the fatal wound, the conduct of the defendant, and his statement that he and the deceased were "scuffling" at the time the pistol was fired.

It was contended that as the evidence was circumstantial, in order to warrant submission to the jury, it must have been such as to exclude every other reasonable hypothesis but that of guilt. But that is not the proper rule for the consideration of a motion for judgment of nonsuit. The rule that the circumstances must be inconsistent with defendant's innocence before he can be convicted is a wholesome one for the guidance of the jury, and the court should charge, and did so in this case, that the jury must be convinced beyond a reasonable doubt of the guilt of the defendant before they could convict him. But on a motion for nonsuit the angle of approach is necessarily different, and the question for the court to determine is whether there is any substantial evidence to support the State's case. If so, it is a matter for the jury to decide under proper instructions as to the *quantum* and intensity of proof. The rule was stated in *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676, as follows: "When reasonable inferences may be drawn from them (circumstances), pointing to defendant's guilt, it is a matter for the jury to decide whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt." See also *S. v. Strickland,* 229 N.C. 201 (210), 49 S.E. 2d 469.

The court charged the jury as to reasonable doubt as follows: "Now a reasonable doubt, gentlemen, is not a vain, imaginary, captious, or a mere possible doubt, but a reasonable doubt, an honest doubt, one based upon common sense and reason, and one growing out of the evidence or the insufficiency of the evidence in the case." This is in accord with approved precedents. *S. v. Braxton,* 230 N.C. 312, 52 S E. 2d 895. It may not be held for error that following this the court charged the jury "if after considering, weighing and comparing all the evidence in the case, the minds of the jurors are left in such condition that they cannot say that they have an abiding faith to a moral certainty of the defendant's guilt, then they have a reasonable doubt, otherwise not."

The defendant noted exception to the expression in the judge's charge, in his preliminary statement of the different degrees of homicide, that murder in the second degree was an unlawful killing with malice, and that malice might be shown by evidence of hatred or ill-will and is implied in law from the killing with a deadly weapon. It was argued there was error in failing to state that an intentional killing must be shown or admitted in order to raise this implication. *S. v. Debnam,* 222 N.C. 266 (270), 22 S.E. 2d 562; *S. v. Burrage,* 223 N.C. 129, 25 S.E 2d 393; *S. v. Phillips,* 229 N.C. 538, 50 S.E. 2d 306; *S. v. Brannon,* 234 N.C. 474, 67 S.E. 2d 633. However, we note that in his specific charge as to what was necessary to be shown in this case to establish murder in the second degree the court instructed the jury that if they were satisfied from the evidence beyond a reasonable doubt that the defendant "did intentionally shoot and kill his wife with malice" they should return verdict of guilty of murder in the second degree. Likewise, as to manslaughter the court instructed the jury if the State had satisfied them beyond a reasonable doubt that the defendant intentionally shot and killed the deceased in the heat of passion suddenly aroused they should return verdict of guilty of manslaughter; and if the State had failed to satisfy them from the evidence beyond a reasonable doubt they should return verdict of not guilty.

The defendant's defense was based on the theory of an accidental shooting, and hence the finding that the shooting was intentional was material in contradiction of defendant's contention of death by misadventure. But we think the court sufficiently presented this view, and that there could be no misapprehension on this point on the part of the jury.

The court instructed the jury as to the meaning of accident and of homicide by misadventure, and presented the defendant's contentions on this phase of the case, such as were based on pertinent evidence. The court in his final instruction to the jury charged them if they were "simply satisfied from all the evidence that the defendant and his wife were tussling over a pistol and it accidentally went off and killed her, it would be their duty to return verdict of not guilty." There was no evidence of culpable negligence, and the question of involuntary manslaughter was not presented to the jury. *S. v. Rawley, ante,* 233.

The exception that the court in charging the jury failed to comply with G.S. 1-180 is untenable. *Price v. Monroe,* 234 N.C. 666 (669), 68 S.E. 2d 283; *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482. The exception to the testimony of Dr. Matthews cannot be sustained. It was competent for him to testify as to the result of his personal examination. Besides substantially the same testimony was admitted without objection. *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648; *White v. Disher,* 232 N.C. 260 (267), 59 S.E. 2d 798.

We have examined each of defendant's assignments of error, whether herein specifically referred to or not, and find none of them sufficient to justify the award of a new trial.

We conclude that in the trial there was

No error.

WILLIE BRYANT v. JIMMIE IRVIN BARBER.

(Filed 8 April, 1953.)

1. Carriers § 2: Utilities Commission § 2—

The Utilities Commission has the power and duty to regulate intrastate transportation of passengers by carrier for compensation over the public highways of this State, and only a holder of a certificate or permit from the Utilities Commission may legally engage in such business unless such party is exempt from regulation by the express terms of the Bus Act. G.S. 62-121.52.

2. Same—

G.S. 62-121.47 exempts from the regulations of the Utilities Commission carriers in intrastate commerce transporting passengers for hire to and from Federal military reservations or bases only if such carriers have been procured by the U. S. Government to carry passengers for it, or the transportation of such passengers is under the control of the United States.

3. Carriers § 7½—

A franchise carrier may maintain an action in the Superior Court to restrain another carrier from illegal operation along his route without a certificate or permit from the Utilities Commission when such illegal operation by such other carrier interferes with its franchise rights. G.S. 62-121.72 (2).

4. Same: Contracts § 26—

Where plaintiff contract carrier, having a permit from the Utilities Commission, has contracts with numerous persons living along his route obligating such persons to ride on plaintiff's buses exclusively, plaintiff is entitled to recover the damages sustained by reason of wrongful acts of another carrier, operating without certificate or permit, in inducing plaintiff's passengers to breach their contracts with plaintiff.

APPEAL by defendant from *Frizzelle, J.*, in Chambers at Snow Hill, N. C., 17 February, 1953. From JONES.

This is an action to restrain the defendant from operating buses to Camp Lejeune in violation of the Bus Act of 1949, and from interfering with the contracts of the plaintiff for the transportation of passengers who have contracted to ride on plaintiff's buses to and from Camp Lejeune, and for damages.

The plaintiff is a contract carrier as defined in the Bus Act of 1949 and as such carrier was duly issued a permanent permit on 8 May, 1952, by the Utilities Commission, authorizing him to transport passengers from certain designated points or areas in Eastern North Carolina to and from Camp Lejeune.

After securing his permit as a contract carrier as authorized by G.S. 62-121.50 and G.S. 62-121.52, the plaintiff entered into contracts with various persons employed at Camp Lejeune for the exclusive privilege of transporting them to and from their work daily.

On 28 April, 1952, the North Carolina Utilities Commission issued an administrative ruling to the effect that the transportation of civilian employees to and from military camps is "for the United States government" and therefore does not require a certificate or permit therefor, such transportation not being subject to regulation by the Commission.

Pursuant to the above ruling the defendant applied for and obtained a certificate of exemption from the Utilities Commission on 3 November, 1952. Immediately thereafter he began the operation of buses along the same route over which the plaintiff's permit authorizes him to operate.

On 19 January, 1953, the plaintiff obtained a temporary restraining order against the defendant, enjoining him from operating buses to and from Camp Lejeune, N. C., from Trenton, N. C., and from interfering with the contracts of the plaintiff and certain passengers who had contracted to ride on plaintiff's buses.

When this cause came on for hearing on the order to show cause why the restraining order should not be continued until the final determination of the action, the defendant demurred to the complaint on the ground that the court had no jurisdiction of the subject matter set out in the plaintiff's first cause of action, and on the ground that neither the first nor the second cause of action set out in the complaint states a cause of action against the defendant.

His Honor overruled the demurrer and continued the temporary restraining order to the final hearing. From these rulings the defendant appeals and assigns error.

Ruark, Ruark & Moore and John D. Larkins, Jr., for plaintiff, appellee.

Hughes & Abbott for defendant, appellant.

DENNY, J. The duty and power to regulate the intrastate transportation of passengers by motor carrier for compensation over the public highways of this State is vested in the North Carolina Utilities Commission pursuant to the provisions of the Bus Act of 1949. And only the holder of a certificate or permit from the Utilities Commission may

legally engage in the transportation of intrastate passengers by motor vehicle over the public highways of this State for compensation, unless such party is exempt from regulation by the express terms of the above Act. G.S. 62-121.52; *Utilities Commission v. Coach Co.*, 236 N.C. 583, 73 S.E. 2d 562.

Section 3 of the Bus Act of 1949, codified as G.S. 62-121.45, vests in the North Carolina Utilities Commission authority to administer and enforce the provisions of the Act and to make and enforce reasonable and necessary rules and regulations to that end. *Utilities Commission v. Fleming*, 235 N.C. 660, 71 S.E. 2d 41.

The administrative ruling issued by the Commission on 28 April, 1952, purporting to exempt from regulation all persons engaged in the transportation of civilian employees to and from the marine bases at Cherry Point and Camp Lejeune and the military reservation at Fort Bragg, was based upon an erroneous interpretation of the law applicable to exemptions authorized under the Bus Act of 1949.

The statute, G.S. 62-121.47, which the Commission interpreted to authorize its administrative ruling referred to herein, reads in pertinent part as follows: "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, . . ."

We construe the above statutory provision to authorize the exemption only of such carriers of passengers by motor vehicle, as may have been procured by the United States government to carry passengers for it, or the transportation of passengers by motor vehicles under the control of the United States.

In view of the conclusion we have reached with respect to the administrative ruling, pursuant to which the defendant was issued a certificate of exemption from regulation by the Commission, it follows that his operation as a carrier of passengers by motor vehicle on the public highways of this State for compensation, was not authorized by the Bus Act of 1949, codified as G.S. 62-121.43 through G.S. 62-121.79.

It is provided in G.S. 62-121.72 (2): "If any motor carrier, or any other person or corporation, shall operate a motor vehicle for the transportation of passengers for compensation in violation of any provision of this article, . . . the Commission or any holder of a certificate or permit duly issued by the Commission may apply to the resident superior court judge of any judicial district where such motor carrier or other person or corporation so operates, or to any superior court judge holding court in such judicial district, for the enforcement of any provision of this article, or of any rule, regulation, requirement, order, term or condi-

tion of the Commission. Such court shall have jurisdiction to enforce obedience to this article or to any rule, order, or decision of the Commission, by writ of injunction or other process, mandatory or otherwise, restraining such carrier, person or corporation, or its officers, agents, employees and representatives from further violation of this article or of any rule, order, regulation, or decision of the Commission."

It would seem that since the plaintiff's first cause of action is bottomed on his alleged rights as the holder of a permit as a contract carrier, and the alleged illegal interference therewith by the defendant, that the provisions of the above statute authorized the institution of this action, and we so hold.

The second cause of action alleges, among other things, that plaintiff had transportation contracts with numerous persons living along his route which obligated such persons to ride on plaintiff's buses exclusively; that the defendant wrongfully, intentionally and maliciously induced and persuaded various persons, naming them, to breach their contracts with plaintiff and to ride on defendant's bus from their homes to and from Camp Lejeune, N. C.; that as a result of the acts of the defendant in inducing plaintiff's passengers to cease to ride on plaintiff's buses in violation of their contracts, the plaintiff has sustained substantial losses of revenue and profits and has been damaged as a result of the defendant's wrongful acts, in the sum of $1,000.00.

The overwhelming weight of authority in this country is to the effect that a party may be held liable in damages for inducing another to breach a contract. 84 A.L.R. 43, *et seq.*, citing *Elvington v. Shingle Co.*, 191 N.C. 515, 132 S.E. 274; *Jones v. Stanly*, 76 N.C. 355; *Haskins v. Royster*, 70 N.C. 601, 16 Am. Rep. 780. See also *Winston v. Lumber Co.*, 227 N.C. 339, 42 S.E. 2d 218, and the concurring opinion of *Barnhill, J.*, in *Bruton v. Smith*, 225 N.C. 584, 36 S.E. 2d 9.

We think the rulings of his Honor in the hearing below, from which the defendant appealed, were proper and should be upheld.

Affirmed.

ROY WHITSON AND WIFE, ARBA WHITSON, v. GUS BARNETT.

(Filed 8 April, 1953.)

1. Deeds § 13b—

The rule in *Shelley's case* does not apply when it is apparent from the language employed in the instrument that the words "bodily heirs" or "heirs of the body" of the first taker are not used in their technical sense as heirs general, but mean children or designate particular persons.

2. Same—

A deed to a person, "and bodily heirs, and their heirs and assigns," with like provision in the *habendum* and warranty, *is held* to convey the land to such person and his children, it being apparent from the language of the instrument that the words "bodily heirs" were intended to mean children and not heirs general in the technical sense.

3. Deeds § 12a—

A clause inserted in a deed following the description of the land may not be construed to defeat the meaning of the language used in the granting clause.

APPEAL by defendant from *McLean, Special Judge,* September Term, 1952, of MITCHELL. Reversed.

This was a controversy without action (G.S. 1-250) to determine the title to land, the subject of a contract to convey. The defendant declined to accept plaintiffs' deed and pay the purchase price for the reason alleged that plaintiffs' title was defective.

The plaintiffs derive their title under a deed which purports to convey the land to Roy Whitson and his bodily heirs and their heirs and assigns. In the deed in the premises the grantees are designated as "Roy Whitson and his Bodily heirs," and in the granting clause the conveyance is made "to Roy Whitson and Bodily heirs, and their heirs and assigns." In the *habendum* it is to "Roy Whitson and Bodily heirs and assigns," and the warranty is to "Roy Whitson and Bodily heirs and their heirs and assigns." Inserted in the deed, following the description of the land, is the condition that "Roy Whitson is not to sell during our life without our consent." Roy Whitson is the father of four children. The grantors are dead.

The court held the deed tendered by plaintiffs was sufficient to convey the entire interest in the land in fee simple, and so adjudged. Defendant appealed.

W. E. Anglin for plaintiffs, appellees.

C. P. Randolph and J. M. Gouge for defendant, appellant.

DEVIN, C. J. Does a deed "to Roy Whitson and Bodily heirs, and their heirs and assigns" enable Roy Whitson to convey the entire interest in the land in fee simple?

Unquestionably if the expression in the granting clause of the deed had been to Roy Whitson and his bodily heirs, and no more, by virtue of the statute G.S. 41-1, and under the uniform decisions of this Court, Roy Whitson would have acquired and could convey an unexceptionable title. *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906; *Bank v. Dortch,* 186 N.C. 510, 120 S.E. 60; *Revis v. Murphy,* 172 N.C. 579, 90 S.E. 573;

Marsh v. Griffin, 136 N.C. 333, 48 S.E. 735. But from the repeated use of the words "to Roy Whitson and Bodily heirs, and their heirs and assigns," the conclusion seems inescapable that the words "Bodily heirs" were used in the sense of issue or children, and not in the technical sense as words of limitation.

The plaintiffs contend that the rule in *Shelley's case* applies here, and that under the rule the effect of the conveyance to Roy Whitson and his bodily heirs is to vest in the grantee a fee simple estate. This rule, which has become imbedded in our law as a rule of property as well as a rule of law, requires that that when by conveyance the ancestor takes an estate of freehold and by the same conveyance an estate is limited mediately or immediately to his heirs in fee or in tail the words heirs or bodily heirs are regarded as words of limitation of the estate and not of purchase. *Benton v. Baucom,* 192 N.C. 630, 135 S.E. 629. But when the intent of the grantor as ascertained from the language of the deed is to use the words heirs or bodily heirs as designation of certain persons, the rule does not apply.

In *Wallace v. Wallace,* 181 N.C. 158, 106 S.E. 501, the conveyance was to C. A. Wallace for life "and after the death of C. A. Wallace the land is to descend in fee simple to his bodily heirs, if any, and if none, to go to his next of kin." It was held in that case that the rule in *Shelley's case* did not apply, and that the language used could not be construed to convey a fee simple title to C. A. Wallace. It was pointed out that if it appears by correct construction that the words bodily heirs are not used in the technical sense as conveying the estate to the entire line of heirs of the first taker, as inheritors under the canons of descent, but as words designating certain persons the rule does not apply. *Swindell v. Smaw,* 156 N.C. 1, 72 S.E. 1; *Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15; *Jones v. Whichard,* 163 N.C. 241, 79 S.E. 503; *Ford v. McBrayer,* 171 N.C. 420, 88 S.E. 736; *Williams v. Blizzard,* 176 N.C. 146, 96 S.E. 957; *Hutton v. Horton,* 178 N.C. 548, 101 S.E. 279; *Blackledge v. Simmons,* 180 N.C. 535, 105 S.E. 202; *Willis v. Trust Co.,* 183 N.C. 267, 111 S.E. 163; *Hampton v. Griggs,* 184 N.C. 13, 113 S.E. 501; *Fillyaw v. Van Lear,* 188 N.C. 772, 125 S.E. 544; *Williams v. Sasser,* 191 N.C. 453, 132 S.E. 278; *Barnes v. Best,* 196 N.C. 668, 146 S.E. 710; *Gurganus v. Bullock,* 210 N.C. 670, 188 S.E. 85; *Matthews v. Matthews,* 214 N.C. 204, 198 S.E. 663; *Turpin v. Jarrett,* 226 N.C. 135, 37 S.E. 2d 124; *Conrad v. Goss,* 227 N.C. 470, 42 S.E. 2d 609; *Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24; *Trust Co. v. Waddell,* 234 N.C. 34, 65 S.E. 2d 317; 26 C.J.S. 418; 47 A.J. 800-801.

Where the conveyance is to the first taker for life and then by whatever language employed to his bodily heirs or heirs of his body, the rule applies and the first taker acquires a fee, as illustrated in the cases cited by plain-

tiffs. *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404; *Hartman v. Flynn,* 189 N.C. 452, 127 S.E. 517; *Marsh v. Griffin,* 136 N.C. 333, 48 S.E. 735; *Pittman v Stanley,* 231 N.C. 327, 56 S.E. 2d 657. But where it is apparent from the deed that the words bodily heirs were not intended to be used in the technical sense as heirs general but as meaning children the rule in *Shelley's case* does not control. *Wallace v. Wallace, supra.*

In all cases the cardinal rule prevails that the intention of the grantor is to be ascertained from the language used in the deed, interpreted in accord with the well established rules of law applicable thereto. *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662; *Glover v. Glover,* 224 N.C. 152, 29 S.E. 2d 350; *Williams v. Johnson,* 228 N.C. 732, 47 S.E. 2d 24. It is the duty of the Court to give to the words of the deed their legal significance unless it is apparent from the deed itself that they were used in some other sense. *May v. Lewis,* 132 N.C. 115, 43 S.E. 550.

In the deed under which the plaintiffs in the instant case acquired title to the land, in the granting clause, which "is the very essence of the contract" (*Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157), the conveyance is made "to Roy Whitson and Bodily heirs, and their heirs and assigns." Roy Whitson was the father of four children. Construing the language and the form of expression employed, we think the words "Bodily heirs" were intended to mean children and not heirs general in the technical sense. If we interpret the words used to mean "to Roy Whitson and children, and their heirs and assigns," we think the purpose of the grantors is made to appear and the phrases fit together understandably. We note the conveyance is not to Roy Whitson and *his* bodily heirs, but to Roy Whitson and Bodily heirs, and *their* heirs and assigns. The clause inserted in the deed following the description of the land may not be construed to defeat the meaning of the language used in the granting clause. *Stokes v. Dixon,* 182 N.C. 323, 108 S.E. 913.

We think under the facts agreed in this case the defendant's right to decline to accept the deed executed only by Roy Whitson and wife must be upheld, and the judgment below

Reversed.

WILLIE BELLE DEATON v. EDGAR J. DEATON.

(Filed 8 April, 1953.)

1. Divorce and Alimony § 15—

A decree of absolute divorce obtained by the wife on the ground of two years separation, G.S. 50-6, does not annul the right of the wife to receive permanent alimony under a judgment rendered in her action for alimony without divorce before the commencement of the proceedings for absolute divorce, since such case falls squarely within the second proviso of G.S. 50-11.

2. Constitutional Law §§ 8a, 10a—

Where the language of a statute is plain and unambiguous, the courts are without power to attribute any other meaning to its words on the ground of public policy, since public policy is in the exclusive province of the General Assembly.

APPEAL by defendant from *Nettles, J.*, at February Term, 1953, of CABARRUS.

Motion to vacate prior judgment awarding permanent alimony to wife on theory that such judgment was annulled by subsequent decree of absolute divorce obtained by wife under two-year separation statute.

These are the facts:

1. On 6 September, 1950, the plaintiff Willie Belle Deaton brought this action against her husband, the defendant Edgar J. Deaton, in the Superior Court of Cabarrus County for alimony without divorce under G.S. 50-16. The defendant was served with summons and entered a general appearance. When the action was tried on its merits before Judge F. Donald Phillips and a jury at the June Term, 1951, of the Superior Court of Cabarrus County, the jury answered the issues of fact in favor of the plaintiff and against the defendant, and Judge Phillips rendered a judgment on the verdict awarding the plaintiff $100.00 monthly from the earnings of the defendant as permanent alimony. The judgment was affirmed by us on the defendant's appeal. *Deaton v. Deaton,* 234 N.C. 538, 67 S.E. 2d 626. The defendant has complied with the judgment in all respects.

2. Subsequent to the trial of this action, to wit, on 2 December, 1952, the plaintiff brought an action against the defendant in the Superior Court of Cabarrus County for an absolute divorce on the ground of two years' separation under G.S. 50-6. The defendant was served with summons in the action. When the action was tried on its merits before Judge Zeb V. Nettles and a jury at the January Term, 1953, of the Superior Court of Cabarrus County, the jury answered the issues of fact in favor of the plaintiff and against the defendant, and Judge Nettles entered a

judgment on the verdict absolutely divorcing the plaintiff and the defendant from the bonds of matrimony.

3. Thereafter, to wit, at the February Term, 1953, of the Superior Court of Cabarrus County the defendant applied to Judge Nettles by a motion in the cause for an order vacating the judgment rendered in this action at the June Term, 1951, on the ground that his liability to pay alimony to the plaintiff terminated as a matter of law when the marriage of the parties was dissolved by an absolute divorce on the application of the plaintiff. Judge Nettles entered an order denying the motion, and the defendant appealed, assigning the denial of his motion as error.

R. Furman James for plaintiff, appellee.

Hartsell & Hartsell, William L. Mills, Jr., and E. Johnston Irvin for defendant, appellant.

ERVIN, J. The appeal presents this question for decision: Does a decree of absolute divorce obtained by the wife under the two-year separation statute codified as G.S. 50-6 annul the right of the wife to receive permanent alimony under a judgment rendered in an action for alimony without divorce before the commencement of the proceeding for absolute divorce?

The plaintiff asserts that this question ought to be answered in the negative. To sustain her position, she lays hold on the second proviso in the statute embodied in G.S. 50-11 and cites these decisions: *Simmons v. Simmons,* 223 N.C. 841, 28 S.E. 2d 489; *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278; *Howell v. Howell,* 206 N.C. 672, 174 S.E. 921; and *Lentz v. Lentz,* 193 N.C. 742, 138 S.E. 12. G.S. 50-11 is couched in this language: "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 unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children *in esse,* or begotten of the body of the wife during coverture; and, provided further, that a decree of absolute divorce upon the ground of separation for two successive years as provided in section 50-5 or section 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce."

The defendant insists that the question raised by the appeal should be answered in the affirmative. He argues that the cases invoked by the plaintiff do not decide this precise question; that the right of the wife to alimony stems from the marital obligation of the husband to support her; that it is unjust and contrary to public policy for the wife to receive alimony from the husband after she has put an end to the marital relation

by procuring a decree of absolute divorce; and that the Legislature intended the second proviso of G.S. 50-11 to protect a prior award of alimony only in case the decree of absolute divorce is obtained by the husband.

We are inclined to accept as valid the contention of the defendant that the decisions cited by the plaintiff do not adjudicate the precise question now before us. The decrees of absolute divorce involved in the *Simmons, Dyer,* and *Howell cases* were procured by husbands rather than by wives. The decision in the *Lentz case* that the subsequent decree of absolute divorce obtained by the wife did not invalidate a prior consent judgment obligating the husband to make certain future payments for the benefit of the wife was rested squarely on the proposition that the consent judgment constituted a contract between the husband and wife and stipulated in express terms that nothing short of the remarriage of the wife should relieve the husband of the obligation to make the specified payments.

We are unable, however, to reconcile the contentions of the defendant respecting legislative intent and public policy with the wording of the second proviso in G.S. 50-11. The General Assembly inserted the second proviso in the statute for the purpose of taking the special cases mentioned in such proviso out of the general enactment that a decree of absolute divorce puts an end to all rights arising out of the marriage. *Cameron v. Highway Commission,* 188 N.C. 84, 123 S.E. 465. In so doing, the General Assembly expressed in unambiguous language its plain purpose that a subsequent decree of absolute divorce obtained by either the husband or the wife upon the ground of separation for two successive years as provided in G.S. 50-5 or G.S. 50-6 shall not impair or destroy the right of the wife to receive alimony from the husband under any judgment of the court rendered before the commencement of the proceeding for absolute divorce. We cannot attribute any other meaning to the proviso without usurping a legislative power denied to us by our organic law. 50 Am. Jur., Statutes, section 228. Where the General Assembly has spoken in a constitutional manner, public policy is what the General Assembly has declared that policy to be. *Batesville Casket Co. v. Fields,* 288 Ky. 104, 155 S.W. 2d 743; *Park Const. Co. v. Independent School Dist. No. 32, Carver County,* 209 Minn. 182, 296 N.W. 475, 135 A.L.R. 59; *State v. Lincoln County Power Dist. No. 1,* 60 Nev. 401, 111 P. 2d 528. This being so, public policy respecting the effect of decrees of absolute divorce is to be found in the second proviso of G.S. 50-11 as well as in the general enactment which the proviso qualifies.

Whether a statute produces a just or an unjust result is a matter for legislators and not for judges. We are nevertheless constrained to observe that justice does not necessarily require that a faithless husband shall be relieved of all responsibility for the support of an innocent wife who has

spent her youth in his service merely because the wife sees fit to put an end in law to a marriage long since ended in fact by his broken vows.

What has been said necessitates an affirmance of the order refusing to vacate the alimony judgment.

Affirmed.

WILLIAM A. COOK v. J. D. HOBBS AND E. H. BESHERS.

(Filed 8 April, 1953.)

1. Automobiles §§ 8i, 18h (2)—

Plaintiff's allegations and evidence to the effect that he was already in an intersection when defendant drove his car into the intersection from plaintiff's right, at excessive speed without proper caution and maintenance of proper lookout, *is held* sufficient to overrule defendant's motion to nonsuit. G.S. 20-141 (a), G.S. 20-155 (b).

2. Automobiles § 18i: Trial § 31b—

A charge as to the duty of a motorist to stop in obedience to a red flashing signal as required by municipal ordinance before entering an intersection within the municipality must be held for prejudicial error when there is no allegation in the complaint making any reference to such signals or municipal ordinance.

APPEAL by defendants from *Crisp, Special Judge,* and a jury, at November Term, 1952, of CABARRUS.

Civil action arising out of a collision between two motor vehicles at a street intersection within the corporate limits of a municipality.

These are the facts:

1. East Eleventh Street, which runs east and west, and North College Street, which runs north and south, intersect and cross each other in a residential district in the City of Charlotte.

2. At one o'clock in the morning on 1 January, 1952, an eastbound Ford owned and operated by the plaintiff William A. Cook, which approached and entered the intersection on East Eleventh Street, and a northbound Cadillac owned by the defendant J. D. Hobbs and operated for him by his agent, the defendant E. H. Beshers, which approached and entered the intersection on North College Street, collided on the intersection, allegedly causing personal injury to the plaintiff and damage to his Ford.

3. The plaintiff sued the defendants to recover damages for the personal injury and property damage allegedly suffered by him in the collision. His complaint charged that the Ford reached and entered the intersection substantially in advance of the Cadillac, and that the defend-

ant E. H. Beshers was guilty of actionable negligence in the management of the Cadillac in these four respects: (1) That he failed to keep a reasonably careful lookout; (2) that he drove the Cadillac "without due caution and circumspection and at a speed . . . so as to endanger" the person and property of the plaintiff in violation of G.S. 20-140; (3) that he drove the Cadillac at a speed greater than was reasonable and prudent under the conditions then existing in violation of G.S. 20-141 (a); and (4) that he failed to yield the right of way at the intersection to the plaintiff whose Ford was already within the intersection in violation of G.S. 20-155 (b). The defendants answered, denying actionable negligence on their part and pleading contributory negligence on the part of the plaintiff.

4. The plaintiff and the defendants offered evidence at the trial tending to establish their respective allegations. They stipulated at that time that the City of Charlotte installed red and yellow flashing signals at the intersection before the collision under a city ordinance embodied in Section 25 of Article 3 of Chapter 2 of the Code of the City of Charlotte; that the flashing signals were working at the time of the collision; and that Section 25 of Article 3 of Chapter 2 of the Code of the City of Charlotte was couched in this language: "Whenever flashing red or yellow signals are used, they shall require obedience by vehicular traffic as follows: (a) Flashing red (stop signal). When a red lens is illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked, and the right to proceed shall be subject to the rule applicable after making a stop at stop sign. (b) Flashing yellow (caution signal). When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or along said street or highway past such signal only with caution." The complaint did not mention either the flashing signals or the city ordinance in any way whatever.

5. These issues were submitted to the jury: (1) Was the plaintiff damaged by the negligence of the defendants, as alleged in the complaint? (2) Was the plaintiff guilty of contributory negligence, as alleged in the answer? (3) What amount, if any, is plaintiff entitled to recover of the defendants for personal injury? (4) What amount, if any, is plaintiff entitled to recover of the defendants for property damage? The jury answered the first issue "Yes," the second issue "No," the third issue "$450.00," and the fourth issue "$700.00." The court entered judgment for the plaintiff and against the defendants for $1,150.00 and the costs of the action, and the defendants appealed, assigning errors.

John Hugh Williams for plaintiff, appellee.

Hartsell & Hartsell, William L. Mills, Jr., and Jones & Small for defendants, appellants.

ERVIN, J. The defendants make these assertions by their assignments of error:

1. That the court erred in refusing to dismiss the action upon a compulsory nonsuit at the close of all the evidence.

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

The evidence warranted the submission of the issues of actionable negligence and contributory negligence to the jury. In consequence, the refusal to nonsuit was proper.

The cause must be tried anew, however, because of error in the portion of the charge covered by the sixth exception. Although the complaint made no reference whatever to the flashing signals or the city ordinance, the judge instructed the trial jurors, in substance, that it would be their duty to answer the first issue "Yes" in case they found by the greater weight of the evidence that the driver of the Cadillac entered the intersection without first stopping in obedience to a red flashing signal and the city ordinance and in that way proximately caused injury to the plaintiff's person or damage to his Ford. In so doing, the judge set at naught the fundamental procedural principle that a plaintiff cannot recover except on the cause of action set up in his complaint. *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182; *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285; *Maddox v. Brown,* 232 N.C. 542, 61 S.E. 2d 613; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648; *Watson v. Durham,* 207 N.C. 624, 178 S.E. 218; *Edwards v. Power Co.,* 193 N.C. 780, 138 S.E. 131, 53 A.L.R. 1404; *Geddie v. Williams,* 189 N.C. 333, 127 S.E. 423; *Dixon v. Davis,* 184 N.C. 207, 114 S.E. 8; *McNeill v. R. R.,* 167 N.C. 390, 83 S.E. 704; *Wilson v. Holley,* 66 N.C. 408; 65 C.J.S., Negligence, section 288.

New trial.

ELLEN ROUSE v. KING SOLOMON ROUSE, EXECUTOR OF THE ESTATE OF W. W. ROUSE, DECEASED, AND KING SOLOMON ROUSE, INDIVIDUALLY, AND BOURBON BLAKE ROUSE, ELBA JEANETTE ROUSE AND CLINTON WOODLEY ROUSE, MINORS, BY W. A. ALLEN, JR., GUARDIAN AD LITEM.

(Filed 8 April, 1953.)

1. Wills § 44—

Under the doctrine of election a person will not be allowed to receive the benefits accruing to him under an instrument and at the same time assert paramount title to other property disposed of by the instrument to another, since he may not accept and reject the same writing.

2. Executors and Administrators § 13a—

Personal property of a decedent must be applied to the payment of the debts of the decedent owing at the time of his death before resort can be had to his real property even to satisfy a specific lien.

3. Same: Wills § 44—

Testator devised to his wife a life estate in certain realty and bequeathed her his personalty. His wife asserted a claim against the estate for money constituting a part of her separate estate which he had received and not accounted for. It was not made to appear that the personalty was insufficient to pay the wife's claim. *Held:* By accepting the rents and profits from the realty, the wife elected to take under the will and is not entitled to have the realty sold to pay her claim as a specific lien.

APPEAL by defendants from *Crisp, Special Judge,* September Term, 1952, LENOIR. Reversed.

Civil action to recover $1,000 and to have said debt adjudged a specific lien on certain real property.

W. W. Rouse, husband of plaintiff, received during coverture a total of $1,000 in cash which belonged to plaintiff as a part of her separate estate and had not, at the time of his death, accounted to her for the same. Instead, he had invested or spent the full sum in the construction of a combination residence and store building on land owned by him.

On 29 July 1948, Rouse died, leaving a last will and testament in which he devised to plaintiff all his real estate for and during the term of her natural life, with remainder to "King Solomon Rouse and his children living at the time of the death" of his wife. He likewise bequeathed to her all his personal property except his piano.

The plaintiff instituted this action (1) for the recovery of said sum, (2) to have the debt decreed a specific lien on the house and lot described in the complaint, and (3) for a decree of foreclosure of said lien to satisfy said debt.

The defendants, owners of the said land, subject to the life estate of plaintiff, answering, deny that the decedent, at the time of his death, was indebted to plaintiff in any amount. They allege further that, in any event, plaintiff elected to accept the benefits accruing to her under the will of her deceased husband by receiving, taking possession of, and claiming as her own the property devised and bequeathed to her, and that by said election she is now estopped to assert her said debt or the alleged specific lien for the payment thereof.

The jury found for its verdict that (1) the decedent received during coverture $1,000 which was a part of plaintiff's separate estate; (2) plaintiff did not loan same to her husband; (3) said fund was invested in the construction of the building located on the property devised by him to plaintiff; (4) he did not, prior to his death, reimburse plaintiff for the money he had received; (5) plaintiff's claim is not barred by the ten-year statute of limitations; and (6) plaintiff, at the death of her husband, took possession of the dwelling house and store devised to her and has since

been in possession thereof, receiving the rents and profits therefrom. There were other findings which are not material here.

Upon the verdict rendered, the court below entered judgment that (1) plaintiff recover of defendant executor the sum of $1,000, (2) said sum, together with interest, constitutes a specific lien upon the land described in the complaint, and (3) said land be condemned to be sold by commissioners named, the net proceeds of sale, after costs and taxes, to be first applied to the satisfaction of said debt and interest, the balance to be distributed as therein directed among defendants or to the clerk for their use and benefit. Defendants excepted and appealed.

Jones, Reed & Griffin for plaintiff appellee.
Allen, Allen & Langley for defendant appellants.

BARNHILL, J. There is error in the judgment entered in the court below. Plaintiff elected to take the benefits accruing to her under the will of her husband. She took possession of the very land upon which she claims a specific lien and, since the death of her husband, has been receiving the rents and profits therefrom. While the record is not entirely clear in respect thereto, we must assume that she has received or claims the right to receive the personal property bequeathed to her, for she "cannot accept and reject the same writing." Bispham's Eq., 6th Ed., 413; *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584, 156 A.L.R. 814.

The doctrine of election rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction; he cannot accept and reject the same writing. *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162; *Benton v. Alexander, supra.*

Here plaintiff accepted the benefits accruing to her under the will and took the very property the law subjects to the payment of her debt, *Moore v. Jones,* 226 N.C. 149, 36 S.E. 2d 920. She now seeks to sell the interest of the remaindermen in the real property to the exoneration of the personalty bequeathed to her in the will. This is one of the several types of claims the law will not enforce. The plaintiff has made her election and is now estopped to assert her claim to a preferred lien on the very property she received as devisee under the will of the debtor. *Tripp v. Nobles,* 136 N.C. 99; *Elmore v. Byrd, supra; Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183; *Benton v. Alexander, supra.*

The personal property of a decedent must be applied to the payment of his debts owing at the time of his death before resort can be had to his real property even to satisfy a specific lien. *Moore v. Jones, supra; Linker v. Linker,* 213 N.C. 351, 196 S.E. 329; *Price v. Askins,* 212 N.C. 583, 194 S.E. 284.

So then, we may concede, without deciding, that the estate is indebted to the plaintiff and said debt is secured by a specific lien on the real property devised to her. If this be true, then it is the duty of the executor to take possession of and sell the personal property bequeathed to plaintiff and, out of the proceeds of the sale, discharge the debt due her. How she can hope to profit by insisting upon this proceeding, we are unable to perceive.

It may be the personal property is insufficient to pay the debts and costs of administration. If so, plaintiff has failed to make that fact appear of record and the court was without authority to order a sale of the testator's real property for the satisfaction of his debts save and except in the manner provided by law.

The judgment entered in the court below is

Reversed.

V. D. FOSTER v. NEWBY HOLT AND CARL THOMAS HOLT.

(Filed 8 April, 1953.)

1. Process § 10—

Service of process under G.S. 1-105 and G.S. 1-106 is ineffective to obtain service on a citizen and resident of this State while such citizen is residing temporarily outside this State, or is in the armed services of the United States and stationed in another state or foreign country.

2. Appeal and Error § 9—

Where there is no appeal from judgment dismissing the action as to one defendant for failure of service of process, plaintiff may not later contend that the judge was without authority to dismiss the action because there was an outstanding valid *alias* summons at the time the ruling was made.

3. Pleadings § 3a—

The complaint should allege the ultimate facts upon which plaintiff's claim for relief is founded and not the evidential facts required to prove the existence of the ultimate facts.

4. Pleadings § 31—

Motion by a defendant in an automobile accident case to strike all reference in plaintiff's pleading to collision and liability insurance on the car is properly allowed.

APPEAL by plaintiff from *Moore, J.*, December Term, 1952, of RANDOLPH.

This is an action to recover for personal injuries and property damages resulting from the alleged negligence of the defendant, Carl Thomas Holt.

The plaintiff alleges in his complaint that he was injured and damaged in an automobile collision on or about 15 July, 1951, between his pickup truck and an automobile owned by the defendant Newby Holt and driven by his son Carl Thomas Holt; that the automobile was being driven with the consent and permission of the defendant Newby Holt; and that the defendant Newby Holt provided the automobile for the use and enjoyment of his family for general family purposes.

The defendant Newby Holt filed an answer in which he denied that he was the owner of the automobile involved in the collision, and alleged that it belonged to his son, Carl Thomas Holt, who was a minor over eighteen but under twenty-one years of age; that prior to the collision in question the said Carl Thomas Holt had been emancipated by his parents and was at the time of the collision working for himself.

It further appears from the record that Carl Thomas Holt is now in the United States Navy; that the summons issued in this action has never been personally served on him, and that he is still under twenty-one years of age.

After the return of the original summons unserved as to Carl Thomas Holt, the plaintiff undertook to have process and a copy of the complaint served on him pursuant to the provisions of General Statutes 1-105 and 1-106, and caused to be issued to the Sheriff of Wake County, under date of 21 August, 1952, an instrument purporting to be an *alias* summons, directing him to serve the same upon the Commissioner of Motor Vehicles of North Carolina as statutory attorney for Carl Thomas Holt. A copy of the complaint and *alias* summons were actually delivered to Carl Thomas Holt by registered mail. Thereafter, a guardian *ad litem* for Carl Thomas Holt, the infant defendant, was appointed, who made a special appearance on his behalf and moved to dismiss the action as to him.

This matter came on for hearing on the special appearance and motion to dismiss the action, as to Carl Thomas Holt, for lack of service of summons on him, at the October Term, 1952, of the Superior Court of Randolph County, before the Honorable William T. Hatch, Judge Presiding.

The court held, it having been made to appear that Carl Thomas Holt is a resident of the State of North Carolina, that the attempted service on him was and is null and void and that the action as to him should be dismissed, and entered judgment accordingly. No appeal was taken from this ruling. But thereafter, on 5 November, 1952, the plaintiff caused to be issued what purported to be an *alias* summons and had it served on the same date on the guardian *ad litem* for Carl Thomas Holt.

In the meantime, the plaintiff filed a reply to the answer of the defendant Newby Holt, in which the plaintiff denied that Carl Thomas Holt was the owner of the automobile involved in the collision in question, and again alleged that the car belonged to the defendant Newby Holt; that

he took title thereto at the time of its purchase and also took out collision and liability insurance thereon.

The defendant Newby Holt filed a motion to strike all references to collision and liability insurance in the plaintiff's reply.

The matter came on for hearing at the December Term, 1952, of the Superior Court of Randolph County at which time the court held "that this case has been and is dismissed as to the said Carl Thomas Holt," and allowed the motion to strike. From the judgment entered on the above rulings, the plaintiff appeals and assigns error.

Ottway Burton for plaintiff, appellant.
H. M. Robins for defendants, appellees.

DENNY, J. The method of serving process on a nonresident as provided in G.S. 1-105 and 1-106 is ineffective to obtain service of process on a citizen and resident of this State while such citizen is residing temporarily outside the State, or is in the armed services of the United States and stationed in another state or foreign country.

Therefore, at the time Judge Hatch dismissed this action as to the defendant Carl Thomas Holt, at the October Term, 1952, of the Superior Court of Randolph County, the infant defendant Carl Thomas Holt had not been served with legal process. However, the plaintiff contends that Judge Hatch was without authority to dismiss the action since at the time he made his ruling and entered his order, there was outstanding a valid *alias* summons and that the time for its service had not expired. Be that as it may, no exception was entered to the ruling or appeal taken therefrom. Hence, the action was terminated at that time as to Carl Thomas Holt and it is now too late to challenge the validity of the ruling. *Phipps v. Pierce,* 94 N.C. 514; *Ferrell v. Thompson,* 107 N.C. 420, 12 S.E. 109, 10 L.R.A. 361; *Barber v. Buffaloe,* 122 N.C. 128, 29 S.E. 336; *Harrison v. Dill,* 169 N.C. 542, 86 S.E. 518; *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299; *Sprinkle v. Reidsville,* 235 N.C. 140, 69 S.E. 2d 179.

On the motion to strike, the rule laid down in *Winders v. Hill,* 141 N.C. 694, 54 S.E. 440, and followed in *Revis v. Asheville,* 207 N.C. 237, 176 S.E. 738, and other cases, is applicable here. In the *Winders case,* this Court said: "The function of a complaint is not the narration of the evidence, but a statement of the substantive and constituent facts upon which the plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required, and they are always such as are directly put in issue. Probative facts are those which may be in controversy, but they are not issuable. Facts from which the ultimate and decisive facts may be inferred are but evidence, and therefore probative. Those from which a legal conclusion may be drawn and upon which the

right of action depends are the issuable facts which are proper to be stated in a pleading. The distinction is well marked in the following passage: 'The ultimate facts are those which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts.' *Wooden v. Strew,* 10 How. Pr. 48; 4 Enc. of Pl. and Pr., p. 612."

In McIntosh, North Carolina Practice and Procedure, section 379, page 389, it is said: "The material, essential, or ultimate facts upon which the right of action is based should be stated, and not collateral or evidential facts, which are only to be used to establish the ultimate facts. The plaintiff is to obtain relief only according to the allegations in his complaint, and therefore he should allege all of the material facts, and not the evidence to prove them, . . ." *Hawkins v. Moss,* 222 N.C. 95, 21 S.E. 2d 873; *Truelove v. R. R.,* 222 N.C. 704, 24 S.E. 2d 537.

The judgment of the court below is

Affirmed.

PARKS ANDREWS McLEAN, SARAH McLEAN RUMPLE, CHRISTINE McLEAN PATTERSON, ALMA McLEAN SHERRILL, WILLIAM BERT McLEAN AND LOIS McLEAN CARSON (ORIGINAL PARTIES PLAINTIFF), AND MRS. ELMA McLEAN (ADDITIONAL PARTY PLAINTIFF), v. TOWN OF MOORESVILLE, NORTH CAROLINA.

(Filed 8 April, 1953.)

Municipal Corporations § 15b: Eminent Domain § 26—Upon payment of permanent damages caused by storm sewer line, city is entitled to easement.

Where plaintiff landowners demand permanent damage in their action against a municipality for trespass based upon the construction by the municipality of a storm sewer line over their lands, and defendant municipality prays for an easement for the purpose of maintaining such drainage system, *held* under the verdict and judgment awarding permanent damage the municipality, upon payment of the damages awarded, acquires a permanent easement to maintain its storm sewer line so long as it is kept in proper repair, and the court properly refuses to sign a judgment that defendant be restrained from maintaining the storm sewer line. G.S. 160-204, G.S. 160-205.

APPEAL by plaintiffs from *McLean, Special Judge,* at December Term, 1952, of IREDELL.

Civil action (1) to recover $1,000 permanent damage to property of plaintiffs in town of Mooresville by reason of the construction by defendant of a "water sewer drainage line" across same, and (2) to permanently enjoin defendant from continuing trespass upon plaintiffs' property.

Defendant, answering, admits that, as a part of its water drainage system, it has laid a line of pipe across the land of plaintiffs to carry the surface water falling in that area, and that it is necessary for the town of Mooresville to have an easement for a right of way 12.5 feet on each side of a given center line, specifically described in amendment to answer, across the land of plaintiffs for the purpose of maintaining its drainage system. And defendant prays that it be granted, and declared the owner of such easement, etc.

Upon the trial plaintiffs offered evidence tending to show the fair market value of their land, prior to the time the pipe was laid, and the fair market value of it after the pipe was laid.

Defendant offered evidence relating to same.

The case was submitted to the jury upon these issues:

"1. Has the defendant committed a continuing trespass by going upon the lands of the plaintiffs and taking a right of way 25 feet wide and 325 feet long, for the purpose of installing its storm sewer line, as admitted in the answer?

"2. Has the act of the defendant in operating its storm sewer line over the lands of the plaintiffs constituted a nuisance, as alleged in the complaint?

"3. What permanent damages are the plaintiffs entitled to recover?"

By consent the first issue was answered "Yes," and the jury answered the second "Yes," and the third "$1,000."

Plaintiffs tendered judgment (1) that they have and recover of defendant the sum of $1,000, together with the costs of the action to be taxed by the Clerk; and (2) that defendant be restrained from continuing the nuisance on their land "by either of the following methods, on or before the 12th day of January, 1953: (a) By removing the drainage sewerage pipe now partially extending on the plaintiffs' property and refrain from further allowing the drainage to be directed over or through the plaintiffs' property; (b) by extending the pipe across the plaintiffs' property, so that it completely traverses the plaintiffs' lands." The trial judge refused to sign the judgment so tendered. Plaintiffs excepted.

Thereupon the court entered judgment (1) that plaintiff have and recover of defendant the sum of $1,000, together with the costs of the action to be taxed by the Clerk; and (2) that defendant is the owner of an easement for sewer purposes over and across the lands of the plaintiffs as described in the amendment to the answer.

Plaintiffs appeal to Supreme Court, and assign error.

Finch & Chamblee for plaintiffs, appellants.

Zeb V. Turlington and William R. Pope for defendant, appellee.

WINBORNE, J. The trial in the court below was upon the theory of the assessment of permanent damages. To have such damages assessed was a right of plaintiffs. See *Donnell v. Greensboro,* 164 N.C. 330, 80 S.E. 377.

Also, defendant Town of Mooresville, being a municipality with the right to condemn an easement for drainage purposes, G.S. 160-204 and G.S. 160-205, had the right to have such damages determined and assessed. See *Wagner v. Conover,* 200 N.C. 82, 156 S.E. 167.

In *Rhodes v. Durham,* 165 N.C. 679, 81 S.E. 938, *Hoke, J.,* writing for the Court, said: "Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such an exigent nature that right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement," citing cases.

The present case is in line with the principle so declared. Here the plaintiffs have asked for permanent damages for the storm sewer line. The jury has assessed, and the judgment has awarded to plaintiffs permanent damages therefor. Indeed, the judgment tendered by plaintiffs provides for the payment of such damages so awarded. Moreover, the defendant has prayed for, and the judgment has granted to it an easement for the storm sewer line, and adjudged that it shall pay to plaintiffs the amount of the award for permanent damages.

Applying decisions of this Court, upon payment of such damages the defendant Town of Mooresville will acquire permanent right to operate and maintain its storm sewer line across the lands of plaintiffs so long as it is kept in proper repair. The principle is epitomized in explanatory comments of *Devin* and *Denny, JJ.,* in denying petition to rehear *Veazey v. City of Durham,* 232 N.C. 744, 59 S.E. 2d 429.

Hence in the judgment from which appeal is taken, we find

No error.

FURNIE HILL, EMPLOYEE, v. GEORGE DUBOSE, EMPLOYER, AND CONNECTICUT INDEMNITY COMPANY, CARRIER.

(Filed 8 April, 1953.)

Master and Servant § 55i—

Where it is apparent from an inspection of the record on appeal from judgment of Superior Court affirming an award of the Industrial Commission that the purport and meaning of a former decision by the Supreme Court upon a former appeal was misconstrued and therefore the law incorrectly applied, the cause must be again remanded to the Industrial Commission for sufficient findings and proper conclusions and award thereon.

APPEAL by defendants from *Crisp, Special Judge,* at September Term, 1952, of LENOIR.

Proceeding under North Carolina Workmen's Compensation Act. G.S. 97.

This proceeding was here on former appeal, reported in 234 N.C. 446, 67 S.E. 2d 371.

Then, and there, this Court, in opinion by *Devin, C. J.,* designated two respects in which the award approved by the judgment from which appeal was taken was erroneous, to wit: (1) That the award of compensation was based upon a finding as to the amount the claimant had earned since the date on which total permanent disability had ceased, rather than upon his capacity or ability to earn, citing G.S. 97-2 (i), and decisions of this Court; and (2) that the award of the Commission should be modified by eliminating the requirement that the case be held open for 300 weeks. And accordingly the case was remanded to the end "that sufficient findings, and proper conclusions and award thereon" might be made by the Industrial Commission as the basis for judgment.

The proceeding is now before this Court on appeal from judgment of Superior Court of Lenoir County affirming an award of compensation to claimant based upon findings of fact and conclusions of law of the North Carolina Industrial Commission pertaining to the matters for which the proceeding was remanded on such former appeal as above stated,—and to which defendants again except, and assign same as error.

Guy Elliott for plaintiff, appellee.

Smith, Sapp, Moore & Smith, Stephen P. Millikin, and McNeill Smith for defendants, appellants.

WINBORNE, J. An inspection of the record and case on appeal, in the light of exceptions taken by defendants to findings of fact and conclusions of law, and award made, leads this Court to conclude that they were made

under misconception of the purport and meaning of the decision on former appeal in respect to matters for which the proceeding was remanded.

The finding of fact in respect to the earning capacity of claimant fails to accord with the provisions of the statute as interpreted and applied in the decisions cited.

And, too, the ruling on former appeal that "the award of the Commission should be modified by eliminating the requirement that the case be held open for 300 weeks" became the law of the case,—and should be observed.

Hence the findings, conclusions and award in relation to matters for which proceeding was remanded on former appeal, are erroneous. Therefore, again the proceeding will be remanded in accordance with opinion of this Court on former appeal to the end "that sufficient findings, and proper conclusions and award thereon may be made by the Industrial Commission as the basis for judgment."

Error and remanded.

CRAVEN COUNTY v. FIRST-CITIZENS BANK & TRUST COMPANY, INC.

(Filed 15 April, 1953.)

1. Deeds § 16b—

Where land within a given area is developed in accordance with a general plan or uniform scheme of restriction, ordinarily anyone purchasing in reliance on the restrictions may sue and enforce the restrictions against any other lot owner taking with record notice, regardless of whether he was an earlier or later purchaser, upon the principle that such restrictions create servitudes upon each lot in favor of each of the rest of the lots in the restricted area, which servitudes amount to negative easements constituting an interest in land.

2. Same—

To be effective, restrictive covenants must be part of a general plan or scheme of development which bears uniformly upon the area affected.

3. Same—

Where the developer imposes restrictions in accordance with a plan of development by separate, distinct divisional units within the larger area, rather than a single development project, effect will be given to the restrictive covenants only as they relate to each separate unit.

4. Same—

Restrictive covenants, being in derogation of the free and unfettered use of land, will be strictly construed in favor of the unrestricted use of the property.

5. Same—

The developers of land registered a map showing a part of same subdivided into lots with a contiguous tract not subdivided. *Held:* Whether the developers treated and dealt with the two areas as a single unit and intended the restrictive easements to cover both tracts or whether the two areas were dealt with as separate, independent units, with intent of the developers and purchasers that the restrictions imposed be limited to the subdivided area, is to be gathered from the terms of the covenants and related facts appearing in the chain of title, and may not be established by parol.

6. Same—

The related facts appearing of record in the chain of title of the land in question, including deeds and maps, conveyances and trusts, judgments of sale and confirmation, *is held* to disclose that the restrictive covenants were intended to apply only to one area of the tract subdivided into lots in the registered map, and not to a contiguous tract designated to be conveyed as a whole or in parcels.

7. Same—

Where all of the land embraced within an area developed as a unit is conveyed to one person by deed containing a restrictive covenant, there is no dominant tenement upon which the covenant can rest, and therefore it stands only as a personal covenant between the parties and does not run with the land.

8. Same: Receivers § 11—

A receiver is without authority to impose restrictive covenants upon the land of the insolvent sold by him under order of court when the land was under no such restrictions in the hands of the insolvent and the order of court does not authorize the imposition of such restrictions.

9. Deeds § 16b: Trusts § 14a—

Where a trust deed authorizing the trustee to sell certain lands does not authorize the trustee to impose restrictive covenants in the deeds to the grantees, the trustee is without authority to impose such restrictive covenants.

10. Deeds § 16b—

Where the grantee in a deed containing an invalid restrictive covenant sells same by deed containing no reference to or mention of the covenant, such noninclusion of the covenant and silence of the parties in respect thereto works an effective abandonment and disavowal of the provisions of the covenant, and therefore cannot have the effect of activating the invalid restrictions.

11. Municipal Corporations § 24—

G.S. 160-59 requiring public notice of the sale of real estate belonging to a municipality has no application to actual partition of land in which a municipality owns an interest, since actual partition between tenants in common involves no sale or disposal of land or any interest therein, but merely severs the unity of possession.

12. Trusts § 13—

Where the instrument confers no duty as such upon the trustee, the deed creates a passive trust, and by operation of law the legal as well as the equitable title vests in the beneficiary. G.S. 41-7.

APPEAL by defendant from *Stevens, J.*, holding the courts of the Fifth Judicial District, at Chambers in Snow Hill, 23 February, 1953. From CRAVEN.

Suit for specific performance instituted and pending in Craven County, submitted to Judge Stevens at the February Term, 1953, of Greene, on waiver of jury trial and agreed statement of facts. It was stipulated that the case should be heard and judgment rendered out of the county and out of term.

From the fifty-page statement of facts agreed we glean these facts as being controlling:

1. On 15 December, 1952, the plaintiff, Craven County, exposed to public sale the tract of land described in the complaint. We omit the detailed description as not being pertinent to decision. It suffices to note that the land involved is located at the north end of the block which lies east of Fort Totten Drive, as shown on both accompanying maps. On Map No. 1 this area, containing 7.3 acres, is designated as "Jones and Meadows Land"; on Map No. 2 as "Fort Totten." The parcel in controversy embraces approximately the northern third of this 7.3 acre area and includes practically all of Block "10" as shown on Map No. 2.

2. At the sale the defendant, First-Citizens Bank & Trust Company, became the highest bidder at the price of $40,000, and agreed in writing with the plaintiff to purchase the land at that price, provided the "land may be lawfully used for business purposes." The plaintiff tendered deed sufficient in form to vest in the defendant fee-simple title to the property. The defendant refused tender, alleging the title offered to be defective. The pertinent facts respecting the dispute as to title follow.

3. In April, 1925, E. H. Meadows and wife and Mrs. Julia B. Jones by separate deeds conveyed to The National Bank of New Berne (hereinafter designated the Bank) two contiguous tracts of land near the western limits of the City of New Bern, embracing the lands shown on the maps. The conveyances were made to the Bank for the purpose of facilitating the development of a residential suburb of the City of New Bern. The Bank, on the same day the deeds were made, executed an instrument in the nature of a declaration of trust under which E. H. Meadows, Mrs. Julia B. Jones, Fort Totten, Inc., and others were the beneficiaries of the trust therein declared. The trust agreement was not registered. It was later withdrawn and another instrument was substituted for it as hereinafter shown.

4. Thereafter a portion of the land, comprising some 40 or 45 acres, was surveyed out and subdivided into streets and into lots of an approximate uniform frontage of 25 feet in width and a depth of 160 feet. A map was made showing the lands so subdivided, copy of which, marked "Map No. 1," appears herewith, page 506. It is noted that this map also included an area of about 7.3 acres which was not subdivided. This area, located along the eastern side of the lands, is shown on the map as being open acreage. It is designated on this map as "Jones and Meadows Land." It includes the land at and around the site of Fort Totten (thrown up by the Federal Forces after the Battle of New Bern to guard the two land approaches into New Bern, namely: Neuse Boulevard on the north, and Trent Road on the south).

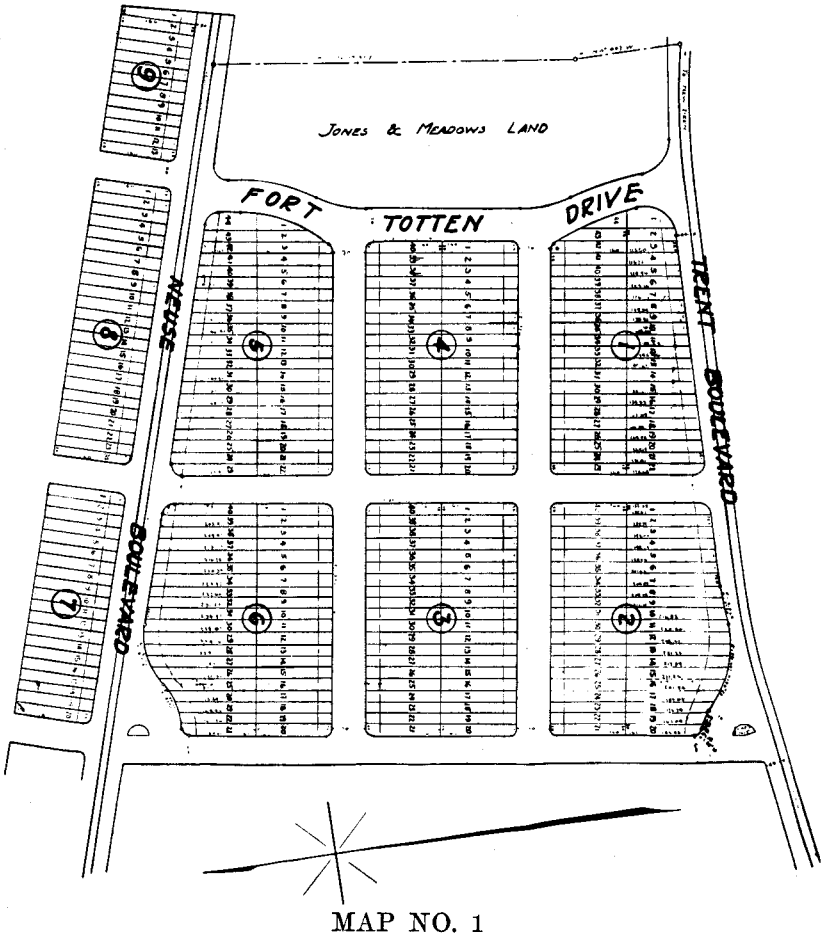
5. The main body of the subdivided area lies west and north of this 7.3 acre area (hereinafter referred to as Fort Totten). The Fort Totten area was left in open acreage. The two areas are separated by Fort Totten Drive, which runs in a general north-south course.

6. On 6 November, 1926, a substitute trust agreement was executed by the Bank and the interested beneficiaries superseding the unregistered declaration of trust executed in April, 1926. A copy of Map No. 1 showing the subdivided area and the Fort Totten open acreage area was attached to the substitute trust agreement and both were registered in the Public Registry of Craven County in Book 265, pp. 287 to 292.

7. This trust agreement, also in the nature of a declaration of trust, was executed by the Bank and the various beneficiaries of the trust (including Fort Totten, Inc., a corporation set up by the original developers to facilitate the promotion of the project). The pertinent provisions of the trust agreement are in substance: (1) that upon demand of Fort Totten, Inc., and payment to the Bank of $154.51 per lot unit for any of the lot units shown on Map No. 1 of the subdivision, the Bank as trustee should execute deeds conveying title to such persons as may be directed by Fort Totten, Inc. (2) The deeds to these lots "shall contain such building restrictions as may be directed by . . . Fort Totten, Inc." (3) The net proceeds of sale of these lots shall be paid to or for the use and benefit of E. H. Meadows and Mrs. Julia B. Jones in designated proportions. (4) As to the 7.3 acre Fort Totten open acreage area designated on the map as "Jones and Meadows Land," the trust agreement provides that it shall be held by the Bank for the sole use and benefit of Fort Totten, Inc., to be conveyed "as a whole or in parcels upon direction of Fort Totten, Inc.," upon the payment of $1,250 per acre or the proportionate part thereof for the fraction of an acre." As to this area, the trust agreement is silent respecting building restrictions.

8. On 10 November, 1926, by due corporate action of Fort Totten, Inc., a form contract, to be used in binding the sale of lots in the subdivision,

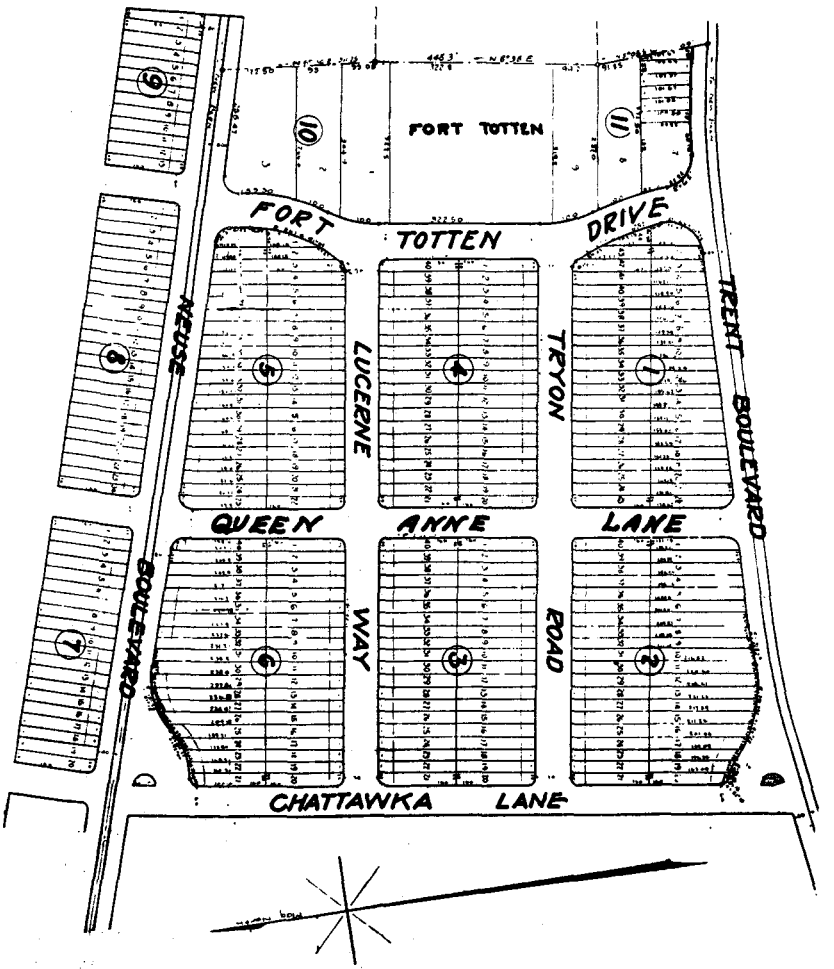
was agreed upon. The form contract was printed and reads in part as follows: ". . . said deed (the deed to be made pursuant to the terms of the binder contract) *to contain certain restrictions applying to lots west of Fort Totten Drive,* binding upon the purchaser, his heirs and assigns, considered to be of advantage to residents of said suburb, as follows: . . . 7. None of said lots, *except certain of them that may be set apart for that purpose* shall be sold or used for business purposes, and no building for business purposes shall be erected on any such lots until plans have been approved by Fort Totten, Inc." (Italics added.)



MAP NO. 1

This is a copy of the map recorded with the trust agreement and power of attorney in book 265 at pages 287 to 292.

9. Only one of these contracts (the one executed 30 July, 1929, to O. C. Crump conveying four lots in the subdivided area) was registered in the Public Registry of Craven County. However, many deeds conveying lots in the subdivided area recite "This deed is made pursuant to contract



MAP NO. 2

DE GRAFFENRIED PARK, NEW BERN, NORTH CAROLINA

This is a copy of the map which by fiat of the Clerk dated 18 November, 1926, was ordered registered. It appears to be registered in Map Book 1, p. 91.

made and entered into by and between said Fort Totten, Inc. and said (name of grantee) dated (date of contract)." All these deeds to which references are made in the record filed here appear to have been executed on or subsequent to 20 July, 1927.

10. At a meeting of the directors of Fort Totten, Inc., held 10 November, 1926, a contract with the Atlantic Coast Realty Company providing for the sale of lots in de Graffenried Park (the subdivided area) was approved. This contract, copy of which is recorded in the minutes of the corporate meeting (not in the Public Registry of the County) recites that "Fort Totten, Inc. has employed said Atlantic Coast Realty Company to sell lots in its subdivision according to a map showing said lots and streets prepared by Clodfelder & Schisler, Civil Engineers, . . . and . . . Atlantic Coast Realty Company has accepted said employment upon the following terms, to wit: Fort Totten, Inc. has caused said land to be laid off into lot units of a frontage of 25 feet and streets and will lay concrete sidewalks, pave streets, lay water mains and sewers, put in electric light lines and cause said utilities to be connected with the utilities of the City of New Bern, etc. That part of the land upon which is situated the old fort shown on the map within lines marked 'Jones and Meadows Land,' not having been divided into lots and streets, *will be sold as a whole or in such parcels as may be agreed upon,* upon such terms and provisions as agreed upon for the sale of lots insofar as the same may be applicable; but no deed shall be delivered to purchasers until an amount equivalent to $1,250 per acre for 7.3 acres, plus 10% of the sale price shall have been paid." (Italics added.)

11. It further appears that after the first map was made—the one which was attached to and recorded with the trust agreement of 6 November, 1926—a second map was made. This second map by fiat of the Clerk of the Superior Court dated 18 November, 1926, was ordered registered, and it appears to have been registered in "Map Book 1, page 91." This map, copy of which marked "Map No. 2," appears herewith, page 507. The only material difference between the first and second maps is in respect to the 7.3 acre Fort Totten area. On the first map this area is designated "Jones and Meadows Land" and is wholly undivided, whereas on the second map it is partially subdivided.

12. On 15 January, 1931, the National Bank of New Berne having closed its doors and Fort Totten, Inc., having been placed in receivership, Mrs. Julia B. Jones and the other beneficiaries under the recorded trust agreement with the Bank, together with the Receiver of Fort Totten, Inc., and Virginia Trust Company as creditor, joined in the execution of a trust agreement under which John A. Guion was substituted as trustee in place of the defunct bank. This agreement is registered in the Register's office in Book 297, page 512. By the terms of this instrument, the

lands within this suburb, except the lots already sold, were conveyed to John A. Guion, Trustee, upon the following conditions and trusts, and for the following purposes, to wit: "I. As to that part of said land within the boundaries of the residential subdivision known as 'de Graffenried Park,' a map of which is duly registered in the office of the Register of Deeds of Craven County, N. C., in Map Book 1, page 91, (Map No. 2) which has been subdivided into lot units of an approximately uniform frontage, being all of the lots lying north of Neuse Boulevard and all of the lots lying west of Fort Totten Drive between Neuse Boulevard and Trent Boulevard, upon demand of Fort Totten, Inc., and the payment to the said trustee herein of the sum of $154.51 per lot unit for each, any or all of the lot units shown on the said map of said subdivision, the said trustee herein will and shall execute good and proper deeds conveying the same in fee simple to such persons as may be directed by Fort Totten, Inc., *which deeds shall contain such building restrictions as may be directed by said Fort Totten, Inc.* II. As to that part of said lands within the boundaries of 'de Graffenried Park,' as shown on the aforesaid map, lying east of Fort Totten Drive and between Neuse and Trent Boulevards, upon demand of Fort Totten, Inc., and payment therefor at the rate of $1,250 per acre, the said trustee herein will and shall execute good and proper deeds conveying the same as a whole or in such lots and parcels and to such person or persons as said Fort Totten, Inc. may designate." (Italics added.)

13. On 1 December, 1934, in the consolidated actions entitled Virginia Trust Company, E. H. Meadows and Mrs. Julia B. Jones, plaintiffs, *v.* E. M. Green, Receiver of Fort Totten, Inc., and John A. Guion, Trustee, Craven County and The National Holding Company, and others, a consent judgment was signed by Judge J. Paul Frizzelle, Resident Judge of the Fifth District. By this judgment the Receiver of Fort Totten, Inc. was authorized to sell the remaining lots and property shown on the maps, and to facilitate the sale, the release prices per unit were materially reduced. One portion of the lots formerly priced at $154.51 was reduced to $100, and another portion to $75.00; and the price of the 7.3 acre Fort Totten open acreage tract, previously fixed at $1,250 per acre, was reduced materially and made subject to subdivision into lots, to be released, if sold as so subdivided, on the basis of the acreage price as fixed. The judgment contained a proviso to the effect that the "Receiver is not authorized to sell the land within this area (the 7.3 acre Fort Totten area) until protective building restrictions and uses applying to the land within this area are agreed upon by Craven County, Virginia Trust Company and Mrs. Julia B. Jones."

14. "Craven County, Virginia Trust Company and Mrs. Julia B. Jones never agreed upon 'protective building restrictions and uses apply-

ing to the land' within this area" (the 7.3 acre area), although the deed from W. C. Chadwick, Receiver, and John A. Guion, Trustee, contained restrictive covenants as hereinafter appear in paragraph 17.

15. By order of Judge Sinclair entered in the Superior Court of Craven County 19 October, 1936, W. C. Chadwick, Receiver of Fort Totten, Inc., was authorized to sell and convey to Dixie Dairy Products, Inc., lots Nos. 7 and 8 in Block 11 as shown on the plat registered in Map Book 1 at page 91 (Map No. 2), for $2,500. This proposed sale for business purposes was never consummated, the reason being that the purchaser after making a cash payment of $500 failed to raise the balance of the purchase price. By order of court the purchaser was refunded part of the sum paid.

16. On 12 November, 1937, W. C. Chadwick, Receiver of Fort Totten, Inc., petitioned the court for approval of a contract with J. W. Ferrell Company for the auction sale of the remaining lots. Approval was obtained by order signed by Judge Frizzelle 27 November, 1937. The contract with Ferrell stipulated that "all lots sold to be subject to building restrictions and conditions heretofore provided for the development as contained in the conveyances heretofore made." The advertisements of sale published in the *New Bern Sun-Journal* indicate that sixty lots were offered for sale. The sale was conducted 30 November, 1937. The Receiver's report shows that "B. O. Jones, Trustee for Craven County," purchased the entire 7.3 acre Fort Totten tract at the price of $2,000. The report of sale was approved and confirmed by order of Judge W. C. Harris, Judge holding the courts of the Fifth Judicial District, dated 2 December, 1937.

17. By deed dated 30 November, 1937, and duly recorded in the Craven County Registry, W. C. Chadwick, Receiver of Fort Totten, Inc., and John A. Guion, Trustee, conveyed the 7.3 acre Fort Totten tract in bulk to "B. O. Jones, Trustee for Craven County." The *habendum* clause of this deed reads as follows: "To have and to hold the said lots or parcels of land unto the said party of the second part, his heirs and assigns, in fee simple forever, and said lots are conveyed upon and subject to the following conditions and restrictions, which said party of the second part, for his heirs and assigns, do agree and covenant shall be kept and performed, as they may be pertinent to the lots hereby conveyed, to wit: . . . 7. The lots hereby conveyed shall not be used for business purposes." The deed confers on B. O. Jones no duty to be performed as trustee.

18. The agreed statement of facts contains this recital: "November 30, 1937, by agreement made between B. O. Jones, Trustee for Craven County, and W. C. Chadwick, Mayor of the City of New Bern, the County agreed to sell to the City an undivided one-half interest in said land (the 7.3 acre Fort Totten tract) and said land was to be held for a

public park for white citizens of said City and County and for no other purpose until said City and County may both consent that said property or any part thereof may be used for other purposes or disposed of by sale or otherwise. See Record of Minutes Book C, page 640." The record is silent respecting (1) whether this contract was reduced to writing, or (2) if so, whether it was registered in the public registry of Craven County. However, the contract appears to have been approved by the County as shown by this excerpt from the minutes of a meeting of the board of commissioners held at an undisclosed time subsequent to the execution of the deed to Jones, Trustee for Craven County: "On motion duly made and carried a one-half undivided interest was sold to the City of New Bern for $1,000 in the following described property: All that block or parcel of land as shown on said map or plan of DeGraffenried Park, bounded on the north by Neuse Boulevard, on the west by Fort Totten Drive, on the south by Trent Boulevard, and on the east by the eastern property line of DeGraffenried Park, as shown on said map. It being the same tract or parcel of land conveyed to the party of the first part by deed of W. C. Chadwick, Receiver, and others, dated 30th day of November, 1937, and registered in the office of the Register of Deeds of said County in Book 328, page 528."

19. The agreed statement next discloses a deed dated 1 July, 1946, made by B. O. Jones, Trustee, to Craven County and the City of New Bern, embracing the entire 7.3 acre tract of Fort Totten lands. This deed, duly recorded in the Public Registry of Craven County, is a deed of bargain and sale, without the usual covenants of title and warranty. It recites a consideration of "one dollar and other good and valuable consideration" paid by the County and City. The *habendum* clause recites that the deed is made "upon the conditions set forth in the contract between said Jones and said City dated 30 Nov., 1937."

20. On 21 November, 1952, the City of New Bern and Craven County joined in the execution of a deed which is designated "deed of partition." This deed, duly registered, states that the City and County have agreed upon a division of the 7.3 acre tract of Fort Totten land, and contains reciprocal conveying clauses reciting in substance that each party releases and conveys to the other in severalty the share allotted to each. The County's designated share includes the lands involved in this action.

After this action was instituted, B. H. Baxter and three others, owners of lots in the subdivision, under leave of court intervened in the action on behalf of themselves and all other landowners similarly situated, and by answer denied plaintiff's allegation that the land sought to be conveyed to the defendant could be used for business purposes, and by affirmative defense alleged that the land was subject to valid restriction against such use of the property.

Upon the facts agreed, the court below, being of the opinion that the deed tendered by the plaintiff, Craven County, is sufficient to convey "a full fee simple interest in the lands in question to the defendant and that the defendant may use said lands for business purposes," entered judgment for the plaintiff.

From the judgment so entered, the defendant appeals.

W. B. R. Guion and R. A. Nunn for plaintiff, appellee.

Ward & Tucker for defendant, appellant.

JOHNSON, J. Is the land sought to be conveyed to the defendant, First-Citizens Bank & Trust Company, subject to a restrictive burden under which the Bank may be prevented from using the property for business purposes? This is the question presented by this appeal.

In the outset it is to be noted that the principle upon which these restrictive burdens on the use of lands within a real estate subdivision are enforceable is that they are servitudes imposed on the various lots or parcels for the benefit of the area affected. Such servitudes ordinarily are treated as easements appendent or appurtenant to the various lots or parcels within the restricted area. The existence of two estates in land is required to support an easement of this sort. On the one hand is the estate which bears the burden—the servient tenement; on the other is the estate which derives the benefit—the dominant tenement. The one owes, whereas the other is owed the obligation. Tiffany, Law of Real Property, Third Edition, Sec. 758; Clark, Covenants and Interests Running with Land, Second Edition, p. 1134; Mordecai's Law Lectures, Second Edition, pp. 469-470.

These servitudes, commonly referred to as negative easements, are usually imposed by restrictive covenants between the developer and the initial purchasers and become seated in the chain of title so that subsequent purchasers are chargeable with notice thereof (*Turner v. Glenn*, 220 N.C. 620, 18 S.E. 2d 197), thus fixing it so each lot in a legal sense owes to all the rest of the lots in the subdivision the burden of observing the covenant, and each of the rest of the lots is invested with the benefits imposed by the burdens. Accordingly, in legal contemplation the servitude imposed on each lot runs to and attaches itself to each of the rest of the lots in the restricted area, thus forming a network of cross-easements or cross-servitudes, the aggregate effect of which is to impose and confer on each lot reciprocal and mutual burdens and benefits appurtenant to the lots, so as to run with the land and follow each lot upon its devolution and transfer. Thompson on Real Property, Permanent Edition (1940), Vol. 7, Sec. 3631; 14 Am. Jur., Covenants, etc., Sections 193 and 194.

Therefore, where land within a given area is developed in accordance with a general plan or uniform scheme of restriction, ordinarily any one purchasing in reliance on such restriction may sue and enforce the restriction against any other lot owner taking with record notice, and this is so regardless of when each purchased; and similarly, a prior taker may sue a latter taker. *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184; 26 C.J.S., Deeds, Sec. 167; Tiffany, Law of Real Property, Third Edition, Chapters 17 and 18, p. 441 *et seq.;* Clark, Covenants and Interests Running with Land, Chapter 6, p. 170 *et seq.*

The right of action rests upon the principle that a negative easement of this sort is a property right amounting to an interest in land. *City of Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396; *Turner v. Glenn, supra; Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697.

Decision here does not require a detailed discussion of the procedural requirements necessary to be followed in order to impose restrictive servitudes on a given area of land. The minimum procedural requirements necessary to impose such burdens have been delineated and fully explained in numerous decisions of this Court, among which are these: *East Side Builders v. Brown,* 234 N.C. 517, 67 S.E. 2d 489; *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Turner v. Glenn, supra; Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918; *Davis v. Robinson, supra; Snyder v. Heath,* 185 N.C. 362, 117 S.E. 294; *Homes Co. v. Falls, supra; Stephens Co. v. Homes Co.,* 181 N.C. 335, 107 S.E. 233.

It suffices here to say that our decisions emphasize these factors: (1) that to be effective the restrictive covenant sought to be enforced must be part of a general plan or scheme of development which bears uniformly upon the area affected (*Sedberry v. Parsons, supra; Humphrey v. Beall, supra*); and (2) that where an entire tract is developed over an extended period of time, and the intent clearly appears, as disclosed by the record chain of title, that the restrictions were imposed by the developer in accordance with a plan of development by separate, distinct divisional units within the larger area, rather than as a single development project, effect will be given to restrictive covenants only as they relate to each such separate unit. *Stephens Co. v. Homes Co., supra; Homes Co. v. Falls, supra; Snyder v. Heath, supra; Higdon v. Jaffa, supra; East Side Builders v. Brown, supra.* See also *Besch v. Hyman,* 223 N.Y.S. 231, 221 App. Div. 455; *Russell Realty Co. v. Hall* (Texas), 233 S.W. 996.

Further, it is to be noted that we adhere to the rule that these restrictive servitudes being in derogation of the free and unfettered use of land, the covenants imposing them are to be strictly construed in favor of the

unrestricted use of property. *Davis v. Robinson, supra.* See also 14 Am. Jur., Covenants, etc., Sec. 212.

It seems to have been assumed below that the main body of the land lying west of Fort Totten Drive and north of Neuse Boulevard is subject to negative easements, imposed pursuant to a general plan or uniform scheme of development, which confer upon the owners of these lots reciprocal rights to prevent the use of any of them for business purposes. *Humphrey v. Beall, supra; Sedberry v. Parsons, supra.*

Conceding, without deciding, that such is the status of the title to the lots within this area, nevertheless decision here requires that we determine the question whether or not these easements or restrictive servitudes reach across Fort Totten Drive and attach to any part of the 7.3 acre tract. The determination of this question is dependent largely upon whether the developers of this property treated and dealt with the two areas as a single unit and intended the restrictive easements to cover both tracts, or whether the two areas were treated and dealt with as separate, independent units, with intent of the developers and purchasers that the restrictions imposed be limited to the area west of Fort Totten Drive and north of Neuse Boulevard. This intent is to be gathered from the terms of the covenants and related facts appearing in the chain of title. It may not be established by parol. *Turner v. Glenn, supra; Davis v. Robinson, supra.*

The record here discloses these crucial facts bearing on the question at hand: (1) The original map of the subdivision shows the 7.3 acre Fort Totten tract left as open acreage designated as "Jones and Meadows Land," whereas the large area west of Fort Totten Drive and north of Neuse Boulevard is divided into streets, lots, and so forth. (2) The trust agreement executed 6 November, 1926, by the Bank as trustee stipulates in effect that building restrictions to be directed by Fort Totten, Inc., shall be imposed on the subdivided area west of Fort Totten Drive and north of Neuse Boulevard, whereas the 7.3 acre tract designated "Jones and Meadows Land" is to be conveyed as a whole or in parcels as directed by Fort Totten, Inc., with no reference being made to restrictions on this area. (3) The printed form contract approved by Fort Totten, Inc., and used in selling the lots expressly recites that the designated restrictions apply "to lots west of Fort Totten Drive." (4) The instrument dated 15 January, 1931, substituting John A. Guion as trustee in place of the defunct bank, reiterates that the lots "west of Fort Totten Drive . . ." shall contain building restrictions, and leaves the area east of the Drive to be sold as acreage, with no mention being made of restrictions. (5) On 27 November, 1937, Judge Frizzelle entered an order approving the proposed contract made by the Receiver of Fort Totten, Inc., with J. W. Ferrell Company for the sale of the remaining lots. This contract, em-

bracing lots in both areas, stipulates that "all lots sold to be subject to building restrictions heretofore provided for the development as contained in the conveyances heretofore made." At the sale conducted pursuant to the contract, "B. O. Jones, Trustee for Craven County," became the purchaser of the entire 7.3 acre area for the price of $2,000, and the report of sale "was approved and confirmed" by Judge Harris, and the record here discloses no reference to restrictions in the order of confirmation.

These and other related facts disclosed by the record impel the conclusion that for restrictive use purposes the large suburban development west of Fort Totten Drive and north of Neuse Boulevard was treated and dealt with by the developers and purchasers of this property as being entirely separate from the 7.3 acre Fort Totten area east of the Drive. The record effectively negatives the suggestion that the parties intended the restrictions imposed on the lots in the larger area to extend to the neighboring 7.3 acre parcel.

We have not overlooked the consent judgment entered 1 December, 1934. This judgment reduced the sale price of the unsold property and authorized the Receiver of Fort Totten, Inc., to sell the remaining lots on both sides of Fort Totten Drive at any time within three years. The judgment provides that the Receiver may not sell the lots in the 7.3 acre area "until protective building restrictions . . . applying to this area are agreed upon by Craven County, Virginia Trust Company and Mrs. Julia B. Jones." As to this, it is suggested by the defendant that presumptively it was the restrictive covenant promulgated by these parties that was placed in the deed by which the Receiver and the Trustee conveyed the entire 7.3 acre tract to B. O. Jones, Trustee for Craven County, and that this deed effectively tied the two areas together as one for restrictive use purposes. The contention presents a close question. However, it may not be sustained in the light of these factors which we think effectively negative the idea of the presumption relied on by the defendant: (1) A contextual examination of the judgment discloses that in reducing the sale price of the various lot units and in giving the Receiver leave to sell within the three-year period the unsold portions of the property at the prices fixed in the judgment for each unit, it was contemplated that the Receiver should sell the lots, including those in the 7.3 acre area, piece by piece (or by the acre in the latter area), at private sales over a period of time; (2) that in the event of such sale in parcels of the 7.3 acre tract, it was left open in respect thereto for the three designated parties, namely: Craven County, Virginia Trust Company, and Mrs. Julia B. Jones, to devise satisfactory restrictions to be imposed on the 7.3 acre area, not for the benefit of the larger area, but as applicable to and for the benefit of the lot units in the 7.3 acre tract. (3) As it turned out, the

Receiver was unable to sell any part of the lots in the 7.3 acre Fort Totten tract, and therefore there was no reason for the three designated parties to agree upon or promulgate restrictions to be imposed on the lots in this area, and on the record as presented these parties never met and affirmatively adopted any restrictive covenants to be imposed on these lots. (4) On failure of the Receiver to dispose of the lots by the parcel, Craven County as moving party contacted J. W. Ferrell and arranged for an auction sale of the unsold lots in both areas. A contract with Ferrell ensued. The contract was approved by order of the court dated 27 November, 1937. The contract as approved provides that the lots shall be sold in accordance with restrictive covenants provided in "conveyances heretofore made." The record shows that no restrictions were imposed on the 7.3 acre tract by these prior "conveyances." At the Ferrell auction sale the entire 7.3 acre area was sold in bulk and so conveyed to Jones, Trustee for Craven County. It thus appears that the court order of 27 November, 1937, also signed by Judge Frizzelle, supersedes the prior judgment of 1 December, 1934, with respect to restrictive covenants.

The record as presented sustains the lower court's conclusion that the two tracts stand as separate and distinct development units; and the servitudes imposed within the area west of Fort Totten Drive and north of Neuse Boulevard do not run to or attach themselves upon any part of the 7.3 acre Fort Totten tract.

Next, it is contended by the defendant that the deed by which the 7.3 acre Fort Totten tract was conveyed to B. O. Jones, Trustee for Craven County, imposed on that tract, treating it as a separate unit, a negative easement prohibiting its use for business purposes. It is noted that this deed—a mimeographed form similar to those used in conveying lots in the residential district west of Fort Totten Drive—contains the same restrictive covenants appearing in those deeds, including this one: "7. The lots hereby conveyed shall not be used for business purposes."

The contention is without merit. It is settled law that a real covenant imposing a servitude on land is coextensive only with the estate to which it is annexed. 14 Am. Jur., Covenants, etc., Sec. 5. This being so, a real covenant imposing a servitude which runs with land loses its character as such and the servitude is extinguished when all the land affected by the covenant becomes vested in one and the same person. This in legal contemplation works a dissolution of the servient and dominant tenements. By merger both are swallowed up in the single ownership. *Spector v. Traster,* 270 Mass. 545, 170 N.E. 567; *Stevenson v. Spivey,* 132 Va. 115, 110 S.E. 367; 14 Am. Jur., Covenants, etc., Sections 291 and 293.

Similarly, and under application of these principles, where, as in the instant case, a deed containing a covenant restricting the use of land embraces and conveys all the land affected thereby, such covenant stands

only as a personal covenant between the parties. And a personal covenant (as distinguished from a real covenant) by its very nature does not run with the land. Thompson on Real Property, Permanent Edition (1940), Vol. 7, Sec. 3632; 14 Am. Jur., Covenants, etc., Sec. 19 *et seq.;* 26 C.J.S., Deeds, Sec. 167. See also *Taylor v. Lanier,* 7 N.C. 98; *Blount v. Harvey,* 51 N.C. 186; *Weisman v. Smith,* 59 N.C. 124; *Ricks v. Pope,* 129 N.C. 52, 39 S.E. 638; *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895.

Therefore, the covenants in the deed to Jones, Trustee for Craven County, stipulating that 7.3 acre Fort Totten tract shall not be used for business purposes, may not be enforced as a real covenant or treated as imposing a negative easement on the land. *Los Angeles Terminal Land Co. v. Muir,* 136 Cal. 36, 68 P. 308; *Mitchell v. Leavitt,* 30 Conn. 587; *Lowell Inst. for Sav. v. Lowell,* 153 Mass. 530, 27 N.E. 518; *Badger v. Boardman,* 82 Mass. 559; *Jewell v. Lee,* 96 Mass. 145.

Moreover, this covenant is unenforceable even as a personal covenant between the parties to the deed. This because neither of the grantors had the legal authority to make any such covenant. Chadwick, Receiver, derived his authority and power from the judgment of Judge Frizzelle, dated 27 November, 1937, approving the contract with Ferrell for an auction sale of all the unsold lots in both development units. The record indicates that the contract as approved directed that the lots be sold subject to building restrictions "contained in conveyances heretofore made." An examination of the "conveyances heretofore made" discloses that no restrictions were imposed on the 7.3 acre Fort Totten tract. Therefore, the Receiver was without authority to impose burdens on this tract. As to Guion, Trustee, it is apparent from the record that his power derived from the indenture of 15 January, 1931, substituting him as trustee in place of the defunct bank. This instrument, executed by all the beneficial owners of the lands, expressly provides that the lots in the residential development west of Fort Totten Drive and north of Neuse Boulevard shall be conveyed subject to restrictions as to use, whereas it is directed that the 7.3 acre tract east of the Drive be sold as a whole or in parcels, with the clear implication being that this tract is treated as a separate unit to be sold without restrictions as to use. It is obvious, therefore, that since neither Chadwick, Receiver, nor Guion, Trustee, had legal authority to limit the use of the property conveyed, the covenant inserted in the deed is a nullity as to both these grantors and may not be enforced by either of them or by anyone claiming through or under them. *Trust Co. v. Refining Co.,* 208 N.C. 501, 181 S.E. 633; *Johnson v. Lumber Co.,* 225 N.C. 595, 35 S.E. 2d 889; 54 Am. Jur., Trusts, Sec. 440.

Nor is there any merit in the defendant's contention that the subsequent conveyances made by Jones, Trustee, and by the City and County activated the restrictive covenant contained in the deed to Jones, Trustee,

and imposed its burden on the land as a negative cross-easement when the ownership of the 7.3 acre tract became divided between the City and County. Here the defendant urges in gist that when the ownership became divided between the City and County, such divided ownership activated the covenant, brought into existence reciprocal servient and dominant tenements, and thus imposed the burdens of the covenant upon both parcels of the land.

As to this contention, it is observed that none of the deeds appearing in the chain of title subsequent to the deed to B. O. Jones, Trustee for Craven County, contains any reference to the so-called restrictive covenant which appears in that deed. As we have seen, the deed to Jones, Trustee for Craven County, created no easement and imposed no burden on the land. Therefore, when the land was first conveyed thereafter by deed containing no reference to or mention of the covenant respecting restriction as to use, such noninclusion of the covenant and silence of the parties in respect thereto worked an effective abandonment and disavowal of the provisions of the covenant contained in the deed to Jones, Trustee for Craven County.

The defendant makes the further contention that title to the lot sought to be conveyed to the defendant bank is defective for that when the 7.3 acre Fort Totten tract was partitioned between the City and County, the partition was made without public notice as required by G.S. 160-59, and that therefore the City's interest in the lot in question has not been released according to the formalities of law. The contention is without merit. This statute requires public notice only in respect to the sale of real estate belonging to a municipality. It has no application to actual partition of land in which a municipality owns an interest. Actual partition between tenants in common involves no sale or disposal of land or any interest therein. It creates no new, different, or additional title or estate in land. It only severs the unity of possession. *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474; *Wallace v. Phillips,* 195 N.C. 665, 143 S.E. 244.

Besides, it is only by virtue of facts resting in parol, apparently conceded by the defendant in the facts agreed, that the City ever occupied, if indeed it did, the position of a tenant in common with the County in respect to the parcel of land in controversy. As to this, it is noted that the deed made by Chadwick, Receiver, and Guion, Trustee, to B. O. Jones, Trustee for Craven County, confers on Jones no duty as such trustee. Therefore, on the record title as here presented the deed created a passive (as distinguished from an active) trust, the immediate effect of which, by operation of our Statute of Uses, G.S. 41-7, was to place in Craven County the whole title to the land—the legal as well as the equitable title. 2 Blackstone, p. 333; *Pippin v. Barker,* 233 N.C. 61, 62 S.E. 2d 520; *Fisher v. Fisher,* 218 N.C. 42, 9 S.E. 2d 493, and cases there cited; *Lee*

v. Oates, 171 N.C. 717, 88 S.E. 889; *Springs v. Hopkins,* 171 N.C. 486, 88 S.E. 774.

It follows from what we have said that the judgment below is Affirmed.

SHELTON M. DOWDY v. SOUTHERN RAILWAY COMPANY, INC., J. W. MOORE AND W. A. INGOLD,

and

BOBBY BURNS, INC., AND HARFORD MUTUAL INSURANCE COMPANY v. SOUTHERN RAILWAY COMPANY, INC., J. W. MOORE AND W. A. INGOLD.

(Filed 15 April, 1953.)

1. Appeal and Error § 29—

Assignments of error not brought forward in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court 28.

2. Railroads § 4—

The negligence of the driver of a vehicle in driving it upon a railroad track in the face of an oncoming train which he could have seen in the exercise of ordinary care for a distance of some 900 yards during the last 25 or 30 feet before reaching the track if he had looked in the direction from which the train was approaching, constitutes contributory negligence barring recovery for the crossing accident notwithstanding that the railroad company may have been guilty of negligence, unless the doctrine of last clear chance applies.

3. Same—

A traveler approaching a public crossing has a right to expect timely warning of approaching train, but failure to give such warning will not justify him in assuming no train is approaching. He still has a duty to keep a proper lookout.

4. Same: Automobiles § 25½—

If the driver is an employee, and at the time of the accident is acting within the scope of his employment in operating the employer's motor vehicle, the driver's contributory negligence will be attributed to the employer, barring the employer's right to recover against a third person for damage to his vehicle.

5. Subrogation § 1—

Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right.

6. Subrogation § 2: Insurance § 43e—

An insurance company paying damages sustained to the vehicle resulting from a crossing accident cannot acquire by subrogation any better right as against the railroad company than that of insured, and where the driver's contributory negligence bars insured it also bars insurer.

7. Negligence § 10—

The doctrine of last clear chance does not arise unless it appears that the injured party has been guilty of contributory negligence, and does not apply when the injured party is guilty of contributory negligence as a matter of law.

8. Evidence § 5—

Courts take judicial notice of subjects and facts of general knowledge.

9. Same—

The courts will take judicial notice that the engineer's seat is on the right side of the locomotive and the fireman's on the left.

10. Railroads § 4: Negligence § 10—Evidence held insufficient to support application of doctrine of last clear chance.

Plaintiffs' evidence tended to show that for a distance of some 25 or 30 feet before plaintiff driver reached defendant's railroad crossing a person could see down the track in the direction from which defendant's train approached a distance of some 900 yards, that the accident occurred in the daytime in clear weather, that the driver did not look to his right, from whence the train was approaching, until his tractor was on the tracks, when he saw the train approaching some 300 to 400 feet away at a speed of 12 to 15 miles per hour, that he threw his tractor into reverse, that the tractor started backward and then stalled on the tracks, and that the locomotive struck the tractor causing personal injury to the driver and damage to the vehicle. The evidence further tended to show that the driver was on the fireman's side of the locomotive, that the fireman warned the engineer of the danger, and that the engineer immediately applied the brakes, and that the train stopped about 150 feet after the impact. *Held:* Considering the evidence in the light most favorable to the plaintiffs it fails to show that by the exercise of reasonable care defendants saw or should have seen the vehicle on the tracks in an apparently helpless condition in time to have stopped the train and avoided the collision, and therefore the doctrine of last clear chance does not apply.

JOHNSON, J., dissenting.

APPEAL by plaintiffs from *Sharp, Special J.*, and a jury, September Civil Term 1952. LEE.

The plaintiff Shelton M. Dowdy seeks to recover damages for personal injuries caused by the alleged actionable negligence of the defendants, the Southern Railway Co., J. W. Moore, the locomotive engineer, and W. A. Ingold, the fireman, in a crossing collision between a tractor and oil tanker driven by the plaintiff and a train of the railway company.

The plaintiff Bobby Burns, Inc., owner of the tractor and oil tanker, and the plaintiff Harford Mutual Insurance Co., insurance carrier, who has paid part of the damage to the tractor and oil tanker, seek to recover damages to the tractor and oil tanker caused by the alleged actionable negligence of the defendants in the crossing collision.

Bobby Burns, Inc., and the Insurance Company filed a joint complaint. The two cases were consolidated for trial.

For the sake of terseness the plaintiffs Shelton M. Dowdy will be referred to as Dowdy; Bobby Burns, Inc., as Burns; and the Harford Mutual Insurance Company as the Insurance Company: the defendants Southern Railway Co., as the Railway Co.; J. W. Moore as Moore, and W. A. Ingold as Ingold.

This in substance is a summary of the evidence offered by the plaintiffs in the trial below.

Dowdy testified in substance. On 7 March, 1951, Dowdy, an employee of Burns, a transport hauler of gas, was hauling gas by tractor and oil tanker, for Burns to the Gulf Bulk Plant in Mount Airy. He had a load of 5,050 gallons of gas. About 9:35 a.m. on this day he turned left off Highway No. 601, went down the road parallel with the Railway Co.'s tracks 400 to 600 yards, then turned left, and crossed the railroad tracks into the Gulf Plant. The track was straight about 900 yards west of the crossing and about the same distance to the east. Dowdy drove to the north side of the Gulf Plant, made a complete circle, and headed back out the gate. The Gulf Plant has a fence around it, and the fence is approximately 25 or 30 feet from the railroad track. There were vines and rosebushes on the fence on each side of the gate. On the right of the gate as one enters, the plant is located; on the left a garage. A tank car was on the sidetrack on Dowdy's right as he drove in the yard. Dowdy testified on direct examination: "As I headed back out to the gate, I looked first to the left, then I looked back to the right. The gate of the Gulf Plant is approximately 25 or 30 feet from the railroad tracks. By the time I looked to the right my tractor was upon the tracks. I then saw the train coming. At that time the train was approximately 300 to 400 feet away. I throwed my tractor in reverse, let out on my clutch right quick, and my tractor choked down. At that time my pulling wheels were on the South side of the track. When I throwed it in reverse, my tractor started backward, and stalled on the track. It moved backward some. I tried to start it to clear the track, but could not start it. The train kept coming and hit the truck into the side. It drug it down the track, and that is when I got hurt. I don't remember anything after I got hit. The train did not blow its whistle or ring its bell between the time I came out of the Gulf Plant, and the time I got hit. The train was going about 12 or 15 miles an hour. The train did not slow up its speed or slacken its speed in any manner, if it did I could not tell it." He knew the railroad track was there; he had crossed it about twice a day, six days a week, for three months. After passing the rose bushes at the gate the track is clear and open, and one can see both ways for a distance of 900 yards. On cross-examination Dowdy

testified: "I looked to the left and didn't see anything. I didn't see anything to the right until I got on the track." He saw the train coming and sat there in the cab trying to get it started to get off the track. He remained in the cab until it and the train both came to a stop. The tank car was on his left on the sidetrack as he came back out of the Gulf Plant. That was the opposite side from which the train was coming. In order to unload his tank trailer, he had to pull his trailer wheels upon the track and back it to the left in position on the side of the track. He has been in that position unloading, and the train would pass.

J. H. Belton testified in substance. I was in my office on the morning of 7 March, 1951, at about 9:35 a.m. My office is about 200 yards from where you turn off to go to the Gulf Plant. I heard the 8:30 regular train pass and blow its whistle at the crossing at the Gulf Plant, but I did not hear this work train blow or ring the bell. I cannot say whether the bell was rung or the whistle blown. I just don't know.

J. B. Rhine testified in substance. I am a member of the State Highway Patrol. On 7 March, 1951, I went to the scene of a collision at the railroad crossing at the Gulf Plant. The road across the track at that point runs generally east and west. It dead ends at the Gulf Plant east of the railroad. When I arrived the train had been moved. The truck was 72 feet from the crossing. The tank was approximately parallel with the railroad but the tractor was turned with a few degrees to the left of the railroad. I went to the hospital and saw Dowdy. Dowdy told me: "I had turned around behind the gasoline plant, and proceeded toward Old 601. When I got on the railroad track with the tractor I saw the train coming, then I put gears in reverse, started to back up. I had moved a little backward when struck by engine of train. I did not hear bell or whistle. Just happened to look in that direction. I had planned to pull across tracks and back up to the plant." Rhine talked to the engineer, Moore, at the scene of the collision. Moore stated he did not see the vehicle; was warned by the fireman. As soon as he was warned of the danger, he applied the brakes and reached for the whistle cord, but did not blow the whistle. He said the bell was ringing, and he blew the whistle at the main crossing of Old 601. The railroad track is straight all the way up 827 feet and relatively level. There was an opening on the day of the accident of 29 feet after passing the garage through which the railroad track north or west was visible before reaching the rose bush at the gate. At that point one could see up the railroad track a distance of 827 feet. Though Rhine was not sure in all the 29 feet visibility was good. There are some rose bushes on the posts of the gate and there were a few bushes by the garage building. The railroad tracks were straight and level and there were no obstructions. After you pass the gate visibility was good for 1,240 feet to the west. The distance from

the gate at the entrance of the Gulf Plant or rose bush to the railroad track was 47 feet and 9 inches by actual measurement from the outside of the rose bush to the railroad track. In this entire space there is a clear view of the railroad tracks to the west all the way for about 1,200 feet. There are no buildings or anybody living on the side of the Gulf Plant. There was nothing to keep the engineer from seeing the truck on the track for a distance of 800 and some feet. The engineer pointed out to me where the engine had come to a stop, which, to the best of Rhine's memory, was the length of the engine and one and one-half car lengths farther down the railroad. Rhine would say the train traveled about 150 feet after the impact. The road leading into the Gulf Plant is sand, gravel and dirt, and about 16 feet wide.

The plaintiff Dowdy offered the testimony of six other witnesses, who testified as to his injuries, but knew nothing about the facts of the collision.

Burns testified as to the damage done to his tractor and oil tanker and that the insurance company paid for the repairs less $250.00 deductible on the tractor and $250.00 on the oil tanker. Burns offered the testimony of a mechanic as to the damage to his tractor and oil tanker.

Dowdy was recalled for further examination and testified that he remembers seeing Rhine at the hospital in Mount Airy, while the nurses and doctors were working on him, but he does not remember anything about any conversation between Rhine and himself.

At the close of the plaintiffs' evidence the defendants moved for judgment as of nonsuit as to all the plaintiffs. The motions were allowed. And from judgments in accordance therewith all the plaintiffs appealed to the Supreme Court, assigning error.

Pittman & Staton and Gavin, Jackson & Gavin for all the plaintiffs, appellants.

W. T. Joyner, Teague & Williams, and H. E. Powers for all the defendants, appellees.

PARKER, J. The plaintiffs' assignments of errors Nos. 1 to 4, both inclusive, which relate to questions asked witnesses by plaintiffs' counsel, objected to by the defendants, and not answered, have not been set out in the plaintiffs' brief. They are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court; *Dillingham v. Kligerman,* 235 N.C. 298, 69 S.E. 2d 500.

The remaining assignments of errors Nos. 5 and 6 are founded on exceptions challenging the rulings of the court below in allowing the motions for judgments as of nonsuit against all the plaintiffs, and the judgments signed in accord therewith.

There is no allegation in the plaintiffs' complaints or replies that the view of the railroad tracks was obstructed from the gate at the Gulf Plant to the railroad track, nor any evidence to that effect. The tank car on the sidetrack is not mentioned in the plaintiffs' pleadings. The plaintiffs offered two witnesses, who testified as to the distance from the gate to the track. Dowdy said it was approximately 25 or 30 feet; Rhine said it was 47 feet and 9 inches by actual measurement from the outside of the rose bush at the gate to the railroad track. The tank car on the sidetrack was on the opposite side of Dowdy from the approaching train. Dowdy testified that after you get out of the gate good you can see up the track to the west, from which the train was coming, a distance of about 900 yards. The track in that direction was straight. The time was about 9:35 a.m. The weather, as admitted in the pleadings, was clear and fair. Dowdy knew of the railroad track; he had crossed it twice a day, six days to the week, for three months. Dowdy drove his tractor out of the gate without stopping onto the railroad crossing, a place of danger. He looked to the left; when he looked to the right his tractor was upon the tracks, and he saw the approaching train 300 to 400 feet away.

Conceding the existence of negligence on the part of the defendants, which they strenuously deny, this case is controlled by the fact that Dowdy drove his tractor and oil tanker upon the railroad crossing in the face of an on-coming train, which he could have seen in the exercise of ordinary care, if he had looked to the right while he was traveling according to his testimony 25 or 30 feet from the gate to the railroad crossing, or according to actual measurement taken by his witness Rhine 47 feet and 9 inches. If Dowdy had looked to his right while traveling this distance, he could have seen the train and avoided injury. This negligence on Dowdy's part contributed to the injury and damage of all the plaintiffs, and bars recovery, unless they can bring themselves within the doctrine of the last clear chance. *Penland v. R. R.*, 228 N.C. 528, 46 S.E. 2d 303 (and cases cited); *Carruthers v. R. R.*, 232 N.C. 183, 59 S.E. 2d 782 (unobstructed view 24 feet and 8 inches from east rail of track); *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370 (unobstructed view after he stopped 8 or 10 feet from east rail); *Herndon v. R. R.*, 234 N.C. 9, 65 S.E. 2d 320 (unobstructed view 45 feet from railroad track); *Stevens v. R. R., ante,* 412, 75 S.E. 2d 232.

"A traveler has the right to expect timely warning, *Norton v. R. R.*, 122 N.C. 910, 29 S.E. 886, but the failure to give such warning would not justify the traveler in relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout." *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137.

Justice Brogden in his characteristic style aptly said: "There are two lines of decisions involving crossing accidents that run through the body

of our law, as clearly marked and defined as the Gulf Stream that runs through the midst of the ocean." *Eller v. R. R.*, 200 N.C. 527, 157 S.E. 800. This case comes within the second class therein mentioned, where the plaintiffs took a chance and lost.

Dowdy was an employee of Burns, and at the time of the collision was acting within the scope of his employment. Dowdy's negligence is in law attributable to Burns. *Hampton v. Hawkins*, 219 N.C. 205, 13 S.E. 2d 227; *Rollison v. Hicks*, 233 N.C. 99, 63 S.E. 2d 190.

The Insurance Co. alleges in its joint complaint that it has paid to Burns for damage to its tractor and oil tanker $2,394.10, and is entitled to be subrogated to the rights of Burns to the extent of the amount paid. Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. *Liles v. Rogers*, 113 N.C. 197, 18 S.E. 104, 37, Am. St. Rep. 627. The party who is subrogated is regarded as entitled to the same rights, and, indeed, as constituting one and the same person whom he succeeds, *Bank v. Bank*, 158 N.C. 238 at 248, 73 S.E. 157; *Grantham v. Nunn*, 187 N.C. 394, 121 S.E. 662; *Beam v. Wright*, 224 N.C. 677, 32 S.E. 2d 213. A party can acquire no better right by subrogation than that of the principal. *Parsons v. Leak*, 204 N.C. 92, 167 S.E. 567. The Insurance Co. is regarded as constituting one person with Burns, and Dowdy's contributory negligence is in law attributable to Burns.

The next question presented: Does the evidence considered in its most favorable light make out a case for the jury on the doctrine of last clear chance? The principles of the doctrine of last clear chance have been defined countless times by this and other courts and various text writers, since its origin in the famous hobbled ass case of *Davies v. Mann*, 10 M. & W. 546, decided by an English Court in 1842. This doctrine does not arise until it appears that the injured party has been guilty of contributory negligence. *Redmon v. R. R.*, 195 N.C. 764, 143 S.E. 829; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337; *Lee v. R. R., ante*, 357, 75 S.E. 2d 143. Dowdy was guilty of such negligence in this case.

This doctrine has been clearly and succinctly stated in *Ingram v. Smoky Mountain Stages, Inc., supra:* "The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so."

It is stated in *Lee v. R. R., supra:* "The last clear chance does not mean the last possible chance to avoid the accident—citing authorities. It means such chance or interval of time between the discovery of the peril

of the injured party, or the time such peril should have been discovered in the exercise of due care, and the time of his injury as would have enabled a reasonably prudent person in like circumstances to have acted in time to have avoided the injury," citing authorities.

The doctrine of last clear chance does not apply when the plaintiff is guilty of contributory negligence as a matter of law. *Redmon v. R. R., supra; Sherlin v. R. R.,* 214 N.C. 222, 198 S.E. 640; *Ingram v. Smoky Mountain Stages, Inc., supra.*

Courts take judicial notice of subjects and facts of common and general knowledge. The law does not require us to be blind and deaf, and ignorant of facts of common and general knowledge to all men. *Reid v. Coach Co.,* 215 N.C. 469, 2 S.E. 2d 578, 123 A.L.R. 140; *Allen v. Bottling Co.,* 223 N.C. 118, 25 S.E. 2d 388 (common knowledge many of our improved roads 16 feet wide). In *Davis v. R. R.,* 170 N.C. 582, 87 S.E. 745, this Court took judicial notice of the fact that the force of a rapidly passing train would be centrifugal from the side of the train and would cause one to fall outward, instead of creating a vortex which would carry him beneath the train.

We take judicial notice of a fact of such common and general knowledge that the engineer's seat is on the right side of the locomotive and the fireman's on the left.

Dowdy drove his tractor and oil tanker upon the railroad track in the face of an on-coming train. His view was unobstructed from the time he left the gate to his left and to his right. He looked to the left, when he looked to the right his tractor was upon the railroad tracks, and he saw the approaching train 300 to 400 feet away. He is the only witness to the speed of the train. He testified it was going about 12 or 15 miles an hour. At that time his tractor and oil tanker were moving forward. Dowdy further testified, at that time he threw it into reverse, and the tractor started backward and stalled on the track.

This Court said in *Temple v. Hawkins,* 220 N.C. 26, 16 S.E. 2d 400, speaking of a truck that stalled on a railroad crossing in the face of an on-approaching train: "The engineer had a right to assume up to the very moment of the collision, that the plaintiff could and would extricate himself from danger. The fact of the failure to give a signal from the engine could not militate against the defendants, since all that such signal could have availed the plaintiff would have been to give him notice of the approach of the train, and this notice the plaintiff already had, since he saw the train at a distance of 1,500 feet down the track moving or in the act of starting to move in the direction of the crossing he was taking." In this case the plaintiff pleaded last clear chance.

A strikingly similar case is *Bailey v. R. R.,* and *King v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833. The only eye witness of the collision, a witness for

the plaintiff, testified: "I saw the train way on up the track about 400 yards, and I saw the truck drive upon the track. The train looked to be about 400 yards up the track. I saw the truck drive up on the crossing and the train was still coming. The truck looked like it was trying to get off, kinder moved back and forth and settled down at the time the train hit it. After the train hit the truck it brought it way on down there the other side of me, took it on down there the other side of the switch." Bailey and King were killed. The Court in affirming a judgment of nonsuit quotes the words quoted above from *Temple v. Hawkins.* In the *Bailey* and *King cases* the plaintiffs did not plead the last clear chance.

There is no evidence that the engineer knew, or by the exercise of due care, could have known, that Dowdy was helpless upon the track—if, indeed, Dowdy was helpless. The defendants had a right to assume up to the very moment of the collision that Dowdy could and would extricate himself from danger. This Court has so stated the law in two similar cases. *Temple v. Hawkins, supra; Bailey v. R. R.* and *King v. R. R., supra.*

When the train was 300 to 400 feet away, according to Dowdy, the only eye witness to the collision who testified, his tractor was on the railroad tracks and going forward. When the tractor was going forward, it was not helpless or stalled on the crossing. Then Dowdy threw his tractor in reverse, and the tractor moved backwards and stalled on the crossing. How far was the train away then? The evidence does not show.

Dowdy drove on the railroad track from the side of the fireman. According to the plaintiffs' witness Rhine, Moore, the engineer, said at the scene of the collision: "He did not see the vehicle. Was warned by the fireman. As soon as warning of danger, applied brakes and reached for whistle cord but did not blow whistle; said the bell was ringing and stated he blew the whistle at main crossing of Old 601." While the engineer on the opposite side of the train from Dowdy, did not see the tractor and oil tanker, his fireman did, and he applied the brakes. According to the plaintiffs' evidence the train engine came to a stop the length of the engine and one and one-half car lengths further down the railroad, about 150 feet after the impact.

The plaintiffs offered no testimony as to how many cars were in the train, nor within what distance it could have been stopped at a speed of 12 or 15 miles an hour. Their evidence shows a prompt application of brakes when the fireman, who was on the left of the locomotive engine, gave the engineer warning. The plaintiffs have pleaded last clear chance, but their evidence considered in the light most favorable to the plaintiffs fails to show sufficient evidence for submission to a jury that the defendants by exercising reasonable care and prudence, might have avoided injurious consequences to the plaintiffs, notwithstanding the plaintiffs' contributory negligence.

The judgments of nonsuit entered in the Superior Court as to all the plaintiffs are

Affirmed.

JOHNSON, J., dissenting: It seems to me there was enough evidence to take this case to the jury, certainly as to the plaintiffs Bobby Burns, Inc., and Harford Mutual Insurance Company, if not as to Dowdy, under the doctrine of last clear chance. See 38 Am. Jur., Sec. 299; Annotations: 92 A.L.R. 47, p. 86; 119 A.L.R. 1041, p. 1045. There is evidence that the tractor-trailer stalled or "choked down" on the tracks when the train was some 300 or 400 feet from the crossing. The witness Dowdy said when he looked and saw the train that distance away "I throwed my tractor in reverse, let out my clutch right quick and my tractor choked down." It would seem there was ample evidence to justify the inference that the engineer or fireman in the exercise of due care should have seen the truck on the track and appreciated its stalled situation in time to have stopped the train and averted the collision. The track was straight and about level for a distance of some 827 feet. The train was traveling only 12 or 15 miles per hour, yet it "did not slow up . . . or slacken its speed in any manner. . . ." Indeed, the engineer told Patrolman Rhine "he did not see the vehicle" until warned by the fireman. He then "reached for the whistle cord. . . ." It was then too late.

It is stated in the majority opinion that the doctrine of last clear chance "does not apply when the plaintiff is guilty of contributory negligence as a matter of law." Conversely, may it not be said with equal force that one may not be adjudged contributorily negligent as a matter of law when the doctrine of last clear chance applies?

My vote is to reverse.

IN THE MATTER OF: FRANK B. STEVENSON, S. S. No. 244-07-7139, CLAIMANT-EMPLOYEE, ET AL., NORTH CAROLINA FINISHING COMPANY, SALISBURY, N. C., EMPLOYER, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA.

(Filed 15 April, 1953.)

1. Master and Servant § 61—

Where the employer resists recovery of unemployment compensation on the ground that claimants' unemployment was due to a work stoppage resulting from a labor dispute, the burden is on claimants to show to the satisfaction of the Commission that their claims are not disqualified for benefits under G.S. 96-14 (d).

2. Master and Servant § 62—

On appeal to the Superior Court from any final decision of the Employment Security Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, and the jurisdiction of the Superior Court is confined to questions of law. G.S. 96-15 (i).

3. Master and Servant § 60—

The evidence in this case *is held* to support the findings of the Employment Security Commission to the effect that the unemployment of claimants after the termination of the strike in which claimants participated was due to the time reasonably required physically to resume normal operations in the chain process method used in the plant, and therefore was due to stoppage of work attributable to a labor dispute, and that claimants were not entitled to unemployment compensation by reason of the provisions of G.S. 96-14 (d).

APPEALS by Frank B. Stevenson, claimant employee, and others of like status, from *Moore, J.*, at November Term, 1952, of ROWAN.

Proceeding under the Employment Security Law, Chapter 96 of the General Statutes of North Carolina, to determine claims and disqualifications for unemployment benefits, particularly as affected by provisions of G.S. 96-14 (d).

A hearing was duly had after notice at Salisbury on Friday, 27 June, 1952, before a special claims deputy of the Employment Security Commission to determine whether or not the unemployment of the claimant employees, the appellants, in this proceeding, at the time of filing claims during June, 1952, and thereafter, was due to a stoppage of work caused by a labor dispute at the plant of the North Carolina Finishing Company, Salisbury, North Carolina.

The record on this appeal discloses (1) that counsel (a) for all claiming employee appellants, (b) for North Carolina Finishing Company, employer, and (c) for the Employment Security Commission stipulated at the hearing on above date that as to appellants there was a stoppage of work at the plant of the North Carolina Finishing Company at Salisbury, North Carolina, involving all production and maintenance employees, commencing at 7 o'clock a.m. on Monday, 24 March, 1952, as the result of a labor dispute over a new contract, the old contract by and between Local 440 and the Company having expired at midnight on 23 March; (2) that such stoppage of work continued until the date which may be developed in this record; (3) that on Saturday, 7 June, 1952, Local 440, United Textile Workers of America, A.F.L., sent a telegram to the manager of North Carolina Finishing Company notifying the company that the strike of its employees represented by the Union was ended as of that day, and that all employees were available for work as of that day, and would report for work, and that the Union would co-operate

in every way in resuming operations in an orderly manner; and (4) that all of the claiming employees, appellants, were unemployed during the strike which was the result of the labor dispute and that they participated, and were interested in the strike and the causes thereof.

At such hearing testimony of witnesses was taken, and the claims of two groups referred to as Exhibits 1 and 2 were considered. Those included in Exhibit 1 do not appeal from denial of their claims. Those listed in Group Exhibit 2, who filed claims in June, 1952, are the appellants. Hence only the pertinent parts of findings of fact made by the special claims deputy in respect to them are necessary to consideration of this appeal. They are as follows:

"1. The North Carolina Finishing Company is a corporation with its plant and general offices located about five miles north of Salisbury, North Carolina, on U. S. Highway No. 29. The plant so located as described hereinabove is the only plant that such company operates. The company, hereinafter referred to as the employer, is engaged in the business of bleaching, dyeing, and finishing of cotton and rayon fabrics, and also is engaged in the manufacture of pillow slips and sheets from some of the finished products. A more general designation for its business is that of a textile finisher. There are approximately eleven or twelve hundred individuals employed by the employer.

"2. There are three departments or divisions of the employer's business, one being the cotton finishing department, another the rayon finishing department, and the third, the department in which sheets and pillow slips are manufactured. The employer does not actually manufacture the cloth but the cloth is obtained in the grey state from the manufacturers to be finished. The bleaching, dying and finishing of cotton cloth is customarily performed at the place where the cloth is actually manufactured and the finishing process is not customarily carried on and performed as a distinct and separate function nor as a separate branch of work or separate business in separate premises. The finishing of rayon cloth is likewise usually finished at the place where it is manufactured and is not usually a separate branch of work which is commonly conducted as a separate business but it is usually conducted in conjunction with the manufacture of such cloth. The employer likewise manufactures sheets and pillowcases from some of the cloth which it finishes for other companies. The employer also purchases some cloth in the grey state which it finishes for itself and which it manufactures into sheets and pillowcases for its customers. Sheets and pillowcases are generally manufactured at the same place where the cloth is manufactured and finished and it is not customary for such an operation to be conducted as a separate branch of work and as a separate business in separate premises. . . .

"4. . . . The method of this employer's operation is what is commonly known as a chain process, in which each worker is dependent upon work carried on by other workers, and such process is a continuous integrated process of finishing cloth and in the manufacture of those products hereinbefore referred to. . . .

"6. . . . When the stoppage of work occurred on March 24, 1952, the employer had ample orders and ample raw material with which to work and to process, but due to the stoppage of work caused by the labor dispute it was necessary for the employer to cancel the orders which it had on hand and to return to the manufacturers the goods which it had on hand to process for those manufacturers, in view of this situation. After the union called off the strike on June 7, 1952, it was therefore necessary for the employer to secure new orders and to get the necessary raw products into its plant in order to resume operations and as of that date of the hearing before the undersigned Special Claims Deputy on June 27, 1952, the employer was still in the process of getting new orders and of replenishing its supplies of the raw products from the manufacturers of those products, and the fact that the employer did not have these raw products on hand when the strike was called off was a direct result of the stoppage of work which was caused by the labor dispute. Furthermore, at the time that stoppage occurred on March 24, there were sufficient orders and raw products on hand for the employer to have continuously operated for a period of at least five or six weeks, even if no further orders and raw products had been secured in the meantime.

"7. Due to the fact that the plant had been closed for several weeks on account of the stoppage of work which was the result of the labor dispute, it was necessary for the machinery, boilers and other equipment at the plant to be inspected and made ready before the actual manufacturing operations were started and a few days elapsed between the time the union called off the strike and before any manufacturing operations could start or processing operations could start. A few of the employees, including some of the claimant-employees, returned to work at the employer's request on or about June 10, 1952, and the number returning to work gradually increased as the processing of the goods and material progressed until on June 27, 1952, the date of the hearing before the undersigned Special Claims Deputy, approximately 85% of the production and maintenance employees were back at work, which enabled the employer to reach approximately 70% of its normal production as of June 27, 1952. At the time of the hearing, however, there were still approximately 15% of the employees away from work because, in a process of this nature considerable time is consumed in reaching normal production and in securing enough raw products with which to carry on full operation and the unemployment of the 15% of the employees who

were still out at the time of the hearing is due directly to the stoppage of work which was a result of the labor dispute and any unemployment of any and all individuals involved in this proceeding during the period beginning March 24, 1952, to and including June 27, 1952, was caused by the stoppage of work attributable to the labor dispute. . . .

"11. Even though approximately 85% of the employees are back at work, there still remains a substantial stoppage of work at the plant or premises of the North Carolina Finishing Co., which stoppage of work is a direct result of the labor dispute and the unemployment of any and all individuals whose names appear on Exhibits No. '1' and No. '2' is due to a stoppage of work caused by a labor dispute which exists at such plant."

Upon these findings of fact, the Special Claims Deputy held as a matter of law, and adjudged that the claimant-employees whose names appear on Exhibit No. 2 are disqualified for benefits beginning 24 March, 1952, and continuing so long as there is a stoppage of work attributable to a labor dispute at the plant of North Carolina Finishing Company.

These claimant-employees appealed therefrom, and the proceeding was removed to the Full Commission for hearing and disposition.

On such hearing the Commission, reciting that it appearing from an examination of the record that the facts as found by the Special Claims Deputy are supported by the evidence in the record, and that the decision is in conformity with the Employment Security Law of North Carolina, and should be affirmed, ordered, adjudged and decreed that the decision of the Special Claims Deputy be, and the same is thereby affirmed in all respects, and that it is declared to be the final decision of the Commission.

Thereupon, pursuant to G.S. 96-15 (i) Frank B. Stevenson and all other claimants of his group affected by the decision so made, appealed therefrom to Superior Court of Rowan County, North Carolina. Review was sought upon grounds stated,—all pivoting upon finding of fact and conclusion of law that the unemployment of the claimants was due to a stoppage of work attributable to a labor dispute.

Upon hearing on such appeal, the judge of Superior Court, "having examined the evidence set out in the record upon appeal from said Commission, being of the opinion that the findings of fact made by the Special Claims Deputy are supported by competent and substantial evidence; and that the conclusions of law made by the Special Claims Deputy . . . are in conformity with the law; and that the decision or order of the Commission affirming said decision . . . and declaring such decision to be the final decision of the Commission is in all respects proper, and . . . should be affirmed," adjudged that the decision of the Commission "be, and the same is hereby affirmed in all respects."

These are the appeal entries in pertinent part: "To the foregoing judgment, Frank B. Stevenson, claimant-employee, *et al.*, including each

claimant, object and except to the signing of the judgment and to the judgment as signed and as same appears of record, and except to the findings that (1) the findings of the Special Claims Deputy are supported by competent and substantial evidence; (2) that his conclusions of law are correct; (3) that the decision of the Commission is proper. Notice of appeal to the Supreme Court of North Carolina is given in open court and further notice waived . . ."

Such appeal to Supreme Court is perfected, and error is assigned.

Robert S. Cahoon for appellants.

Nelson Woodson for North Carolina Finishing Company, appellee.

R. B. Overton, R. B. Billings, and D. G. Ball for Employment Security Commission of North Carolina, appellee.

WINBORNE, J. G.S. 96-14 (d) of the Employment Security Law of North Carolina provides that "An individual shall be disqualified for benefits . . . (d) For any week with respect to which the commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed . . ."

Admittedly in the case in hand a stoppage of work because of a labor dispute occurred on 24 March, 1952, at the plant of the North Carolina Finishing Company at which claimant-employees were last employed. A strike, involving all production and maintenance employees, was commenced on that day, and continued until 7 June, 1952, and claimant-employees participated, and were interested in the strike, and the causes of it, and were unemployed during the strike.

And the appellants state in their brief filed on this appeal that "the sole issue, and the only one upon which evidence was taken, was whether the appellants were disqualified to receive benefits under the provisions of Section 96-14 (d) of the General Statutes . . ."

Indeed, the claimant-appellants have the burden to show to the satisfaction of the Commission that they were not disqualified for benefits under this section of the Employment Security Law. *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544; *Employment Security Com. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403.

And it is provided in G.S. 96-15 (i) that on appeal to the Superior Court from any final decision of the Employment Security Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, shall be conclusive and the jurisdiction of the court is confined to questions of law. And an appeal may be taken from the decision of the Superior Court, as provided in civil actions.

A reading of the record on this appeal reveals ample evidence to support the findings of fact made by the Special Claims Deputy, and adopted and affirmed by the Commission. And there is no suggestion of fraud. Hence the findings of the Commission are conclusive on appeal to Superior Court and in this Court. *Unemployment Compensation Comm. v. Martin,* 228 N.C. 277, 45 S.E. 2d 385; *Employment Security Comm. v. Kermon,* 232 N.C. 342, 60 S.E. 2d 580.

Therefore in the light of the findings of fact of the Commission, does it follow as a matter of law that the unemployment of claimant-employees, after the strike ceased to exist to date of the hearing before the Special Claims Deputy, to wit, 27 June, 1952, was due to a stoppage of work which existed because of the labor dispute?

This exact question has not been presented heretofore to this Court. However, it has been considered and passed upon by courts of other states which have adopted statutes in almost identical language as G.S. 96-14 (d). See *Carnegie-Illinois Steel Corp. v. The Review Board of the Indiana Employment Security Division, et al.* (1947) (Ind.), 72 N.E. 2d 662; *Blakely v. Employment Security Division, et al.* (1950) (Ind.), 90 N.E. 2d 353; *Chrysler Corp. v. Review Board* (1950) (Ind.), 92 N.E. 2d 565; *American Steel Foundries v. Gordon* (1949) (Ill.), 88 N.E. 2d 465; *Ablondi, et al. v. Board of Review, Division of Employment Security Dept. of Labor and Industry, et al.* (1950) (N.J.), 73 A. 2d 262; *Magner v. Kinney* (1942) (Neb.), 2 N.W. 2d 689; *Saunders v. Maryland Unemployment Compensation Board* (1947), 53 A. 2d 579; *Bako, et al., v. Unemployment Compensation Board of Review* (Pa.), 171 Pa. Super. 222, 90 A. 2d 309; *M. A. Ferst Limited v. Huiet* (1949) (Ga.), 52 S.E. 2d 336.

While these decisions of other courts are not controlling here, they appear to have been well considered, and decided, and are most persuasive. There, as here, the statute under consideration is in plain and unambiguous language, and needs only a literal interpretation to ascertain the legislative intent as expressed in the statute.

The trend of these decisions is, as expressed in the *Carnegie case, supra,* that "a stoppage of work commences at the plant of the employer when a definite check in production operations occurs," and "a stoppage of work ceases when operations are resumed on a normal basis"; but that "the stoppage of work caused by a labor dispute must not exceed the time which is reasonably necessary, and required to physically resume normal operations in such plant or establishment."

And as stated in the *Saunders case, supra,* "The benefits of the law are denied only when the unemployment is due to a labor dispute. Whether it is, or whether it is not, is a question to be determined in each case. The line of demarcation is not the end of the strike but the end of work stop-

page due to the strike. That test is applied to all alike, and there is no discrimination."

In the light of these principles, the Employment Security Commission of North Carolina has found as a fact that the unemployment of claimant-employees after the strike was called off was "due to a stoppage of work caused by a labor dispute," and will continue "so long as there is a stoppage of work attributable to a labor dispute at the plant" of the employer.

Indeed, there is nothing on this record to show that the stoppage of work at the plant of the North Carolina Finishing Company exceeded the time reasonably necessary and "required to physically resume normal operations" in the chain process method of operation in use at its plant, as found by the Commission.

After careful review of the record and case on appeal, error in matters of law is not made to appear. Hence, the judgment from which appeal is taken is

Affirmed.

CHARLIE D. BIZZELL, MARY ESTELLE BIZZELL, JAMES L. ADAMS AND WIFE, MATTIE B. ADAMS, PLAINTIFFS, v. A. J. BIZZELL AND WIFE, MERLE BIZZELL; CHARLES H. BIZZELL AND WIFE, IRMA BIZZELL; FLORENCE B. WENTZ AND HUSBAND, ROBERT WENTZ; ANNIE LAURIE BIZZELL; ELIZABETH B. BUTLER AND HUSBAND, E. E. BUTLER; LELA UNDERWOOD, WIDOW; HERBERT L. BIZZELL AND WIFE, SUE P. BIZZELL; BESSIE B. ATKINSON AND HUSBAND, MOSES ATKINSON; O. R. BIZZELL AND WIFE, LULA BIZZELL; HENRY BIZZELL AND WIFE, FLORENCE BIZZELL; MAUDE BIZZELL, UNMARRIED; BLANCHE B. MEREDITH AND HUSBAND, ARENA MEREDITH; GEORGE BIZZELL AND WIFE, MRS. GEORGE BIZZELL; LUCY B. GRADY AND HUSBAND, POPE GRADY; ANNIE B. SECREST AND HUSBAND, HAL SECREST; JESSIE B. BARBOUR AND HUSBAND, ENGENE BARBOUR; SALLIE LEE WALL AND HUSBAND, EUGENE WALL; FRANK HOLMES BIZZELL, UNMARRIED; CHARLES JAMES BIZZELL AND WIFE, MRS. CHARLES JAMES BIZZELL; HERBERT OSCAR BIZZELL AND WIFE, MRS. HERBERT OSCAR BIZZELL; ROY BIZZELL AND WIFE, MRS. ROY BIZZELL; DORIS BIZZELL, UNMARRIED (ORIGINAL DEFENDANTS); AND D. B. SUTTON, JEFF. D. JOHNSON, JR., TRUSTEE; JEM ROBINSON; JOHN B. WILLIAMS, JR., TRUSTEE; DUNN PRODUCTION CREDIT ASSOCIATION; AND H. PAUL STRICKLAND, TRUSTEE (ADDITIONAL PARTY DEFENDANTS).

(Filed 15 April, 1953.)

1. Appeal and Error § 1: Wills § 39—

Where the court below has made no adjudication construing the will in question, the Supreme Court may not construe the will on appeal, since the Supreme Court's jurisdiction is limited to questions of law and legal inference raised by exceptions to rulings made and judgments entered in the Superior Court.

2. Cancellation and Rescission of Instruments § 8—

Where it is conceded that the deed in question conveyed some estate to the grantees, a stranger to the instrument cannot maintain an action to vacate or annul the deed or subsequent deeds of trust executed by the parties on the ground of mental incapacity of the grantors or fraud and undue influence or want of consideration, since the right to attack the deeds on these grounds rests exclusively in the grantors, or in case of their mental incapacity, in a person duly appointed to prosecute the action in their behalf. G.S. 1-57, G.S. 1-64.

3. Same: Wills § 39—Parties claiming remainder under will may attack alleged life tenants' deeds as constituting cloud on title.

Plaintiffs sought construction of a will, contending that plaintiff grantors acquired fee simple title to the lands in question under the will and that defendants' claims constituted a cloud on their title. Original defendants claimed that plaintiff grantors took only a life estate, and that they had an estate in remainder, and had the trustees in deeds of trust executed by plaintiffs joined as additional parties defendant and attacked the deed from plaintiff grantors to plaintiff grantees and the deeds of trust executed by plaintiffs as constituting a cloud on their remainder. *Held:* All parties having an interest in the land affected by the construction of the will are entitled to an opportunity to be heard, which includes the right to allege their claim, and therefore plaintiffs' demurrer to the original defendants' defense setting up that plaintiff grantors had only a life estate and attacking the deeds and deeds of trust as constituting a cloud on their remainder was properly overruled.

4. Cancellation and Rescission of Instruments § 8: Pleadings § 31—

In an action by plaintiffs to construe a will upon their contention that it devised the fee in certain lands to them, allegations of the original defendants, claiming a remainder in the lands, that deeds of trust executed by plaintiffs were void for fraud and undue influence, mental incapacity of grantors and want of consideration, are properly stricken upon motion of the trustees joined as additional parties defendant, since strangers to the instruments may not attack them on the grounds asserted, and therefore the allegations are irrelevant and immaterial to the cause alleged.

JOHNSON, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs and additional defendants from *Burney, J.*, September Term, 1952, SAMPSON. Reversed.

Civil action to quiet title to real property, heard on demurrer by plaintiffs to original defendants' cross action and motion by additional defendants to strike certain portions of the original defendants' answer.

In 1929 Elizabeth Bizzell died leaving a last will and testament in which she devised the real estate described in the complaint to the plaintiffs Bizzell. In 1942 plaintiffs Bizzell executed a deed to plaintiffs Adams which deed was sufficient in form and substance to convey a fee simple title to said property subject to the life estate therein reserved to the grantors. Thereafter, in 1946, plaintiffs executed a deed of trust

conveying said land to Jeff. D. Johnson, Jr., to secure an indebtedness due one D. B. Sutton, and in January 1947 plaintiffs Adams executed a deed of trust conveying the *locus* to John B. Williams, Jr., trustee, to secure an indebtedness to Jem Robinson. In April 1947 they executed another deed of trust to H. Paul Strickland, trustee, to secure an indebtedness to Dunn Production Credit Association.

The original defendants are the children and grandchildren of the testatrix other than the plaintiffs Bizzell and Mattie B. Adams.

Plaintiffs instituted this action against the original defendants and allege in their complaint in effect that (1) their mother, the testatrix, devised the *locus* to plaintiffs Bizzell in fee; (2) by reason of the phraseology of the devise the original defendants claim all said land as devisees under the will, subject to a life estate therein devised to plaintiff Bizzell; and, (3) said claim of defendants casts a cloud on their fee simple title. They pray judgment decreeing that they own said land in fee and that defendants have no right, title, or interest therein.

On motion of defendants the trustees named in the several deeds in trust and the parties secured thereby were made parties defendant. Thereupon the original defendants filed answer in which they allege that (1) the plaintiffs Bizzell took only an estate for life under the devise contained in their mother's will, (2) the deed from them to plaintiffs Adams conveys no interest therein, (3) they as devisees and as heirs at law are seized and possessed of the title to said land subject to the said life estate, and (4) the claim of plaintiffs and their grantees casts a cloud upon their remainder interest in the *locus*. They further allege, by way of cross action, that the deed from plaintiffs Bizzell to plaintiffs Adams was procured by fraud and undue influence; was executed without consideration; and that the grantors Bizzell at the time were without sufficient mental capacity to execute the same. They further allege that plaintiffs Adams, in furtherance of their scheme to defraud plaintiffs Bizzell, executed the trust deeds above mentioned and that the deed from the Bizzells to the Adamses and the several deeds of trust above cited cast a cloud on their title to said property. They pray that said deed and trust deeds be vacated and that they be adjudged the owners of said land subject only to the life estates of plaintiffs Bizzell, free and clear of any adverse claim asserted by plaintiffs Adams and the additional defendants.

Plaintiffs demurred to the second and third defenses and cross action of the original defendants for that said defendants are without capacity to maintain an action to vacate the deed from plaintiffs Bizzell to plaintiffs Adams and the trust deeds executed by plaintiffs for fraud or undue influence, or for want of consideration or of mental capacity, and upon other grounds specified in the written demurrer filed. The additional defendants appeared and moved to strike from the third defense and

cross action all the allegations (specifying them) made as a basis for their prayer that the several deeds and trust deeds therein referred to be adjudged null and void and of no effect.

The court below overruled the demurrer and denied the motions to strike *in toto*. The plaintiffs and the additional defendants excepted and appealed.

Williams & Williams for John B. Williams, Jr., trustee, and Jem Robinson; H. Paul Strickland for H. Paul Strickland, trustee, and Dunn Production Credit Association; P. D. Herring, for Mary Estelle Bizzell and Mattie B. Adams, plaintiffs; Howard H. Hubbard for Mary Estelle Bizzell and Mattie B. Adams, plaintiffs, and J. D. Johnson, Jr., trustee, and D. B. Sutton, additional defendants.

Algernon L. Butler for appellees.

BARNHILL, J. Whether this action be considered as a proceeding under the Declaratory Judgment Act or as an action to quiet title or remove a cloud from the title to the real property described in the complaint is of little importance. In either event the relief sought is the same. Plaintiffs seek to have the Court construe the last will and testament of Elizabeth Bizzell and to decree that the devise of the testatrix's real property therein contained vested in the plaintiffs Bizzell a fee simple title to said land. On the other hand, the original defendants assert in their answer that said plaintiffs under said devise became seized, at most, of an estate for life and that they, the original defendants, are the owners of said land in fee, subject to said life estates. Therefore, a judgment decreeing the rights of the respective parties under said devise will settle the whole controversy.

Counsel in their argument in this Court requested the Court to construe the will and declare the rights of the respective parties thereunder and thus put an end to the controversy on this appeal. But this we are not at liberty to do. This is an appellate court and its prerogative is to consider and decide, on appeal, questions of law and legal inference raised by exceptions to rulings made and judgments entered in the Superior Courts of the State. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Trust Co. v. Waddell, ante,* 342. This appeal involves only questions of proper pleading, and we must confine decision to the questions presented by the exceptive assignments of error contained in the record.

The court below erred in overruling the demurrer of plaintiffs to the cross action contained in the answer of the original defendants. It is conceded that the testator devised to plaintiffs Bizzell a life estate, or some lesser estate, in the land which is the subject of this controversy. This being true, their deed to the plaintiffs Adams is valid in law to con-

vey whatever estate was devised to them until and unless it is vacated and annulled by a court of competent jurisdiction in an action instituted by them for that purpose, G.S. 1-57, or, if they are mentally incompetent as alleged, then in an action instituted by a person duly appointed by the court to prosecute the action in their behalf. G.S. 1-64; *Rental Co. v. Justice,* 211 N.C. 54, 188 S.E. 609.

What is here said in respect to the deed alleged in the cross action applies with equal force to the trust deeds executed by the plaintiffs. The original defendants are without legal capacity to maintain an action to vacate any one of them for fraud or undue influence or want of consideration. If we concede that a cause of action is alleged, the fact remains the right to maintain the cause does not belong to them. It rests in others.

The demurrer to the second further defense was properly overruled. The plaintiffs raise an issue of title, challenge the validity of the claim asserted by the original defendants, and pray judgment decreeing that the will of Elizabeth Bizzell devises said land to them in fee. On this issue the original defendants must have their day in court. If the court is to construe the will and declare the respective rights of the parties thereunder, all parties must be accorded an opportunity to be heard. But to be heard the original defendants must allege their claim. This in substance they have done in their second further defense. The facts therein alleged are properly pleadable in this cause. *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614.

It follows that there was error in the judgment overruling the motion to strike filed by the additional defendants. The allegations contained in and forming a part of the cross action are irrelevant and immaterial and must be stricken. *Privette v. Privette,* 230 N.C. 52, 51 S.E. 2d 925; *Light Co. v. Bowman,* 231 N.C. 332, 56 S.E. 2d 602.

In this connection we note that the additional defendants did not move to strike from the "third defense and cross action" those allegations which are essential to a proper presentation of the claim of ownership asserted by the original defendants. These allegations, not included in the motion to strike, are a proper part of the answer, notwithstanding the fact we reverse the judgment overruling the demurrer of plaintiffs to the cross action. That is to say, the original defendants have a right to plead that (1) under a proper construction of the will of Elizabeth Bizzell they are seized of a remainder interest in said land, (2) the deed and the trust deeds referred to in the pleadings purport to convey said premises in fee, and (3) the claim of the plaintiffs and said instruments executed by them cast a cloud on their title; and pray judgment decreeing that they are the owners of the land subject to the limited estate devised

to the plaintiffs Bizzell, free and clear of any right, title, or interest of the plaintiffs Adams or the additional defendants.

For the reasons stated the judgment entered in the court below is Reversed.

JOHNSON, J., took no part in the consideration or decision of this case.

SUE AGNES BORDERS v. ELVA ELIZABETH YARBROUGH.

(Filed 15 April, 1953.)

1. Easements § 1—

An easement is an interest in land, and is generally created by deed.

2. Easements § 6—

Grantees take title to land subject to duly recorded easements which have been granted by their predecessors in title. G.S. 47-27.

3. Easements § 1—

The creation of an easement by deed must not be so uncertain, vague and indefinite as to prevent identification with reasonable certainty.

4. Same—User of reasonable easement, acquiesced in by owner of servient tenement, held to locate with sufficient certainty easement granted by deed.

The deed to defendant stated that the lot was subject to a perpetual easement across same for a sewerage line running "from lot No. 5 to the disposal in the street." Prior to the execution of the deed to defendant the sewerage line across defendant's lot had been constructed, and was used for some time after defendant acquired title to lot No. 6. *Held:* The dominant and servient tenements were identified, and the user of the easement, acquiesced in by the owner of the servient estate, locates the way with sufficient certainty, and therefore the description in the deed is sufficiently definite and certain to create the easement, irrespective of any way of necessity or whether the easement is apparent or not.

APPEAL by defendant from *Crisp, Special Judge,* September Civil Term, 1952, of CLEVELAND.

This is a civil action to have the plaintiff adjudged the holder of a perpetual easement for sewerage purposes over the defendant's land; to enjoin the defendant from interfering with the plaintiff's use of the alleged easement, and for compensatory and punitive damages because of defendant's acts in interfering with the use of the alleged easement causing sewerage to back up in plaintiff's house.

The complaint in substance alleges: The plaintiff and the defendant are owners in fee simple of adjoining lots on the west side of Churchill

Drive in Shelby, North Carolina, the plaintiff owning lot No. 5 and the defendant lot No. 6 of Beam Bros. property known as "Beaumonde"; a plat of which is properly recorded in the public registry of Cleveland County. Plaintiff's deed, properly recorded is dated 1 November 1951. Defendant's deed properly recorded is dated 1 February 1952.

Immediately after the description in the deed to the defendant of lot No. 6 by metes and bounds appears the following: The same being the property conveyed 11 October, 1951, to Berender and wife by Gardner and wife, as will appear of record in the Register of Deeds Office of Cleveland County, reference being made to said deed for further identification and description of the property: "Subject to the restrictions and provisions contained in the deed above referred to, reference being made to same for full text thereof." The deed referred to recorded in Deed Book 6-P at p. 140 describes lot No. 6, and sets forth certain restrictions and easement, including the following: "this lot is sold subject to an easement across the same for a sewerage line running from lot No. 5 to the disposal in the street. This shall be a perpetual easement over this lot."

Before the plaintiff bought lot No. 5 and the defendant lot No. 6, a sewer line, pursuant to the easement granted, was run from lot No. 5 across lot No. 6; that the sewer lines of the plaintiff and defendant joined at a point on lot No. 6, and a common sewer line ran to the disposal in the street, and that this condition existed before and at the time plaintiff bought lot No. 5 and the defendant lot No. 6, and continued to exist until early June 1952.

In June 1952, the defendant had her sewer line uncovered, and discovered the joint sewer line; the defendant then had the plaintiff's sewer line disconnected, and started to take up the joint sewer line. Over the plaintiff's protests the defendant put in a different sewer line, not connecting with it the plaintiff's sewer line. The defendant then covered with dirt the lines, leaving the plaintiff's sewerage line loose in the dirt with no outlet to the disposal in the street. As a result sewage in August began backing up in plaintiff's house, and the defendant refuses to allow plaintiff to go upon her property to make necessary repairs.

From a judgment overruling a demurrer to the complaint, the defendant appeals, assigning error. Affirmed.

Horn & West for plaintiff, appellee.
Horace Kennedy for defendant, appellant.

PARKER, J. The appellant in her brief makes only these contentions: First, that the description of an easement in the deed is too uncertain, vague and indefinite to permit identification with reasonable certainty of an easement; that the claimed easement is not apparent; and that the

plaintiff does not allege in her complaint that her right to run a sewer line across defendant's lot is a way of necessity.

An easement is an interest in land, and is generally created by deed. Mordecai Law Lectures, Vol. 1, p. 464; *Norfleet v. Cromwell,* 64 N.C. 1; *Thompson v. Umberger,* 221 N.C. 178, 19 S.E. 2d 484. G.S. 47-27 provides for the recordation of deeds of easements. "Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title. G.S. 47-27; *Walker v. Phelps,* 202 N.C. 344, 162 S.E. 727; *Norfleet v. Cromwell,* 64 N.C. 1; *Burgas v. Stoutz,* 174 La. 586, 141 So. 67; *J. T. Donohue Realty Co. v. Wagner, supra;* 28 C.J.S., Section 24, p. 676, *et seq.*" *Waldrop v. Brevard,* 233 N.C. 26, 62 S.E. 2d 512. To the same effect, 17 Am. Jur., Easements, Sec. 132.

"With reference to the manner of grant, the rule is that in describing an easement, all that is required is a description which identifies the land that is the subject of the easement and expresses the intention of the parties. No set form or particular words are necessary to grant an easement. As a general rule, any words clearly showing the intention to grant an easement which is by law grantable are sufficient. In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant." 17 Am. Jur., Easements, Sec. 25.

"An easement may be created by express grant. No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms. . . . The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements." 28 C.J.S., Easements, Sec. 24.

It is stated in 110 A.L.R., Annotation p. 175 "where the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances" (Citing numerous authorities); and also at p. 178 "It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant."

The creation of an easement by deed must not be so uncertain, vague and indefinite as to prevent identification with reasonable certainty. *Gruber v. Eubank,* 197 N.C. 280, 148 S.E. 246; *Thompson v. Umberger, supra.*

In *Patton v. Educational Co.,* 101 N.C. 408, 8 S.E. 140, a deed in the defendant's chain of title contained this clause: "With the following reservation, that is to say, the said M. M. Patton reserves 33 feet for a

street running from the cross street down L. Clayton's fence to J. P. Jordan's fence, thence up Jordan's fence to the street that leads down to M. M. Patton's house." Patton's deed to Jordan contained the following clause: "And further, that the street now opened up through to the college land, thirty-three feet wide, shall be kept open." This Court said: "The reservation is not vague and uncertain, as in *Waugh v. Richardson,* 30 N.C. 471, and *McCormick v. Monroe,* 46 N.C. 13, relied on by defendants."

We have examined the original record in *Bender v. Tel. Co.,* 201 N.C. 355, 160 S.E. 352. The description in the conveyance of the right of way, an easement in land, is as follows: "I hereby grant unto the said company, its associated and allied companies, their respective successors, assigns, lessees and agents, the right, privilege and authority to construct, reconstruct, operate and maintain lines of telephone and telegraph, consisting of such poles, wires, cables, conduits, guys, anchors and other fixtures and appurtenances as the grantee may from time to time require, upon, across and/or under the property which I own or in which I have any interest in the Township of Nutbush, County of Warren and State of North Carolina, bounded on the East by R. J. Bender; on the South by Peter Seaman; on the West by Mrs. Henry Bender, and on the North by Frances Taylor, and upon and along the roads, streets or highways adjoining the said property, etc." This Court said in that case: "The description in the conveyance of the right-of-way, an easement in land, is sufficiently definite and certain."

Let us apply the law to the facts. A deed in the defendant's chain of title, properly recorded, and specifically referred to in the deed to the defendant states "this lot is sold subject to an easement across the same for a sewerage line running from lot No. 5 to the disposal in the street. This shall be a perpetual easement over this lot." The defendant took title to lot No. 6 subject to this duly recorded easement, which had been granted by her predecessor in title. The description in the deed identifies lot No. 6 as the subject of the easement, and expresses the intention of the parties that a sewerage line shall run from lot No. 5 over lot No. 6 to the disposal in the street. The deed describes with exactness the dominant and servient tenements.

The complaint alleges: "That the sewerage lines of the plaintiff and defendant join at a point on the aforesaid lot No. 6 and a common sewerage line ran to the disposal in the street; that this condition existed before the plaintiff acquired the aforesaid lot No. 5 and before the defendant acquired the aforesaid lot No. 6, and was in accordance with the perpetual easement over the said lot No. 6 in favor of the said lot No. 5; that this condition continued to exist until early in June 1952." In June 1952 the defendant disconnected plaintiff's line. This user of a reason-

able way for a sewerage line by the owner of lot No. 5, the dominant tenement, across lot No. 6 to the disposal in the street, acquiesced in by the owner or grantor of the servient estate, lot No. 6, sufficiently locates the way, which will be deemed to be that which was intended by the grant of the easement.

The description in the deed of the easement for a sewerage line in this case is sufficiently definite and certain and we so hold.

The facts in *Gruber v. Eubank, supra,* relied upon by the defendant, and *Thompson v. Umberger, supra,* are distinguishable.

The plaintiff having an easement created by deed does not have to allege nor contend for a way by necessity. Under the facts of this case it is immaterial whether the easement is apparent or not.

The demurrer was properly overruled, and the defendant's assignment of error is not tenable.

Affirmed.

C. J. TOWERY AND GLENN TOWERY, SURVIVING PARTNERS OF TOWERY'S DAIRY; C. J. TOWERY, EXECUTOR OF THE WILL OF W. J. TOWERY; GLENN TOWERY; AND NELLIE TOWERY v. CAROLINA DAIRY, INC.

(Filed 15 April, 1953.)

1. Contracts § 18—

Where there is a breach of a contract or some provision thereof which does not go to the substance of the whole contract and indicate an intention to repudiate it, the breach may be waived by the innocent party, who may elect to treat the contract as still subsisting and continue performance on his part.

2. Pleadings §§ 17c, 28—

Extraneous matter *dehors* the pleadings may not be considered either on demurrer or on motion for judgment on the pleadings.

3. Limitation of Actions § 6d—Pleadings held not to show as matter of law that the action for breach of contract was barred.

Where plaintiffs' complaint alleges a breach of a provision of the contract between the parties by defendant but further alleges matter disclosing a waiver of such breach by plaintiffs, and that plaintiffs' continued performance on their part thereafter until a subsequent breach by defendant of the entire contract less than three years prior to the institution of the action, *held* the complaint does not permit the inference, as a matter of law, that action on the contract is barred by the three-year statute of limitations, and this result is not affected by a self-serving declaration by defendant that the contract was breached at the earlier date.

APPEAL by plaintiffs from *Crisp, Special Judge,* September Term, 1952, CLEVELAND. Reversed.

Civil action to recover damages for breach of contract, heard on motion for judgment on the pleadings.

Summons herein was issued 8 November 1950 and served on defendant 9 November 1950.

The plaintiffs allege that on 15 December 1944, Towery's Dairy, a partnership of which they are the present owners, was engaged in the production and retail sale of milk; that on said date said partnership entered into a contract with defendant in substance as follows:

The partnership contracted to sell and the defendant agreed to purchase all the milk produced by the partnership's dairy for a period of five years. The beginning price was $4.30 per hundred pounds, which wholesale price was based upon the retail price of milk which was then 16c per quart. It was agreed that if the retail price of milk should be raised by defendant, then it would increase the price paid the partnership by three-fourths of said increase, and if the retail price should be decreased, the price paid the partnership should be decreased by three-fourths of the decrease in the retail price. In consideration of the agreement on the part of the partnership to discontinue its retail sale of milk and turn its retail routes over to it, the defendant agreed to pay the partnership an additional $1.25 per hundred pounds of milk delivered under the contract.

They further allege that on 16 May 1947 the retail price of milk was increased by defendant, but it breached its contract by failing and refusing to increase the wholesale price paid as it was, under its contract, obligated to do, but it did continue to pay the $1.25 per hundred pounds premium price. The partnership continued to make delivery under the contract, and to accept payment minus the increase in price due it, until 19 January 1949, on which date defendant "further violated the terms of its contract" by refusing to accept delivery of any milk from the partnership unless it would agree to waive and relinquish the premium payment of $1.25 per hundred pounds. The partnership refused to agree to such modification of the contract and thereupon defendant refused to accept any further deliveries of milk, thereby breaching its contract.

Plaintiffs allege various elements of damages including the loss resulting from the refusal of defendant in 1947 to increase the price to be paid plaintiffs.

The pleadings filed include two demurrers. The first demurrer was overruled. Apparently the second one has not been heard and no judgment has been entered thereon.

When the cause came on for trial in the court below, after the reading of the pleadings, the defendant, through counsel, "stated in open court that any contract referred to in the pleadings if breached by the defendant was breached at the time or times alleged in the complaint . . . and requested the court to find from the allegations contained in the pleadings

and the aforesaid admission of the defendant that the action was barred by the three-year statute of limitations . . ." Thereupon, the court entered judgment as follows:

"THE COURT HOLDS that this action of the plaintiffs is barred by the three-year statute of limitations, and it is so ordered, adjudged and decreed."

Plaintiffs excepted and appealed.

Horace Kennedy and Horn & West for plaintiff appellants.
D. Z. Newton and Peyton McSwain for defendant appellee.

BARNHILL, J. Whether the "request" made by counsel for defendant be treated as a demurrer or a motion for judgment on the pleadings, the judgment entered thereon was erroneous and must be vacated.

While the breach of a continuing contract may justify a termination of the contract by the innocent party, the mere fact a breach of one of the provisions of the contract has been committed by one party does not necessarily accomplish that result, as the party not in fault may elect to waive the breach and continue performance regardless of the breach. *Lowell v. Wheeler's Estate,* 112 A. 361; *Dudzik v. Degrenia,* 57 A.L.R. 823; *Miller v. Mantik,* 81 A. 797; *Cook & Bernheimer v. Hagedorn,* 131 N.E. 788; *Thomas-Bonner Co. v. Hooven O. & R. Co.,* 284 F. 377.

Where there is a breach of a contract or some provision thereof which does not go to the substance of the whole contract and indicate an intention to repudiate it, the breach may be waived by the innocent party. *Non constat* such breach, he may elect to treat the contract as still subsisting and continue performance on his part. *Manufacturing Co. v. Lefkowitz,* 204 N.C. 449, 168 S.E. 517; *Manufacturing Co. v. Building Co.,* 177 N.C. 103, 97 S.E. 718; *Sinclair Refining Co. v. Costin,* 116 S.W. 2d 894; 12 A.J. 967-8; 17 C.J.S. 981-2, 992.

Here, while plaintiffs plead the breach in 1947 of one of the provisions of the contract sued upon, they further allege facts showing a waiver on their part and continued performance; and the defendant, in its answer, expressly pleads waiver. Even so, the defendant moves the court to dismiss the action for that it is barred by the three-year statute of limitations and bases its motion on a unilateral, self-serving, conditional admission that the contract was breached in 1947, more than three years prior to the institution of this action. The judgment entered clearly indicates the court below considered this admission in arriving at its conclusion that the action of the plaintiffs is now barred by the applicable statute of limitations.

In this there was error. Extraneous matter *dehors* the pleadings may not be considered either on demurrer or on 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." *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384, and cases cited; *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897.

In any event, the allegations made by plaintiffs are sufficient to repel an attack by demurrer and the facts pleaded by them will not permit the inference, as a matter of law, that their action is barred by the three-year statute of limitations. On the allegations made, one provision of the contract was breached in 1947. But plaintiffs elected not to treat the breach as a repudiation. Thereafter, they continued performance by delivering to defendant—and defendant accepted delivery of—"all the milk produced by Towery's Dairy" as provided by the contract, until 1949. Hence plaintiffs are entitled to be heard on their claim for damages alleged in the complaint.

The other questions debated in the briefs and on oral argument are not presented for decision.

The judgment entered in the court below is

Reversed.

BLUE RIDGE MEMORIAL PARK, INC., A CORPORATION, AND CITY OF LENOIR, A MUNICIPAL CORPORATION, v. UNION NATIONAL BANK, INC., A BANKING CORPORATION, AND V. H. BLACKWELDER, M.D., EUGENE ESTES, JAMES BARGER, R. C. POWELL, FRANK L. SMITH, SR., JAMES H. HUGGINS, P. P. YATES, W. D. TUTTLE, J. F. PARLIER, W. SCOTT BRAWLEY, L. P. McKINNEY AND COIT BARBER, FOR THEMSELVES AND ON BEHALF OF ANY OTHER AND ALL OTHER LOT PURCHASERS OF PLAINTIFF, WHO MAY CARE TO COME IN AND MAKE THEMSELVES PARTIES.

(Filed 15 April, 1953.)

1. Contracts § 8—

Parties to a contract are conclusively presumed to have executed the agreement with full knowledge of the existing statute law.

2. Cemeteries § 1—Cemetery may sell land to municipality upon its agreement to assume obligation of perpetual care of lots.

A cemetery sold its property to a municipality by contract under which the city assumed all obligations of the cemetery in connection with maintenance of the cemetery and perpetual care of the lots. The sale price was a stipulated amount, less the amount of the trust fund set up by the cemetery for perpetual care of lots. The cemetery had sold interment rights in several lots with agreement for perpetual care under the statute and also subject to G.S. 65-29. *Held:* The contract of sale to the city complied with provisions of the statutes, G.S. 65-26, G.S. 65-29, and upon completion of the sale the cemetery is entitled to order that the trustee turn over to it the amount in the trust fund.

MEMORIAL PARK *v.* BANK.

APPEAL by plaintiff from *Rudisill, J.*, at November-December Term, 1952, of CALDWELL.

Civil action under the Declaratory Judgment Act (G.S. 1-253 *et seq.*), to determine questions which have arisen in connection with the sale by the plaintiff, a perpetual care cemetery corporation, of its property to the City of Lenoir, heard below on waiver of jury trial and agreed statement of facts.

These in substance are the facts agreed:

1. The plaintiff, Blue Ridge Memorial Park, Inc., being the owner of about 20 acres of land near the City of Lenoir, subdivided the land into cemetery lots and established what is known as Blue Ridge Memorial Park, and has sold interment rights in many of the lots and executed certificates or deeds therefor, and has set up a trust fund for the perpetual care of the cemetery lots sold, consisting of an original amount of $5,000 plus $4 per grave space for the lots conveyed, as provided by G.S. 65-26.

2. A trust agreement was executed between the plaintiff and defendant, Union National Bank, as trustee, setting up a permanent trust fund for the care of lots or grave spaces sold in the cemetery. The trust agreement was executed under the provisions of Chapter 644, Sec. 6, Session Laws of 1943, now codified as G.S. 65-18 through 65-36. The amount deposited in the trust fund, including the initial deposit of $5,000, is approximately $11,456.

3. The plaintiff cemetery corporation has entered into a written contract with the City of Lenoir to sell to it the cemetery property, and the City has agreed, as provided by G.S. 65-29, to assume the maintenance thereof as a part of the consideration to be paid for the property.

4. The contract between the cemetery corporation and the City recites that the cash consideration to be paid by the City is $27,500, "less the present value of the perpetual care fund now on deposit at Union National Bank . . ., also less any cash balance remaining in any bank or otherwise, after the payment of taxes and other indebtedness the corporation may now owe, . . ."

5. The defendant, Union National Bank, as Trustee, has been advised of the proposed sale and has been requested to turn over to the plaintiff, or to the City of Lenoir as Assignee of the plaintiff, the amount of the trust fund held by the Bank, as provided by G.S. 65-29. The Bank has refused to so release the fund.

6. None of the contracts executed by purchasers of grave space specifically authorized Blue Ridge Memorial Park, Inc., to retain, for its own use, any amount accumulated in such perpetual care fund from the sale of lots, if the corporation should sell the cemetery property to a municipality which assumed, in writing, all obligations of such cemetery in connection with the maintenance thereof. However, the contracts with the

lot purchasers contained this recital: "This contract subject to Public Laws, North Carolina Session 1943, relative to perpetual care fund providing for minimum of $4.00 per grave, on lots covered by this contract, payable as provided in said Act *and subject also to the General Statutes of North Carolina, Section 65-29.*" (Italics added.)

The trial court made conclusions of law as follows:

(a) That "the City of Lenoir has authority under the law to purchase the Blue Ridge Memorial Park cemetery and assume its upkeep and the perpetual care of the several lots already sold and conveyed, provided all statutory requirements are met."

(b) ". . . that the requirements of G.S. 65-29 were not met by a mere reference to the statute in the sales agreement, that it was necessary that such possibility should have been inserted in the contract so that each purchaser would be put on notice that the cemetery might be sold to a municipality and if so the trust fund set up would be turned over to the Blue Ridge Memorial Park, Inc., and that the contract failing so to provide fails to meet the requirements of the statute."

(c) ". . . that the Blue Ridge Memorial Park, Inc. is not entitled to the possession of the trust fund now held by Union National Bank until it obtains the consent of all the holders of interment rights in the cemetery lots sold to allow the trust fund to be turned over to it."

The court entered judgment adjudging "that the Blue Ridge Memorial Park, Inc. is not now entitled to retain for its own any amount accumulated in such perpetual care trust fund now held by Union National Bank as Trustee."

The plaintiff excepted and appealed.

L. H. Wall for plaintiffs, appellants.
Williams & Whisnant for defendants, appellees.

JOHNSON, J. G.S. 65-26 requires, in connection with the operation of a private cemetery offering perpetual care service, that a trust fund shall be set up and maintained as security for the performance of the obligations of perpetual care.

G.S. 65-29 provides: "In event of the voluntary purchase by any city or town of a cemetery providing perpetual care of lots under this article, it shall be lawful for the cemetery to provide in its agreement with purchasers that in event of the voluntary purchase by such municipality of such cemetery property, such cemetery may retain for its own any amount accumulated in such perpetual care fund on sale of lots made subsequent to the ratification of this article: Provided, such municipality purchasing and accepting a conveyance of said cemetery property shall, as part consideration for making by such cemetery of said conveyance, assume in

writing all obligations of such cemetery in connection with the maintenance thereof."

In the case at hand the City of Lenoir by its contract with the plaintiff has effectively assumed all obligations of the plaintiff in connection with the maintenance of the cemetery and perpetual care of the lots. The contract is in substantial compliance with the requirements of the foregoing statute.

The cash consideration which the City is paying the cemetery corporation is $27,500, less the amount of the trust fund and other unaudited items. Therefore, in effect the trust fund is being transferred to the City, and the obligation of the City to perform the perpetual care obligations of the cemetery corporation is being substituted in place of the security provided by the perpetual care fund. This arrangement has the sanction of the statute, G.S. 65-29.

The court below in declining to release the trust fund rested decision on the fact that the contracts between the cemetery corporation and the purchasers of lots do not contain the specific recital that the cemetery corporation may reclaim the trust fund on sale of the property to a municipality. However, it is noted that each of these contracts between the cemetery corporation and the purchasers of lots recites that it is made "subject also to the General Statutes of North Carolina, Section 65-29." This recital is sufficient compliance with the provisions of the statute.

As we have seen, the statute law of the state expressly permits a city or town to purchase and take over the property of a private, perpetual care cemetery corporation and assume all the obligations of the corporation as to maintenance and perpetual care. The statute law further provides in effect that the undertaking of the municipality to provide perpetual care may be substituted for the trust fund, and that this fund may be released to the cemetery corporation when the municipality assumes the obligation of perpetual care.

In the case at hand the holders of interment rights are conclusively presumed to have dealt with the plaintiff corporation with full knowledge of the existence of this statute law.

A study of the record impels the conclusion that the plaintiff corporation and the City of Lenoir have complied with the requirements of the controlling statutes, and the plaintiff is therefore entitled to the trust fund held by the defendant bank. It necessarily follows that the court below erred in refusing to require the Bank to pay over to the plaintiff the amount of the fund.

The case will be remanded for the entry of judgment in conformity with this opinion.

Reversed and remanded.

CHARLES TAYLOR v. KINSTON FREE PRESS COMPANY, INC., AND RALPH L. SHELL.

(Filed 15 April, 1953.)

1. Torts § 6—

The intent and purpose of G.S. 1-240 is to permit a defendant who has been sued in a tort action to bring into the action, for the purpose of enforcing contribution, every tort-feasor against whom the plaintiff could have originally brought suit in the same action.

2. Libel and Slander §§ 1, 9: Torts § 4—

Libel is a tort, and therefore all those who join in the publication of a false and malicious defamation in writing as composer and publisher are joint tort-feasors within the purview of G.S. 1-240.

3. Libel and Slander § 9: Torts § 6—

Where plaintiff sues a newspaper alone for alleged libel, the newspaper, upon allegations that an individual composed the libelous matter and had it published as a paid advertisement, is entitled to have such individual joined as a joint tort-feasor for the purpose of contribution under G.S. 1-240, and such individual's demurrer to the cross-action of the newspaper against him is properly overruled.

4. Appeal and Error § 37: Pleadings § 16—

On appeal from the denial of one defendant's demurrer to the cross-action of his codefendant, the plaintiff is not a party to the appeal, and the complaint is not subject to demurrer *ore tenus* in the Supreme Court.

APPEAL by defendant Shell from *Crisp, Special Judge,* September Term, 1952, of LENOIR. Affirmed.

Action to recover damages for libel.

Plaintiff instituted action against the corporation publishing the newspaper known as "Kinston Daily Free Press," alleging the malicious publication in said newspaper of an article containing false and defamatory matter injuriously affecting him in his profession and practice as an attorney at law. It was alleged that after due notice as required by G.S. 99-1 the defendant Free Press Company refused to retract.

The article complained of is set out at length in the complaint but need not here be restated except to say that it purported to be "an open statement to the City of Kinston and its environs" and signed by Dr. Ralph L. Shell.

For answer the defendant Free Press Company admitted the publication complained of, and that it declined to retract; that it published the article for Dr. Shell as a paid advertisement at regular rates without malice and in good faith relying on the truthfulness of the statements therein contained, and defendant pleaded the truth thereof as a defense.

For a further defense and cross-action against Dr. Shell the defendant Free Press Company alleged that the article complained of was prepared by Dr. Shell, and delivered to defendant Company with instructions to publish it in the *Kinston Daily Free Press* at advertising rates which were paid; that defendant Company relying on the representations of Dr. Shell as to the truthfulness of the matter, at his instance, published it; that if the article contained false and libelous statements concerning the plaintiff, and the plaintiff sustained damage therefrom, Dr. Shell is jointly liable therefor. Defendant Free Press Company further alleges that Dr. Shell is primarily liable for any and all damage which the plaintiff may recover, and asks that Dr. Shell be made party defendant to the end that he be required to pay all such damages as may be recovered by the plaintiff in this action.

Upon motion of the defendant Free Press Company Dr. Ralph L. Shell was by order made party defendant and served with process.

Thereafter defendant Shell demurred to the cross-complaint of defendant Free Press Company on the ground that it did not state a cause of action against defendant Shell, for that there is no right of contribution, or primary or secondary liability as between the defendant Free Press Company and defendant Shell.

The demurrer was overruled and defendant Shell appealed.

Whitaker & Jeffress, Lassiter, Leager & Walker for defendant, Kinston Free Press Company, Inc., appellee.

Jones, Reed & Griffin for defendant, Ralph L. Shell, appellant.

DEVIN, C. J. The only question presented by this appeal is the correctness of the decision of Judge Crisp in overruling the demurrer of defendant Shell to the cross-action of defendant Free Press Company. The demurrer was based upon the ground that there was no right to contribution as between these defendants growing out of the cause of action alleged in the complaint, and that no question of primary and secondary liability could be raised.

It is well settled that all who take part in the publication of a libel or who procure or command libelous matter to be published may be sued by the person defamed either jointly or severally. Odgers on Libel and Slander, pg. 171; Newell on Slander and Libel, pg. 237; 1 Cooley on Torts, pg. 273; 33 A.J. 186; *Gattis v. Kilgo,* 128 N.C. 402, 38 S.E. 931; *Lewis v. Carr,* 178 N.C. 578, 101 S.E. 97; *Tucker v. Eatough,* 186 N.C. 505, 120 S.E. 57; *Flake v. News Co.,* 212 N.C. 780, 195 S.E. 55; *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736; *Connelly v. State Co.,* 152 S.C. 1, 149 S.E. 266.

In *Tucker v. Eatough, supra,* where an individual and an unincorporated labor union were sued for libel, it was held the labor union as such could not be sued, but *Chief Justice Clark* observed: "The defendant Eatough is liable for any libel that he may be proven to have issued, and any individuals or corporations who aided and abetted him in issuing a libel can be made parties defendant."

In our case the plaintiff has sued only the Publishing Company. But the Publishing Company has by proper procedure sought to avail itself of the provisions of G.S. 1-240, and to bring into the action the person who prepared the article complained of and procured its publication for the purpose of enforcing contribution against him as joint tort-feasor in the event the plaintiff should recover. The demurrer admits the facts pleaded but denies their sufficiency to entitle the defendant Free Press Company to this relief.

The intent and purpose of G.S. 1-240 is to permit a defendant who has been sued in a tort action to bring into the action, for the purpose of enforcing contribution, every tort-feasor against whom the plaintiff could have originally brought suit in the same action. *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335; *Read v. Roofing Co.,* 234 N.C. 273, 66 S.E. 2d 821.

That the publication of a libel causing injury to the person defamed is a civil wrong and is embraced within the category of torts may not be gainsaid, and it follows that all those who join in the publication of a false and malicious defamation in writing as composer and publisher must be regarded in law as joint tort-feasors within the purview of the statute.

It follows that on the allegations in the cross-complaint of defendant Free Press Company the defendant Shell was properly made party defendant, and that the demurrer of defendant Shell on the ground that the cross-complaint was insufficient to support the contingent plea for contribution under the statute was properly overruled. We have examined the cases cited by appellant and none of them militate against the conclusion here reached.

This disposition of the appeal renders it unnecessary to determine at this stage of the action questions of primary and secondary liability between the defendants in case of recovery by the plaintiff.

The plaintiff Taylor was not a party to this appeal. The sufficiency of his complaint is not challenged on this record. It is not subject to demurrer *ore tenus* in this Court on this appeal.

The judgment overruling the demurrer of the defendant Shell is

Affirmed.

DORIS WADE JACKSON v. HANNIBAL BAGGETT.

(Filed 15 April, 1953.)

1. Insurance § 51: Parties § 10a—

Where insurer has paid all but $50.00 of the damage sustained by plaintiff's car in the collision in suit, insurer is a proper party in plaintiff's action against the tort-feasor, and may be joined as an additional party plaintiff or defendant, at the instance of the original defendant or the insured, in the discretion of the lower court, but the refusal as a matter of law of defendant's motion that insurer be joined as an additional party defendant is erroneous.

2. Insurance § 51: Pleadings § 31—

If the insurer is not a party to an action to recover for damages to the insured vehicle, all reference to insurance should be stricken from the pleadings upon motion aptly made.

APPEAL by defendant from *Burney, J.*, September Civil Term 1952. SAMPSON.

Civil action to recover damages for injury to an automobile caused by the alleged actionable negligence of the defendant.

The plaintiff filed a complaint in which she alleged that her husband was operating her car upon a public highway, and while attempting to overtake and pass the defendant's car, the defendant negligently and heedlessly and without giving any signal turned his automobile to the left causing a collision with plaintiff's car, and that such negligence was the proximate cause of damage to plaintiff's car in the amount of $1,650.00.

The defendant filed an answer denying any negligence on his part, and further alleging that even if he were guilty of negligence, then the driver of plaintiff's car was guilty of contributory negligence.

The defendant further alleged in his answer upon information and belief that the plaintiff had her automobile insured against damage by collision with the Twin States Insurance Co., an insurance company licensed and doing business in North Carolina; that this insurance company has paid the plaintiff for the loss she sustained, and has been subrogated to the rights, if any, of the plaintiff against the defendant; that the insurance company is a necessary and proper party to this action, and that an order should be entered making said insurance company a party defendant, and so prays.

Whereupon the plaintiff made a motion that all references in the answer to the insurance company be stricken out as prejudicial to the plaintiff. One of plaintiff's counsel, Charles A. Poe, made an affidavit in support of plaintiff's motion to strike, which in substance states that he is counsel for the plaintiff and the Twin States Insurance Co.; that the

plaintiff carried $50.00 deductible collision insurance on her automobile with the said insurance company, and that the insurance company has paid all her damage except $50.00, and she has paid the $50.00; that any recovery in this suit will be distributed by affiant to plaintiff and the insurance company according to their interests.

The court signed an order stating that the court found as a fact that the plaintiff's car was insured against damage by the said insurance company; that the policy had a $50.00 deductible provision; that the insurance company has paid all her loss except $50.00. The order further stated that the insurance company is a proper party, being united in interest as subrogee to a $1,600.00 interest; that the joinder of the insurance company would not prejudice the plaintiff and such joinder should be made; but that the court was of opinion that the case of *Powell v. Wake Water Co.*, 171 N.C. 290, 88 S.E. 426, is controlling, and granted the plaintiff's motion as a matter of law to strike from the defendant's answer all reference to the said insurance company.

From the order so signed the defendant appealed, assigning error.

Harris, Poe & Cheshire for plaintiff, appellee.

Howard H. Hubbard and Charles F. Lambeth, Jr., for the defendant, appellant.

PARKER, J. The question presented on this appeal has been answered in the recent case of *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231; the opinion in which was filed 17 September 1952. In fairness to the able and learned trial judge it should be stated that the opinion in *Burgess v. Trevathan* was filed the same day the order in this case was signed, and neither he nor counsel had any opportunity to see it before the order was signed.

In *Burgess v. Trevathan, supra, Justice Ervin* speaking for the Court says: "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 company 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, 1-163; *Insurance Co. v. Motor Lines, Inc., supra* (225 N.C. 588); *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."

See an interesting note on *Burgess v. Trevathan, supra,* in 31 N.C.L. Rev. pp. 224 *et seq.* (1953).

The Twin States Insurance Company, according to the finding of fact by the trial judge, has paid the plaintiff for her loss except $50.00, and is entitled to share to the extent of its payment in the proceeds of the judgment in this action brought by the plaintiff to recover the total amount of her loss, if there is such a recovery. The insurance company, therefore, is a proper party to the action. When this case is returned to the Superior Court, the Twin States Insurance Company may be brought into this action by the Court in *the exercise of its discretionary power to make new parties* at the instance of the defendant (or the insured) either in the capacity of an additional plaintiff or in the capacity of an additional defendant. If the court in its discretion fails to make the Twin States Insurance Company a party, then it should strike out of the defendant's answer all reference to the insurance company.

The defendant's exception and assignment of error to the order signed by his Honor allowing as a matter of law the plaintiff's motion to strike from the defendant's answer all reference to the Twin States Insurance Company must be upheld, and the order is

Reversed.

CLAUDE M. WEDDINGTON v. CAREY C. BOSHAMER.

(Filed 15 April, 1953.)

1. Sales § 11: Payment § 2—

Where the purchaser gives the seller a check for the agreed purchase price of property acquired by the purchaser at a bankruptcy sale, and the sole condition of the sale is the confirmation of defendant's bid at the bankruptcy sale, the sale is intended as a cash sale, and if the check is not paid by the bank, or its invalidity is otherwise established, no title to the property passes to the purchaser.

2. Same—

Plaintiff admitted that at the time he issued his check in payment of a cash sale he did not have sufficient funds in the bank to cover it, and did not deposit sufficient funds until two days later. In the meantime, defendant ascertained that the check was "no good." *Held:* Defendant was entitled to elect to rescind the sale and so inform plaintiff and return his check.

APPEAL by plaintiff from *Nettles, J.*, January Term, 1953, of CABARRUS.

This is an action to recover damages for alleged breach of contract.

The plaintiff and the defendant attended a bankruptcy sale in Charlotte, N. C., on 24 April, 1952. The defendant was high bidder at the sale on four Edmos knitting machines at a price of $1,625. It was announced at the sale that anyone could go to the courthouse that afternoon and ascertain whether his bid was confirmed or rejected. Before the sale was completed, the plaintiff inquired of the defendant as to what he would take for the four machines he had purchased. The plaintiff had placed several bids on these machines at the sale. The defendant informed him he would take $2,000, whereupon the plaintiff said he would take them. After the bankruptcy sale, the plaintiff inquired of the defendant if he wanted a check. The defendant stated that he did and plaintiff gave him a check for $2,000 on his personal account in a Concord bank. The sale of the machines to the defendant was duly confirmed by the court in the afternoon of the day the bankruptcy sale was conducted.

On Saturday afternoon following the sale on Thursday, the plaintiff contacted the defendant by telephone relative to arranging delivery of the machines. The plaintiff was informed by the defendant that plaintiff's check was "no good"; that the defendant had already sold the machines and that the plaintiff could not have them.

The plaintiff testified, "On Monday I received a letter signed by Carey C. Boshamer dated April 26, 1952 enclosing the check. On Monday morning I got $2,000 in cash and went down to his office and told him I had brought the money down there for the machines. He said there was nothing they could do about it, that he had already sold to somebody else, . . . I knew at the time I gave the check I did not have the funds in the Cabarrus Bank to cover it. . . . I did not tell Boshamer that at the time. On Friday I did not have funds in the bank to cover the check. I called Mr. Boshamer Saturday and he told me the check was no good, that he had sold to somebody else and the sale was off. I deposited the money Saturday morning. . . . When I gave Boshamer the check I considered I had bought the machines except for the court approving the same.

That was the only stipulation he made when I bought them. It was a deal so far as I was concerned."

The plaintiff seeks to recover $5,500 in damages alleging that at the time he purchased the machines they were worth $7,500.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was allowed and the plaintiff appeals, assigning error.

M. B. Sherrin and John Hugh Williams for plaintiff, appellant.

Mullen, Holland & Cooke and Verne E. Shive for defendant, appellee.

DENNY, J. We think it is clear from the evidence adduced in the trial below that the agreement between the plaintiff and the defendant for the purchase and sale of the knitting machines in question was intended to constitute a cash transaction, subject only to the confirmation of the defendant's bid at the bankruptcy sale. Plaintiff's own testimony supports this view, and when the defendant ascertained that the plaintiff's check given in payment for these machines was worthless, he had the right to rescind the sale.

It is the settled law in this jurisdiction that where personal property is sold for a cash consideration and the buyer gives a check for the purchase price, the check, in the absence of an agreement to the contrary (*Dewey v. Margolis,* 195 N.C. 307, 142 S.E. 22), does not constitute payment until it has been paid by the drawee bank. "A worthless check is not a payment." *Hayworth v. Insurance Co.,* 190 N.C. 757, 130 S.E. 612. In such cases, as between the parties, the transfer of title is conditioned upon the payment of the check by the bank on which it is drawn; and if the check is dishonored by the bank and not paid, or its invalidity is otherwise established, no title to the property passes to the purchaser. *Motor Co. v. Wood, ante,* 318, 75 S.E. 2d 312; *Parker v. Trust Co.,* 229 N.C. 527, 50 S.E. 2d 304, and cases cited; 46 Am. Jur., Sales, section 447, page 613. See also *Davidson v. Furniture Co.,* 176 N.C. 569, 97 S.E. 480.

In this case, the plaintiff admits that at the time he issued the check in question, he did not have sufficient funds in the bank on which it was drawn to cover it, nor did he deposit sufficient funds to do so until two days later. In the meantime the defendant ascertained that the check was "no good," elected to rescind the sale and so informed the plaintiff and returned his check.

The ruling of the court below will be upheld, and the judgment is

Affirmed.

ORVIN O. HUNSUCKER v. HIGH POINT BENDING & CHAIR COMPANY, AND CAROLINA POWER & LIGHT COMPANY, ORIGINAL DEFENDANTS; AND HERMAN-SIPE & COMPANY, AND UNITED STATES CASUALTY COMPANY, ADDITIONAL PARTIES DEFENDANTS.

(Filed 29 April, 1953.)

1. Torts § 5—

Under the common law, an injured person can sue any one or all of several joint tort-feasors whose negligent acts or omissions unite to produce his injury.

2. Torts § 6—

The general rule of the common law is that there is no right to indemnity as between joint tort-feasors.

3. Same: Negligence § 8—

As an exception to the common law rule that there is no right to indemnity as between joint tort-feasors, a tort-feasor who has paid the injured person for the injury, and whose negligence is secondary, is entitled to indemnity against the tort-feasor whose negligence was primary, such indemnity being based upon the fiction of a *quasi*-contract implied from the circumstance that he has discharged an obligation for which the actively negligent tort-feasor was primarily liable.

4. Master and Servant § 40a—

When an employee who has accepted and is bound by the provisions of the North Carolina Workmen's Compensation Act suffers an injury by accident arising out of and in the course of his employment as the proximate consequence of the active negligence of his employer and the passive negligence of a third party, he can claim the compensation allowed by the Workmen's Compensation Act from his employer and the insurance carrier.

5. Master and Servant § 41—

Where an employee who is bound by the provisions of the Workmen's Compensation Act suffers an injury arising out of and in the course of his employment as a proximate consequence of the active negligence of his employer and the passive negligence of a third party, he is entitled, in addition to the compensation from his employer allowed under the Act, to sue the third party when neither the employer nor the insurance carrier brings suit within six months from the date of the injury. G.S. 97-10.

6. Torts § 6—

There is no fundamental distinction between the right of one tort-feasor to contribution from another tort-feasor equally at fault and the right of a passively negligent party to indemnity from the actively negligent party, since neither right arises unless both of them are liable to the same person as joint tort-feasors, and both the right to contribution and the right to indemnity rest on principles of equity and natural justice and not on any theory of subrogation to the rights of the injured person. G.S. 1-240.

7. Master and Servant § 37—

Under the provisions of the North Carolina Workmen's Compensation Act the liability of the employer to his employee for compensable injury is

limited to the compensation provided in the Act, and the Act relieves the employer of any liability as a tort-feasor to his employee.

8. Master and Servant § 41: Negligence § 8: Torts § 6: Parties § 10a: Pleadings § 31—

The North Carolina Workmen's Compensation Act abrogates both the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault, and the common law right of a passively negligent third party to demand indemnity from an actively negligent employer, and therefore in the employee's action against the third party tort-feasor, order joining the employer and its insurance carrier as additional parties defendant is properly vacated, and those portions of the original defendant's answer which set up a cross action against the employer and the insurance carrier for indemnity are properly stricken.

APPEAL by original defendant Carolina Power & Light Company from *Moore, J.*, at February Term, 1953, of CATAWBA.

Civil action by an injured employee against alleged negligent third parties to recover damages for an injury compensable under Workmen's Compensation Act heard upon motions to strike allegations of the third parties and to vacate orders of court impleading the employer and the insurance carrier.

For convenience of narration, the High Point Bending & Chair Company is called the Chair Company, the Carolina Power & Light Company is characterized as the Power Company, Herman-Sipe & Company is designated as Herman-Sipe, and the United States Casualty Company is referred to as the Casualty Company.

The essential facts are stated in chronological order and in ultimate terms in the numbered paragraphs set forth below.

1. The Chair Company operated a furniture factory on premises owned by it in Siler City.

2. The furniture factory was electrified by the Power Company by means of a high-voltage power line passing over the premises of the Chair Company.

3. The Chair Company hired Herman-Sipe, a building contractor, to construct an addition to the furniture factory near the high-voltage power line of the Power Company.

4. During the progress of the work, to wit, on 10 November, 1949, the plaintiff Orvin O. Hunsucker, an employee of Herman-Sipe, was severely burned when a steel pipe which he was handling came in contact with the high-voltage power line of the Power Company.

5. The plaintiff and his employer had accepted the provisions of the North Carolina Workmen's Compensation Act. In consequence, the Casualty Company, as the insurance carrier for Herman-Sipe, paid the plaintiff workmen's compensation on account of his injury.

6. Neither Herman-Sipe nor the Casualty Company has ever brought an action against the Chair Company or the Power Company for the recovery of damages suffered by the plaintiff on account of his injury.

7. On 18 January, 1952, the plaintiff commenced this action against the Chair Company and the Power Company in the Superior Court of Catawba County. His complaint stated in detail that his injury was caused by the combined actionable negligence of the Chair Company and the Power Company, and that he suffered damages totaling $85,000 on account of his injury. He prayed judgment against the Chair Company and the Power Company for that sum.

8. On 2 January, 1953, the Clerk of the Superior Court of Catawba County entered an order in the cause making Herman-Sipe and the Casualty Company additional party defendants, and directing that summons be issued against them. The order was entered at the instance of the Chair Company and the Power Company, and without notice to the plaintiff, or Herman-Sipe, or the Casualty Company.

9. At the time of the entry of the order, the Chair Company and the Power Company filed separate amended answers in the action. Each amended answer denied actionable negligence on the part of the defendant filing it; pleaded contributory negligence on the part of the plaintiff as a complete defense to the cause of action asserted in the complaint; set up the facts respecting the payment of workmen's compensation to the plaintiff by the Casualty Company; and pleaded independent concurring negligence on the part of the employer, Herman-Sipe, as a bar, *pro tanto,* to the recovery of the amount of the workmen's compensation paid by the Casualty Company to the plaintiff. Each amended answer also pleaded a third-party action against Herman-Sipe and the Casualty Company. The contents of the third-party action of the Chair Company are not detailed because no question relating to them arises on the appeal.

10. The third-party action of the Power Company demanded indemnity by way of recovery over against the plaintiff's employer, Herman-Sipe, and its insurance carrier, the Casualty Company, for the full amount of any judgment which the plaintiff should obtain against the Power Company in this action on account of his injury. This demand was bottomed on these theories: (1) That the Power Company would be entitled to be indemnified against any such judgment by Herman-Sipe because the plaintiff's injury was the proximate product of a combination of active or primary negligence on the part of Herman-Sipe and passive or secondary negligence on the part of the Power Company; and (2) that the Power Company would be entitled to be indemnified against any such judgment by the Casualty Company because the Casualty Company had contracted to indemnify Herman-Sipe against any loss by reason of liability imposed upon it by law for damages on account of injuries to its

employees. The factual allegations of the third-party action of the Power Company are not detailed. We take it for granted without so deciding for the purpose of this particular appeal only that such allegations made out a case of active or primary negligence on the part of Herman-Sipe and passive or secondary negligence on the part of the Power Company.

11. Shortly after 2 January, 1953, summons was served upon Herman-Sipe and the Casualty Company.

12. Herman-Sipe and the Casualty Company forthwith filed these motions in the cause: (1) Motions to vacate the order of 2 January, 1953, making them parties to the action; and (2) motions to strike from the amended answers the third-party actions alleged against them by the Chair Company and the Power Company.

13. The motions were heard by Judge Moore at the February Term, 1953, of the Superior Court of Catawba County. He entered orders allowing all of the motions in all respects. The Power Company alone appealed. It asserts that Judge Moore committed legal error in each of these respects: (1) That he erred in setting aside the order making Herman-Sipe and the Casualty Company parties; and (2) that he erred in striking from the amended answer of the Power Company its third-party action against Herman-Sipe and the Casualty Company for indemnity.

Eddy S. Merritt and Patrick & Harper for the plaintiff Orvin O. Hunsucker, appellee.

Thomas P. Pruitt, E. S. Delaney, Jr., and A. Y. Arledge for the original defendant Carolina Power & Light Company, appellant.

Jones & Small and Sigmon & Sigmon for the additional defendant Herman-Sipe & Company, appellee.

Jones & Small for the additional defendant United States Casualty Company, appellee.

ERVIN, J. It is advisable to note at the outset certain well settled rules of the common law which were accorded full recognition in this State before the adoption of the Workmen's Compensation Act.

Under the common law, an injured person can sue any one or all of several joint tort-feasors whose negligent acts or omissions unite to produce his injury. *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690; *Bechtler v. Bracken,* 218 N.C. 515, 11 S.E. 2d 721; *Smith v. Sink,* 210 N.C. 815, 188 S.E. 631; *Ridge v. High Point,* 176 N.C. 421, 97 S.E. 369; *Sircey v. Rees' Sons,* 155 N.C. 296, 71 S.E. 310; *Dillon v. Raleigh,* 124 N.C. 184, 32 S.E. 548.

The general rule of the common law is that there is no right to indemnity as between joint tort-feasors. *Taylor v. Construction Co.,* 195 N.C. 30, 141 S.E. 492; *Bowman v. Greensboro,* 190 N.C. 611, 130 S.E. 502. This general rule is subject to certain well defined exceptions or limitations, which coalesce in the doctrine that a party secondarily liable in a tort action is entitled to indemnity from the party primarily liable, even in cases where both parties are denominated joint tort-feasors.

One of these exceptions or limitations rests solely upon a difference between the kinds of negligence of two tort-feasors, and comes into play when the active negligence of one tort-feasor and the passive negligence of another tort-feasor combine and proximately cause an injury to a third person. *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648; *Slattery v. Marra Bros.,* 186 F. 2d 134; 65 C.J.S., Negligence, section 102. In such case, the passively negligent tort-feasor, who is compelled to pay damages to the injured person on account of the injury, is entitled to indemnity from the actively negligent tort-feasor. *Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118.

The rationale of this exception or limitation is similar to that which underlies the entire law of indemnity. 42 C.J.S., Indemnity, sections 2 and 23. It is simply this: The actively negligent tort-feasor and the passively negligent tort-feasor are both liable in damages to the injured third person for the joint wrong. As between themselves, however, the primary liability for the damages rests upon the actively negligent tort-feasor because of the difference in the kinds of negligence of the two tort-feasors. When the passively negligent tort-feasor is forced to pay the damages to the injured third person, he discharges the obligation for which the actively negligent tort-feasor is primarily liable, and for this reason is entitled to indemnity from him. *Clothing Store v. Ellis Stone & Co., supra; Johnson v. Asheville,* 196 N.C. 550, 146 S.E. 229; *Taylor v. Construction Co., supra; Bowman v. Greensboro, supra; Hipp v. Farrell,* 169 N.C. 551, 86 S.E. 570; *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859; *Doles v. R. R.,* 160 N.C. 318, 75 S.E. 722, 42 L.R.A. (N.S.) 67; *Commissioners v. Indemnity Co.,* 155 N.C. 219, 71 S.E. 214; *Gregg v. Wilmington,* 155 N.C. 18, 70 S.E. 1070.

Although it is bottomed on the liability of the actively negligent tort-feasor and the passively negligent tort-feasor to the same person for the joint wrong, this exception or limitation was ingrafted on the general rule denying indemnity by judicial decisions during the golden age of the *quasi*-contract when judges resorted to legal fictions to lend the appearance of legal orthodoxy to new rules of law evolved by their own imaginations. The old-time judges said that the duty imposed by law upon the actively negligent tort-feasor to reimburse the passively negligent tort-feasor for the damages paid by him to the victim of their joint tort was

based on an implied contract, meaning a contract implied in law from the circumstance that the passively negligent tort-feasor had discharged an obligation for which the actively negligent tort-feasor was primarily liable. And this is all the courts mean today when they declare that the right of the passively negligent tort-feasor to indemnity from the actively negligent tort-feasor rests upon an implied contract. There is, of course, in such case no contract implied in fact. This is necessarily so because contracts implied in fact are true contracts based on consent. *Queen v. DeHart,* 209 N.C. 414, 184 S.E. 7; *Montgomery v. Lewis,* 187 N.C. 577, 122 S.E. 374; 12 Am. Jur., Contracts, section 6; 17 C.J.S., Contracts, sections 4 and 6.

When an employee who has accepted and is bound by the provisions of the North Carolina Workmen's Compensation Act suffers an injury by accident arising out of and in the course of his employment as the proximate consequence of the active negligence of his employer and the passive negligence of a third party, he can claim the compensation allowed by the Workmen's Compensation Act for his injury from his employer and the insurance carrier. He can also sue the negligent third party for the damages resulting from his injury in a common law action of tort in case neither his employer nor the insurance carrier brings such an action against the negligent third party within six months from the date of the injury. G.S. 97-10. The injured plaintiff has pursued these courses in the instant cause.

This brings us to the chief question arising on this appeal. Does the North Carolina Workmen's Compensation Act abrogate the common law right of a third party to recover indemnity from an employer for damages which the third party may be compelled to pay to an injured employee on account of a compensable injury proximately caused by the active negligence of the employer and the passive negligence of the third party?

Counsel for the appellant admit that this inquiry must be answered in the affirmative unless we repudiate as unsound what was said by us in the seventh subdivision of the opinion in the recent case of *Lovette v. Lloyd,* 236 N.C. 663, 73 S.E. 2d 886. They assert with much earnestness and eloquence that we should take that course. They insist that the construction put upon the North Carolina Workmen's Compensation Act in the *Lovette case* is grossly unjust to the passively negligent third party; that diligent research indicates that the *Lovette case* is not supported by a single authority in any jurisdiction; that we fell into error in the *Lovette case* because we overlooked a fundamental distinction between the statutory right of one joint tort-feasor to demand contribution from another joint tort-feasor in equal fault and the common law right of a passively negligent joint tort-feasor to require indemnity from an actively

negligent joint tort-feasor; and that the *Lovette case* cannot be reconciled with the North Carolina Workmen's Compensation Act.

The sincerity and zeal of the able attorneys who represent the appellant prompt us to test the validity of each of these arguments, and to examine anew the considerations underlying the *Lovette case* uninfluenced by anything said or decided in *Essick v. Lexington,* 233 N.C. 600, 65 S.E. 2d 220; or *Eledge v. Light Co.,* 230 N.C. 584, 55 S.E. 2d 179.

These provisions of the Workmen's Compensation Act bear directly on our problem:

1. "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified." G.S. 97-9.

2. "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter." G.S. 97-10.

We declared, in substance, in *Lovette v. Lloyd, supra,* that the North Carolina Workmen's Compensation Act abrogates the common law right of the passively negligent third party to demand indemnity from the actively negligent employer for damages paid by the former to the injured employee. Counsel for the appellant press a twofold argument to sustain the proposition that this construction of the Workmen's Compensation Act is grossly unjust to the passively negligent third party. They assert initially that it converts the third party into a scapegoat, and sends him away into the legal wilderness bearing the sin of the employer on his head. They insist secondarily that it wrests from the third party his common law right of indemnity, and gives him nothing whatever in recompense.

Neither of these positions is wholly sound. When the passively negligent third party responds in damages to the injured employee, he is not enacting in its entirety the simple role of an innocent scapegoat atoning for the sin of the employer. He is making amends for an injury which the employee would not have suffered had it not been for his own passive negligence. There is no substance in the notion that the North Carolina

Workmen's Compensation Act confers no right whatever upon the passively negligent third party. It reduces his liability in tort for the injury to the employee by the amount of the workmen's compensation received by the employee from the actively negligent employer or his insurance carrier. *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. In so doing, the North Carolina Workmen's Compensation Act is far more liberal to the negligent third party than the workmen's compensation acts of the majority of jurisdictions. Larson's Workmen's Compensation Laws, sections 75.23 and 76.22; 71 C.J., Workmen's Compensation Acts, section 1611.

Be these things as they may, the construction put on the North Carolina Workmen's Compensation Act in the *Lovette case* is not invalidated by the mere circumstance that such construction may occasion hardship or injustice to a passively negligent third party. 50 Am. Jur., Statutes, section 376. When the people of North Carolina vested the power to legislate in their General Assembly, they accepted the legal philosophy embodied in this declaration of the Roman historian Livy: "No law can possibly meet the convenience of every one: We must be satisfied if it be beneficial on the whole and to the majority." They knew, moreover, that perfect laws, like all the other absolutes, are as fabulous as the pot of gold at the rainbow's end. In consequence, they were not so foolish as to decree in their constitution that the enactments of their legislators must be perfect in conception and just in execution.

Counsel for the appellant assert that an extensive investigation on their part indicates that there is not a single judicial decision in any jurisdiction supporting the views respecting indemnity expressed in the seventh subdivision of the opinion in the *Lovette case.* They cite the twenty-two cases hereinafter mentioned to sustain this contention.

Much confusion is avoided if constant heed is paid to the significant and simple circumstance that the employer, *i.e.,* Herman-Sipe, had no contract with the appellant, or any other legal relation with it except that of joint tort-feasor.

Despite their undoubted diligence in searching for authorities, counsel for the appellant overlooked *Congressional Country Club v. Baltimore & Ohio R. Co.,* Md. Ct. of App., 1950, 71 A. 2d 696; *Perdue v. Brittingham,* 186 Md. 393, 47 A. 2d 491; *Slattery v. Marra Bros., supra;* and *Bankers Indemnity Co. v. Cleveland Hardware & Forging Co.,* 77 Ohio App. 121, 62 N.E. 2d 180, which involve precisely the same legal issues as those joined between the appellant and the employer in the case at bar. These four authorities expressly hold that the exclusive liability and remedy clauses in the Workmen's Compensation Acts of Maryland, New Jersey, and Ohio abrogate the common law right of the passively negligent third party to recover indemnity from the actively negligent employer for

damages which the third party is compelled to pay to the injured employee on account of a compensable injury. The Federal Longshoremen's and Harbor Workers' Compensation Act contains exclusive liability and remedy clauses somewhat similar to those incorporated in workmen's compensation acts. 33 U.S.C.A., section 905. The search made by counsel for the appellant failed to unearth *American Mutual Liability Ins. Co. v. Matthews,* 182 F. 2d 322, and *Standard Wholesale Phosphate & Acid Works, Inc., v. Rukert Terminals Corp.,* 193 Md. 20, 65 A. 2d 304, which hold, in substance, that the Federal Longshoremen's and Harbor Workers' Compensation Act forecloses the common law right of the passively negligent third party to demand indemnity from the actively negligent employer for damages which the third party is forced to pay to the injured employee on account of a compensable injury, and that in consequence the passively negligent third party cannot call on the actively negligent employer for indemnity for such damages unless the actively negligent employer has actually bound himself by contract to pay such indemnity. See, also, in this connection: *Lundberg v. Prudential Steamship Corp.,* 102 F. Supp. 115.

We return at this point to the cases cited by appellant. *Hitaffer v. Argonne Co.,* 183 F. 2d 811, the *S. S. Samovar,* 72 F. Supp. 574, the *Tampico,* 45 F. Supp. 174, *Schubert v. Schubert Wagon Co.,* 249 N.Y. 253, 164 N.E. 42, 64 A.L.R. 293, *Wright v. Wright,* 229 N.C. 503, 50 S.E. 2d 540, *Koontz v. Messer,* 320 Pa. 487, 181 A. 792, and *Murray v. Lavinsky,* 120 Pa. Super. 393, 182 A. 803, require no analysis. They do not involve the precise problem presented by the appeal. Moreover, the rulings in the *S. S. Samovar case,* and the *Tampico case* are disapproved in *American Mutual Liability Ins. Co. v. Matthews, supra.*

The other fifteen cases cited by appellant are decisions recognizing the right of third parties to recover indemnity under unusual circumstances from negligent employers covered by the Workmen's Compensation Acts of California, Iowa, and New York, and the Federal Longshoremen's and Harbor Workers' Compensation Act. They are clearly distinguishable, however, from the controversy between the appellant and the employer in the case at bar in that in each of them the negligent employer had an express contract with the third party or bore some special legal relationship to him other than that arising out of participation in the joint wrong to the injured employer. Thus, in *Mirsky v. Seaich Realty Co.,* 256 App. Div. 658, 11 N.Y.S. 2d 191, *Clements v. Rockefeller,* 189 Misc. 889, 76 N.Y.S. 2d 493, *Alloco v. Gulf Oil Corp. Monroe County, N. Y.,* 1945, 59 N.Y.S. 2d 515; and *Rappa v. Pittson Stevedoring Corporation,* 48 F. Supp. 911, which involved the Workmen's Compensation Act of New York, and *Barbara v. Stephen Ransom, Inc.,* 191 Misc. 957, 79 N.Y.S. 2d 438, *Severn v. United States,* 69 F. Supp. 21, and *Green v.*

War-shipping Administration, 66 F. Supp. 393, which involved the Federal Longshoremen's and Harbor Workers' Compensation Act, the employer was obligated by an express contract to indemnify the third party for the damages which the third party was compelled to pay to the injured employee. In *Westchester Lighting Co. v. Westchester County Small Estates Corp.,* 278 N.Y. 175, 15 N.E. 2d 567, and *Burris v. American Chicle Co.,* 120 F. 2d 218, which involved the Workmen's Compensation Act of New York, and *American District Telegraph Co. v. Kittleson,* 179 F. 2d 946, which involved the Workmen's Compensation Act of Iowa, and *McFall v. Compagnie Maritime Belge,* 304 N.Y. 314, 107 N.E. 2d 463, and *Rich v. United States,* 177 F. 2d 688, which involved the Federal Longshoremen's and Harbor Workers' Act, the negligent employer was doing work for the third party. He was required to indemnify the third party for damages paid to an injured employee because he had breached his independent contractual duty to the third party to perform the work with due care. In *Baugh v. Rogers,* 24 Cal. 2d 200, 148 P. 2d 633, 152 A.L.R. 1043, which involved the Workmen's Compensation Act of California, and *Tabor v. Stewart,* 277 App. Div. 1075, 100 N.Y.S. 2d 697, and *Gorham v. Arons,* New York County, 1947, 76 N.Y.S. 2d 850, which involved the Workmen's Compensation Act of New York, the third party and the employer occupied a special legal relationship other than that arising out of their participation in the joint wrong to the injured employer, and the special legal relationship under local law imposed upon the employer the obligation to indemnify the third party. We deem it proper to make certain observations at this juncture. Our construction of the *Westchester Lighting Company case* is in substantial accord with those put upon it by the United States Court of Appeals for the Second Circuit in *American Mutual Liability Ins. Co. v. Matthews, supra,* and Professor Arthur Larson in section 76.43 of his illuminating treatise on the Law of Workmen's Compensation. Moreover, our interpretation of the *Kittleson case* harmonizes with that of the United States Court of Appeals for the Second Circuit in *Slattery v. Marra Bros., supra.*

The fifteen cases under present scrutiny are not really inconsistent with the general rule enunciated in *Slattery v. Marra Bros.* and the other decisions noted above that the Workmen's Compensation Acts and the Federal Longshoremen's and Harbor Workers' Compensation Act abrogate the common law right of the passively negligent third party to recover indemnity from the actively negligent employer for damages which the third party is compelled to pay to the injured employee on account of a compensable injury. They merely hold that the general rule is subject to exceptions, and that the exceptions come into play when, and only when, the third party has an independent right to call on the employer for indemnity because of some express contract between the third

party and the employer, or because the employer stands in some special legal relationship to the third party other than that arising out of their participation in the joint wrong to the employee.

It was expressly held in *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613, that the North Carolina Workmen's Compensation Act abrogates the statutory right of a negligent third party to recover contribution from a negligent employer in equal fault where the third party is compelled to pay damages to an injured employee on account of a compensable injury.

Counsel for the appellant assert that there is a fundamental distinction between the right of indemnity and the right of contribution; that the fundamental distinction between the two rights enables the right of indemnity to survive the workmen's compensation act, and causes the right of contribution to succumb to it; that we overlooked the fundamental distinction between the two rights when the *Lovette case* was before us; and that in consequence of our oversight we erroneously concluded that the *Brown case* supports the proposition that the North Carolina Workmen's Compensation Act also abrogates the common law right of the passively negligent third party to obtain indemnity from the actively negligent employer. They insist, moreover, that the *Lovette case* cannot be reconciled with the Workmen's Compensation Act.

Counsel for appellant explain their theories respecting the rights of contribution and indemnity and the incidence of the workmen's compensation act on them in this fashion:

1. The provisions of the North Carolina Workmen's Compensation Act incorporated in G.S. 97-9 and G.S. 97-10 do this and nothing more: They extinguish the right of the injured employee or anyone claiming through him to sue the employer for damages on account of an injury by accident in the employment.

2. The common law right of the passively negligent third party to recover indemnity from the actively negligent employer is based on an implied contract between the third party and the employer. Since it is independent of the right of the injured employee to sue the employer for damages, the right of indemnity is not affected in any way by the Workmen's Compensation Act.

3. The statutory right of the negligent third party to demand contribution from the negligent employer in equal fault is based on the subrogation of the third party to the right of the injured employee to sue the employer for damages. Since it is claimed by the third party through the injured employee, the right of contribution is abrogated by the Workmen's Compensation Act.

The *Brown case* affords no comfort to the appellant. It does not turn upon any supposed distinction between the statutory right to contribution and the common law right to indemnity. Its rationale can be applied just

as readily to defeat indemnity as to deny contribution. Counsel for the appellant interject the *Brown case* merely because they realize that it is a lion in their path, and that they must distinguish it from the case at bar if their client is to prevail.

We are unable to accept the arguments and theories of counsel for the appellant on the present phase of the appeal. When the jargon of the *quasi*-contract is laid aside, it is obvious that there is no fundamental distinction between the right of contribution and the right of indemnity. Neither right is based on any theory of subrogation to the rights of the injured person. *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269, 11 A.L.R. 2d 221; 18 C.J.S., Contribution, section 1; 42 C.J.S., Indemnity, section 3. Both rights rest on principles of equity and natural justice. *Moore v. Moore,* 11 N.C. 358, 15 Am. Dec. 523; *Allen v. Wood,* 38 N.C. 386; 18 C.J.S., Contribution, section 2; 42 C.J.S., Indemnity, section 20.

As we have seen, the judge-made right of the passively negligent joint tort-feasor to demand indemnity from the actively negligent joint tort-feasor is bottomed on the proposition that if the party secondarily liable on an obligation is compelled to pay the obligation, he is entitled to full reimbursement from the party primarily liable on the obligation. When it created the right of contribution between joint tort-feasors in equal fault by the statute now codified as G.S. 1-240, the General Assembly did not assign a reason for its action. It is safe to assume, however, that the General Assembly was moved to enact this legislation by the reason underlying the entire law of contribution, namely, that where one person has been compelled to pay money which others were equally bound to pay, each of the latter in good conscience should contribute the proportion which he ought to pay of the amount expended to discharge the common burden or obligation. *Azzolina v. Order of Sons of Italy,* 119 Conn. 681, 179 A. 201; *Harvey v. Oettinger,* 194 N.C. 483, 140 S.E. 86; *Lancaster v. Stanfield,* 191 N.C. 340, 132 S.E. 21.

The construction which the appellant puts on the relevant provisions of the North Carolina Workmen's Compensation Act is too narrow. It is, moreover, in irreconcilable conflict with numerous well considered decisions.

This Court has held without variableness or shadow of turning that the exclusive remedy clause of the North Carolina Workmen's Compensation Act, *i.e.,* G.S. 97-10, relieves the employer of liability to his employee as a tort-feasor under the law of negligence for an injury by accident in the employment, and imposes upon him in its stead an absolute liability irrespective of negligence to pay compensation to his employee for any injury by accident arising out of and in the course of the employment. *Tscheiller v. Weaving Co.,* 214 N.C. 449, 199 S.E. 623; *Lee v.*

American Enka Corp., 212 N.C. 455, 193 S.E. 809; *Bright v. Motor Lines*, 212 N.C. 384, 193 S.E. 391; *Slade v. Hosiery Mills*, 209 N.C. 823, 184 S.E. 844; *Johnson v. Hughes*, 207 N.C. 544, 177 S.E. 632; *McNeely v. Asbestos Co.*, 206 N.C. 568, 174 S.E. 509; *Pilley v. Cotton Mills*, 201 N.C. 426, 160 S.E. 479; *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266.

Since it relieves the employer of liability to his injured employee as a tort-feasor, the North Carolina Workmen's Compensation Act abrogates both the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault, and the common law right of a passively negligent third party to demand indemnity from an actively negligent employer. This is necessarily so for the very simple reason that one party cannot invoke either of these rights against another party unless both of them are liable to the same person as joint tort-feasors. The validity of this consideration is made crystal clear by *Justice George W. Connor* in the *Brown case* and *Chief Judge Learned Hand* in *Slattery v. Marra Bros., supra.*

When all is said, we cannot adjudge that an actively negligent employer is primarily liable for damages paid to an injured employee by a passively negligent third party in the face of a positive legislative declaration that the employer is not liable for such damages at all.

The conclusion that the North Carolina Workmen's Compensation Act abrogates the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault, and the common law right of a passively negligent third party to demand indemnity from an actively negligent employer is also supported by the exclusive liability clause of G.S. 97-9, which provides that an employer who accepts the provisions of the Act and secures the payment of compensation to his employees according to its terms "shall only be liable to any employee who elects to come under" the Act "for personal injury or death by accident to the extent and in the manner . . . specified" in the Act. This clause manifests the legislative intent that the liability of the employer is to be limited to the compensation payable by him on account of the injury or death of his employee. To say that this legislative intent is to be set at naught and that the injured employee or his personal representative is to receive additional money through a negligence action from the employer merely because the additional money passes through the hands of a third party in the guise of contribution or indemnity is to lose the substance of law by grasping at its shadow. This declaration of the Court of Appeals of Ohio is as applicable to G.S. 97-9 as it is to the Workmen's Compensation Act of Ohio: "For the obligations thus imposed upon the employer under the Workmen's Compensation Act the employer is relieved of any liability at common law because of such injuries, death or occupational

diseases that befall his employees while acting in the course and scope of their employment, and it makes no difference whether the claim is presented by the employee or one who claims the right of retribution because of damages which he has been compelled to pay such employee."

What has been said demonstrates the soundness of the views expressed in the *Lovette case,* and the propriety of the order striking portions of the appellant's answer. The ruling on the motion to vacate the order making additional parties finds support in the *Lovette case* and *Clark v. Bonsal,* 157 N.C. 270, 72 S.E. 954, 48 L.R.A. (N.S.) 191.

Affirmed.

LINDSAY BRADFORD, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF JOHN M. W. HICKS, DECEASED, v. MARGARET WELLS JOHNSON, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF JOHN HICKS JOHNSON, DECEASED; MARGARET JOHNSON, A MINOR; BERTHA LEIGH JOHNSON, A MINOR; JOHN HICKS JOHNSON, JR., A MINOR; FRANK PAGE HICKS, WILLIAM L. WYATT, WILLIAM L. WYATT, JR., EDGAR MARSHALL WYATT, ANNIE CATHERINE WYATT, FRANCES WYATT NIPPER; WILLIAM L. WYATT, III; A MINOR; DIANNE HOUSTON WYATT, A MINOR; EMILY HUGHES WYATT, A MINOR; VINCENT CHARLES DICKENSON WYATT, A MINOR; EDGAR MARSHALL WYATT, JR., A MINOR; ROBERT J. WYATT, MARY EUGENIA WYATT THOMAS, ROBERT J. WYATT, JR., EDITH WYATT NEWBOLD; GENIE CHRISTIAN THOMAS, A MINOR; ROBERT J. WYATT, III, A MINOR; HOWARD LYON WYATT, A MINOR; ROBERTA NEWBOLD, A MINOR; ARCH NEWBOLD, JR., A MINOR; LOUISE WYATT NORRIS, MARY NORRIS COOPER, LOUISE NORRIS RAND, MARION NORRIS GRABAREK; CARL LLOYD COOPER, A MINOR; DORIS COOPER, A MINOR; MARGARET LOUISE RAND, A MINOR; EDWARD NORRIS RAND, A MINOR; R. W. GRABAREK, JR., A MINOR; LOUISE NORRIS GRABAREK, A MINOR; ETHEL HICKS WELDON, ELIZABETH WELDON SLY, MARGARET B. WELDON JONES, NATHANIEL WELDON, JR.; JOHN E. SLY, JR., A MINOR; WARREN FREDERICK SLY, A MINOR; MARGARET ELIZABETH JONES, A MINOR; FRANCES HICKS GARRETT, BERTHA GARRETT ENTWISTLE, FRANCES REID GARRETT; GLENDA T. GARRETT, A MINOR; BERTHA HICKS WILLIAMSON, WILLIAM V. WILLIAMSON, JR.; HARRISON H. WILLIAMSON, A MINOR; FRANCES H. WILLIAMSON, A MINOR; SARA NEAL WILLIAMSON, A MINOR; MINNIE HICKS WILLIAMS; RALPH W. WILLIAMS, JR., A MINOR; JUDITH LEGRANDE WILLIAMS, A MINOR; CHARNER M. WILLIAMS, A MINOR; JULIA HICKS ADE; SANDRA W. ADE, A MINOR; RAYMOND ADE, JR., A MINOR; WILLIAM B. HICKS ADE, A MINOR; JOHN HICKS ADE, A MINOR; TIMOTHY QUENTIN ADE, A MINOR; JULIA LOUISE ADE, A MINOR; MARY JOHNSON HART; ELIZABETH HICKS HART, A MINOR; JULIA DRANE HART, A MINOR; JULIAN DERYL HART, JR., A MINOR; JOHN MARTIN HART, A MINOR; WILLIAM HART, A MINOR;

MARGARET LOUISE HART, A MINOR; MARGARET LOUISE JOHNSON, MARION F. WYATT, MARION F. WYATT, JR.; BARBARA ANN WYATT, A MINOR; MARION F. WYATT, III, A MINOR; JIMMIE J. WYATT, A MINOR; MARY RENNIE NEWBOLD, A MINOR; BERTHA HICKS TURNER; THE UNBORN ISSUE OR LINEAL DESCENDANTS OF THE BLOOD OF JOHN HICKS JOHNSON, FRANK PAGE HICKS, WILLIAM L. WYATT, ROBERT J. WYATT, LOUISE WYATT NORRIS, ETHEL HICKS WELDON, FRANCES HICKS GARRETT, BERTHA HICKS WILLIAMSON, MINNIE HICKS WILLIAMS, JULIA HICKS ADE, MARY JOHNSON HART, MARGARET LOUISE JOHNSON, MARION F. WYATT, MARION F. WYATT, JR., AND MARY RENNIE NEWBOLD; ANY PERSONS WHO MAY HEREAFTER BE ADOPTED BY ANY OF THE NEPHEWS OR NIECES OF JOHN M. W. HICKS, DECEASED, AND THE ISSUE OR LINEAL DESCENDANTS OF THE BLOOD OF ANY SUCH ADOPTED CHILD; ANY PERSONS WHO MAY HEREAFTER BE ADOPTED BY ANY CHILD OF ANY OF THE NEPHEWS OR NIECES OF JOHN M. W. HICKS, DECEASED, AND THE ISSUE OR LINEAL DESCENDANTS OF THE BLOOD OF ANY SUCH ADOPTED CHILD.

(Filed 29 April, 1953.)

1. Wills § 34c—

The statutes relating to the right of adopted children to take as distributees and heirs, G.S. 29-1, Rule 14; G.S. 28-149 (10); G.S. 48-23, have no bearing upon whether an adopted child takes under a will except in so far as they establish and define the parent and child relationship between the adoptive parents and the adopted child, but whether an adopted child comes within a particular class designated by testator as "children," "issue," "descendants," etc., must be determined by ascertaining the intent of testator.

2. Wills § 31—

In ascertaining the intent of testator it is permissible, when necessary to ascertain such intent, for the will to be considered in the light of the testator's knowledge of certain facts and circumstances existing at the time of or after the execution of the will.

3. Wills § 34c—

As a general rule, in the absence of language showing a contrary intent, a child adopted either before or after the execution of the will, but prior to the death of testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he desired, such adopted child shall be included in the word "children" when used to designate a class which is to take under the will.

4. Same—

It appeared in this case that testator knew of the adoption of a child by his nephew, gave the child Christmas presents similar to those given to each natural-born child of his other nieces and nephews, but did not include such adopted child with testator's natural-born great nieces and nephews as beneficiary of an irrevocable trust created after the adoption. Some years later testator executed a codicil materially changing his will, but without provision excluding the adopted child from a devise of the *corpus* of testamentary trusts to the class. *Held:* The adopted child is entitled under the will to share in the *corpus* of the trusts.

5. Same—

Under a testamentary provision for distribution of personalty among the children of a named person, a child adopted by such person after the testator's death does not take.

6. Same—

Under a provision in a will for division of personalty among "the living issue" of a named person, an adopted child of such person may not take, since the word "issue" means "lawfully begotten heirs of the body," and therefore the term may not include an adopted child.

APPEAL by J. Francis Paschal, guardian *ad litem,* from *Harris, J.,* January Term, 1953, of WAKE.

This action was instituted on 12 July, 1952, pursuant to the provisions of the Declaratory Judgment Act (G.S. 1-253 through G.S. 1-267), for advice and instruction to the plaintiff as trustee of the trusts created under the will of John M. W. Hicks, deceased, with respect to the questions hereinafter set out.

The facts necessary to an understanding of the questions involved in this appeal are as follows:

1. The testator executed his will on 8 December, 1926, and added a codicil thereto on 1 March, 1935. He died 17 March, 1944. At the time of his death he was a citizen and resident of Wake County, N. C., and his will and the codicil thereto have been duly probated and recorded in the office of the Clerk of the Superior Court in the aforesaid county.

2. Item Seven of the testator's will established twelve equal residuary trusts, one for each of his surviving nieces and nephews (except Frank Page Hicks, for whom it is stated in the codicil other provision had been made by the testator), to wit: William L. Wyatt, Robert J. Wyatt, Marion F. Wyatt, John Hicks Johnson, Louise Wyatt Norris, Ethel Hicks Weldon, Frances Hicks Garrett, Bertha Hicks Williamson, Minnie Hicks Williams, Julia Hicks Ade, Mary Johnson Hart, and Margaret Louise Johnson. The will provides that the beneficiary of each trust shall receive the income therefrom for life only. The *corpus* of each of these twelve trusts consists entirely of personal property, and no property therein is traceable to realty.

3. The plaintiff is the duly appointed, qualified, and acting trustee of the trusts set up under Item Seven of the will and the codicil thereto.

4. The pertinent provisions of the will and codicil which we are called upon to construe with respect to the distribution of the *corpus* of one of the above trusts, the beneficiary thereunder, to wit: John Hicks Johnson, having died on 2 July, 1951 (interpolating into the will proper the altering provisions of the codicil), are as follows:

"Each such respective separate and distinct trust shall cease and determine by the death of the respective life beneficiary of such separate and distinct trust.

"Upon the termination of any of the said several respective separate and distinct trusts the capital of that said respective trust shall be divided so far as practicable in kind among the surviving children of my nephews including children of Frank Page Hicks and the surviving children of my nieces at the time of the termination of that respective separate and distinct trust and shall be transferred and paid over to them absolutely and free from any trust and in equal shares, share and share alike, *per capita* and not *per stirpes,* the living issue of any predeceased child of any of my nephews and the living issue of any predeceased child of any of my nieces to take the share which his, her or their parent would have taken if living and the same to be divided between them, *per stirpes* and not *per capita.* But in the event that there shall be no one living of those among whom a division should be made as outlined above, then the capital of said trust shall be converted into cash and the cash shall be divided among the surviving descendants of William J. Hicks and his wife, Julia L. Hicks, my father and mother, in equal shares, *per capita* and not *per stirpes.*"

5. The defendants are all persons, born and unborn, who have or might have an interest in any of the twelve trusts.

6. On petition of the plaintiff, guardians *ad litem* were appointed as follows:

(a) J. Francis Paschal, guardian *ad litem* for the minor and unborn issue or lineal descendants of the blood of the nephews and nieces of the testator, John M. W. Hicks.

(b) William T. Joyner, Jr., guardian *ad litem* for the minor and unborn issue or lineal descendants of the blood of Marion F. Wyatt, Jr. Marion F. Wyatt, Jr., is the adopted son for life of Marion F. Wyatt, having been adopted on 2 December, 1929.

(c) Joseph C. Moore, Jr., guardian *ad litem* for Mary Rennie Newbold and her unborn issue or lineal descendants. Mary Rennie Newbold is the adopted daughter of Edith Wyatt Newbold (a daughter of Robert J. Wyatt). This child was adopted on 9 January, 1952.

(d) James H. Pou Bailey, guardian *ad litem* for any person and the issue and lineal descendants of such person, who may hereafter be adopted by any of the testator's nieces or nephews.

7. Each of the guardians *ad litem* filed an answer and appeared at the trial below in behalf of his wards. Answer was also duly filed by Marion F. Wyatt, Jr., and he was represented at the trial by counsel. No other defendants filed answer.

8. When this cause came on for hearing in the court below all parties who had filed pleadings appeared, waived trial by jury, and stipulated and agreed that the court should hear the entire matter without the inter vention of a jury, and render judgment in or out of term.

9. Among the findings of fact by the court are these: (a) That the testator, John M. W. Hicks, knew of the adoption of Marion F. Wyatt, Jr., by Marion F. Wyatt some fourteen years prior to the death of the testator; that at each Christmas he gave to Marion F. Wyatt, Jr., a present identical with that given to the natural-born children of his nieces and nephews; that this present was usually a five-dollar bill; (b) that in the vault at the testator's home there was found, after the death of testator, an envelope with the names of Marion F. Wyatt and wife, Maude Henley Wyatt, and Marion F. Wyatt, Jr., written thereon in testator's handwriting; that this envelope contained three five-dollar gold pieces; that similar envelopes were found in the vault for each of the families of the testator's nieces and nephews and that the contents of each envelope were similar; (c) that the testator in December, 1941, established a trust for the benefit of 31 named children of his nieces and nephews; that the 31 children named by the testator to share in the proceeds of the trust were all of the natural-born children of the testator's nieces and nephews then living; that the name of Marion F. Wyatt, Jr., was not included among the beneficiaries of this trust; that this trust has produced an income varying from approximately $37,000 to approximately $55,000 a year; and (d) that the testator kept in his own handwriting a book denoted by him as the "Family Record"; included therein were notations of the marriages of each of his nieces and nephews and of the births of children to each of these marriages; with the entry of a birth, there appeared the date and place and sometimes the baby's weight; on the appropriate pages relating to Marion F. Wyatt, there is an entry of the birth of a daughter now deceased; there is no entry for Marion F. Wyatt, Jr., nor does his name appear anywhere in this book.

10. It was stipulated in the case on appeal by counsel for the plaintiff and the defendant, Marion F. Wyatt, Jr., and the several guardians *ad litem,* among other things, that summonses in this action were regularly issued and served on the defendants; that all parties were properly before the court; that the facts duly agreed upon are incorporated in the judgment in the findings of fact by the court.

11. The court concluded as a matter of law that the word "children" and the word "child," as used in Item Seven of the will of John M. W. Hicks, include Marion F. Wyatt, Jr., and also include, as to any trust which thereafter terminates, any person who may hereafter be adopted for life by any of testator's nieces or nephews. The court further held that the word "issue" as used in the same item of the will includes Mary Rennie Newbold and her issue, and also includes any person who may hereafter be adopted for life by any child of any of testator's nieces or nephews and its issue. Judgment was entered accordingly, and J. Francis Paschal, guardian *ad litem,* appeals, assigning error.

J. Francis Paschal, guardian ad litem, appellant.

Joyner & Howison for Marion F. Wyatt, Jr., appellee; W. T. Joyner, Jr., guardian ad litem, appellee; Joseph C. Moore, Jr., guardian ad litem, appellee; James H. Pou Bailey, guardian ad litem, appellee.

Mitchell, Capron, Marsh, Angulo & Cooney and Joseph B. Cheshire and Joseph B. Cheshire, Jr., for plaintiff, appellee.

DENNY, J. The plaintiff seeks the advice and instruction of the Court as to the rights and interests of all persons, born and unborn, in the residuary trusts created by the will of John M. W. Hicks, particularly as to the rights therein of any child heretofore or hereafter adopted by any of the nieces or nephews of the testator, or of any child heretofore or hereafter adopted by any child of any of the nieces or nephews of the testator. This advice and instruction is sought not only for the guidance of the trustee in distributing the *corpus* of the trust which was terminated by the death of John Hicks Johnson, but in order that the trustee may be able to distribute the *corpus* of the eleven remaining trusts as they terminate, without the necessity for further litigation with respect to questions raised in this action. Therefore, we think the appeal properly presents for determination these questions:

(1) Is Marion F. Wyatt, Jr., the child of Marion F. Wyatt (a nephew of the testator), within the meaning of the word "children" as used in Item Seven of the testator's will and, therefore, a member of the class designated to take *per capita* in the distribution of the *corpus* of the trust which terminated upon the death of John Hicks Johnson?

(2) Was it the intent of the testator to include any child or children who might be adopted by any of his nieces or nephews, after his death, within the class designated as the surviving children of his nieces and nephews, and thus enable such adopted child or children to take *per capita* in the distribution of the *corpus* of the respective trusts terminating after the adoption of such child or children?

(3) Does the word "issue" as used in Item Seven of the will include Mary Rennie Newbold and her issue and any other child who may hereafter be adopted for life by any child of any of the testator's nieces or nephews and its issue?

The statute under which Marion F. Wyatt, Jr., was adopted provided that the order of adoption should have "the effect forthwith to establish the relation of parent and child between the petitioner and the child during minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to

the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting him." C.S. 185.

The status of an adopted child with respect to the inheritance of real property and the distribution of personal property has been changed substantially by Chapter 832 of the Session Laws of 1947 (G.S. 29-1, Rule 14), Chapter 879 of the Session Laws of 1947 (G.S. 28-149 (10)), and Chapter 300 of the Session Laws of 1949 (G.S. 48-23). The pertinent portion of the 1949 Act, codified as G.S. 48-23, reads as follows: "The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property from the adoptive parents in accordance with the statutes of descent and distribution." And our present statute of distribution, G.S. 28-149 (10), provides that, "An adopted child shall be entitled by succession, inheritance, or distribution of personal property . . . by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents." Likewise, our statute of descents, G.S. 29-1, Rule 14, provides, "An adopted child shall be entitled by succession or inheritance to any real property by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents."

However, the above statutes have no bearing on the questions presented on this appeal except in so far as they establish and define the parent and child relationship between the adoptive parents and the adopted child. Whether an adopted child is entitled to take under a will is usually dependent upon whether such child comes within a particular class designated by the testator as "children," "issue," "descendants," or "heirs of the body," etc., of a designated person or persons. And whether an adopted child comes within such class must be determined by ascertaining the intent of the testator. 57 Am. Jur., Wills, section 1174, page 768.

The intent of a testator is ordinarily to be ascertained from an examination of his will from its four corners. Even so, it is permissible, when necessary in order to ascertain such intent, for the Court to consider the will in light of the testator's knowledge of certain facts and circumstances existing at the time of or after the execution of the will. *Trust Co. v. Waddell, ante,* 342, 75 S.E. 2d 151; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12; *Trust Co. v. Bd. of National Missions,* 226 N.C. 546, 39 S.E. 2d 621; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356.

It seems to be the general rule that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the

testator knew of the adoption in ample time to have changed his will so as to exclude such child, if he so desired, such adopted child will be included in the word "children" when used to designate a class which is to take under the will. *Smyth v. McKissick,* 222 N.C. 644, 24 S.E. 2d 621; *Munie v. Gruenewald,* 289 Ill. 468, 124 N.E. 605; *Beck v. Dickinson,* 99 Ind. App. 463, 192 N.E. 899; *Mooney v. Tolles,* 111 Conn. 1, 149 A. 515, 70 A.L.R. 608; *Isaacs v. Manning,* 312 Ky. 326, 227 S.W. 2d 418; *In re Upjohn's Will,* 304 N.Y. 366, 107 N.E. 2d 492. *Cf. Phillips v. Phillips,* 227 N.C. 438, 42 S.E. 2d 604, and *Wilson v. Anderson,* 232 N.C. 212, 59 S.E. 2d 836; *S. c.,* 232 N.C. 521, 61 S.E. 2d 447, in which the rights of adopted children were determined by the construction of statutes, not testamentary provisions.

In the case of *Smyth v. McKissick, supra,* Ellison A. Smyth created an irrevocable trust agreement in 1932 for the benefit of certain named beneficiaries. Thereafter, in 1934 he executed a will under the terms of which the remainder of his estate was put in trust for the benefit of the same beneficiaries named in the trust indenture. The final distribution of the *corpus* of the trust under the will was directed to be made "upon the death of all," the testator's children and the death or remarriage of his daughter-in-law, but in no event earlier than 1944. The estate was then to be distributed to the children of his deceased children. Thomas Smyth, one of the children of James Adger Smyth (a son of the testator who died prior to the execution of the will), and a grandson of the testator, Ellison A. Smyth, was married in November, 1932, to Frances Thrower Smyth. Having no children born to them, in 1938, they adopted for life, David Hutchinson Smyth. It was admitted that the testator knew and approved of the adoption. He treated this child as he did the children born to his other grandchildren, giving him presents and keeping a photograph of him in his home. Thomas Smyth died in April, 1941, leaving a last will and testament by which he disposed of all his property to his widow. The testator, Ellison A. Smyth, died 3 August, 1942.

This Court, in passing upon the interest of the adopted child in the irrevocable trust which was created in 1932, held that the trust indenture was effective from the date of its execution and the adopted child took nothing thereunder. But, since the will did not become effective until the death of the testator and the testator knew and approved of the adoption, the adopted child took under the provisions of the will. The Court, in speaking through *Devin, J.* (now *Chief Justice*), said: "The will of Ellison A. Smyth spoke from his death in 1942. At that time Thomas Smyth was dead, leaving an adopted child. David Hutchinson Smyth had become in law the child of Thomas Smyth and Frances Thrower Smyth, as respects them, as much so as if he had been born to them by natural law. While his adoption did not constitute him an heir of Ellison

A. Smyth (*Grimes v. Grimes,* 207 N.C. 778, 178 S.E. 573), yet as the lawful child of Thomas Smyth he was entitled to take in substitution and as representative of his adopting father. He was then qualified in every legal aspect, as the 'child' of Thomas Smyth, to step into his father's shoes, and as the son of his father take property rights which had been set aside for his father." *Cf. Tankersley v. Davis,* 195 N.C. 542, 142 S.E. 765.

In the instant case the testator knew of the adoption of Marion F. Wyatt, Jr., and recognized him as a child of his nephew, Marion F. Wyatt. Each Christmas he gave him a present similar to that given to each natural-born child of his nieces and nephews. But, it is argued, since Marion F. Wyatt, Jr., was not included as a beneficiary under the trust created by the testator in 1941, and all 31 of the surviving natural-born children of his nieces and nephews were included, that this fact should negative any intent on the part of the testator to include Marion F. Wyatt, Jr., in his will. We do not think that the failure to include Marion F. Wyatt, Jr., as a beneficiary under the terms of the 1941 trust agreement perforce excludes him from the will. It might be argued that the reason he was not included in the 1941 trust agreement was because he was included in the will. Furthermore, the testator made considerable changes in his will in 1935 by the execution of a codicil thereto. This codicil was executed more than six years after the adoption of Marion F. Wyatt, Jr., and the testator inserted no provision therein indicating an intent to exclude him as a member of the class he had designated to take the *corpus* of these trusts as they terminate. Hence, we concur in the ruling of the court below with respect to the right of Marion F. Wyatt, Jr., to take under the provisions of the will.

As to the second question before us, it seems to be well settled that under a testamentary provision for children of a named person, a child adopted by such person after the testator's death does not take. To hold otherwise would make it possible for property of a testator to be diverted to strangers of his blood without his knowledge or consent. Therefore, in our opinion this question should be answered in the negative and we so hold. Among the opinions from other jurisdictions in accord with this view, we cite the following: *In re Fisler,* 131 N. J. Eq. 310, 25 A. 2d 265; *Moffet v. Cash,* 346 Ill. 287, 178 N.E. 658; *Comer v. Comer,* 195 Ga. 79, 23 S.E. 2d 420, 144 A.L.R. 664; *Everitt v. LaSpeyre,* 195 Ga. 377, 24 S.E. 2d 381; *Re Nelson,* 143 Misc. 843, 258 N.Y.S. 667; *Sanders v. Adams,* 278 Ky. 24, 128 S.W. 2d 223; *Corr's Estate,* 338 Pa. 337, 12 A. 2d 76; *Wildman's Appeal,* 111 Conn. 683, 151 A. 265; *Puterbaugh's Estate,* 261 Pa. 235, 104 A. 601, 5 A.L.R. 1277; *Lichter v. Thiers,* 139 Wis. 481, 121 N.W. 153; *Casper v. Helvie,* 83 Ind. App. 166, 146 N.E. 123; *Malek v. University of Missouri,* 213 Mo. Appeal 572, 250 S.W. 614;

Parker v. Carpenter, 77 N.H. 453, 92 A. 955; *Cochran v. Cochran,* 43 Tex. Civ. App. 259, 95 S.W. 731.

What we have heretofore said is sufficient to require a negative answer to the third question posed for decision. Nevertheless, there is another impelling reason why this question should be so answered.

The testator provided in his will that, "the living issue of any predeceased child of any of my nephews and the living issue of any predeceased child of any of my nieces to take the share which he, her or their parents would have taken if living and the same to be divided among them, *per stirpes* and not *per capita.*" This necessitates a consideration of what the testator meant by the use of the word "issue." Nothing else appearing, it will be presumed that he used it in its generally accepted legal sense.

The word "issue" when used in a will is generally construed as a word of limitation and means "lawfully begotten heirs of the body." *Harrell v. Hagan,* 147 N.C. 111, 60 S.E. 909, 125 Am. St. Rep. 539; *Ford v. McBrayer,* 171 N.C. 420, 88 S.E. 736; *Bowden v. Lynch,* 173 N.C. 203, 91 S.E. 957; *Love v. Love,* 179 N.C. 115, 101 S.E. 562; *Edmondson v. Leigh,* 189 N.C. 196, 126 S.E. 497. Or its meaning may be expressed as inclusive of all persons descended from a common ancestor. Bouvier's Law Dictionary (Third Edition), Volume 1. Likewise, the natural and ordinary meaning of the word "issue" is understood to include only a child or children born of the marriage of the ancestor or their descendants. And regardless of any provisions that may be contained in an adoption law with respect to the parent and child relationship, or the right of an adopted child to take by, through, and from its adoptive parents, the adoption of a child under such law does not make such adopted child a lawfully begotten heir of the bodies of the adoptive parents.

Hence, we hold that Mary Rennie Newbold and her issue and any other child who may hereafter be adopted by any of the testator's nieces or nephews and its issue may not take under the provisions of the last will and testament of John M. W. Hicks.

The judgment of the court below will be modified in accord with this opinion.

Modified and affirmed.

L. J. POWELL (ORIGINAL PARTY PLAINTIFF) AND WIFE ZELPHIA POWELL (ADDITIONAL PARTY PLAINTIFF) v. L. F. MILLS AND WIFE HAZEL MILLS, AND CHARLES MILLS.

(Filed 29 April, 1953.)

1. Trespass to Try Title § 1—

Plaintiff in an action for the recovery of land and for trespass thereon must rely upon the strength of his own title which he must establish by some recognized legal method and, nothing else appearing, has the burden of proving title in himself and defendant's trespass.

2. Same—

In all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but there is no presumption in favor of either party to the action.

3. Adverse Possession § 9c—

A deed constitutes color of title only to the land designated and described in it, and the party claiming under a deed as color of title must by proof fit the description in the deed to the land it covers.

4. Deeds § 1a: Boundaries § 1: Frauds, Statute of, § 9—

A deed must contain a description of the land sought to be conveyed either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers, and when the language of the description is patently ambiguous, parol evidence is not admissible to aid the description.

5. Boundaries § 3c—

Ordinarily, lines should be run with the calls in the regular order from a known beginning, and reversing a call may be resorted to only when the terminous of a call may not be ascertained by running forward but can be fixed with certainty by running reversely the next succeeding line.

6. Boundaries § 5a—Description in this case held patently ambiguous and insufficient to convey land.

A call "thence south 36 deg. east to the back line" and "thence with said back line to B. F. Ormond's line in Poley Bridge Branch" *is held* too indefinite to convey land within the meaning of the statute of frauds, there being nothing in the instrument identifying "back line" or pointing to a source from which evidence *aliunde* may be sought to make certain such uncertainty, and the call to a point in the line of the contiguous property "in Poley Bridge Branch," in the light of the evidence, being insufficient to locate any point in said line, and there being no distance called for to reach the next corner, there is no definite point from which a reverse call could be run to make the description certain.

7. Adverse Possession § 9c—

A deed which is inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative as color of title.

8. Adverse Possession § 5—

A deed inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative to fix known and visible lines and boundaries as a basis for a claim of adverse possession for twenty years. G.S. 1-40.

9. Trespass to Try Title § 3—

Where, in an action to recover possession of land and for trespass, plaintiffs fail to show title to any part of the land claimed by defendants, defendants' motion to nonsuit should be allowed.

APPEAL by defendants from *Harris, J.*, at October Term, 1952, of CRAVEN.

Civil action to recover of defendants damage for alleged wrongful trespass by defendants upon lands of plaintiffs, described in the complaint, and to restrain defendants, their servants and agents from further trespass thereon.

The original plaintiff alleges in his complaint (1) that at all times mentioned therein he was the owner of and in possession of the following described land, viz.: "All that certain tract of land lying, situate and being in No. 3 Township, Craven County, on the road running from Fort Barnwell to Dover, and described as follows: BEGINNING at the back line ditch between A. B. Hawkins and C. Marshburn and runs south 14 deg. east to the end of said ditch, and thence south 12 deg. east 96 poles to a pine on the east side of said road; thence south 36 deg. east to the back line and thence with said back line to B. F. Ormond's line in Poley Bridge Branch; thence northwardly with Poley Bridge Branch to the line ditch between A. B. Hawkins and C. Marshburn; thence down said ditch to the place of BEGINNING, containing 60 acres, more or less, and being the same land conveyed by J. J. Boyd and others to A. S. Powell, 10 September, 1907, by deed registered in the office of the Register of Deeds at Craven County in Book 165, page 543; and conveyed by said A. S. Powell to plaintiff 3 December, 1917, by deed registered in said office in Book 219, page 59, and 14 September, 1926, by deed registered in said office in Book 274, page 136; the dividing line between plaintiff's land and the land of W. H. Ormond having been established by agreement made 27 October, 1944, registered in said office in Book 381, page 141; and (2) that on or about 3 June, 1948, defendants wrongfully and unlawfully entered upon said land, with their servants and agents, and there cut and carried away and converted to their own use valuable trees and timber, and threaten to continue such wrongful trespass unless restrained by the court," etc. Restraining order was signed.

Defendants, in answer filed, say that they have no knowledge or information as to any chain or title to any land claimed to be owned by plaintiff, and deny that they have trespassed upon lands described in the com-

plaint,—admitting that defendants did cut some timber on "land owned by L. F. Mills and/or wife Hazel Mills," approximately three-quarters of a mile north of any land owned or claimed to be owned by the plaintiffs.

And for further defense and counterclaim defendants aver that the title to the property of L. F. Mills and wife comes from original grant #632, dated 1 January, 1793, to John Lane, signed by Richard Dobbs Speight, the Governor, duly recorded in office of Secretary of State at Raleigh, in Book No. 76 at page 450, conveying 150 acres, which is inclusive of property owned by the defendants.

Defendants, by permission of court, amended their answer, reaffirming each and every allegation of their answer, and averred that "they own and are in possession of that certain tract of land as shown on the court map in this cause and embraced, as indicated on the map, within the following bounds: Beginning at the point indicated by the letter A and running thence to B, to C, to 5, to 4, to D, to E, to F, to G and back to A. If plaintiff claims any land embraced within said bounds, such claim or right thereto by said plaintiff is expressly denied." And defendants further deny that they have cut or removed any timber of any value from any lands owned by plaintiff.

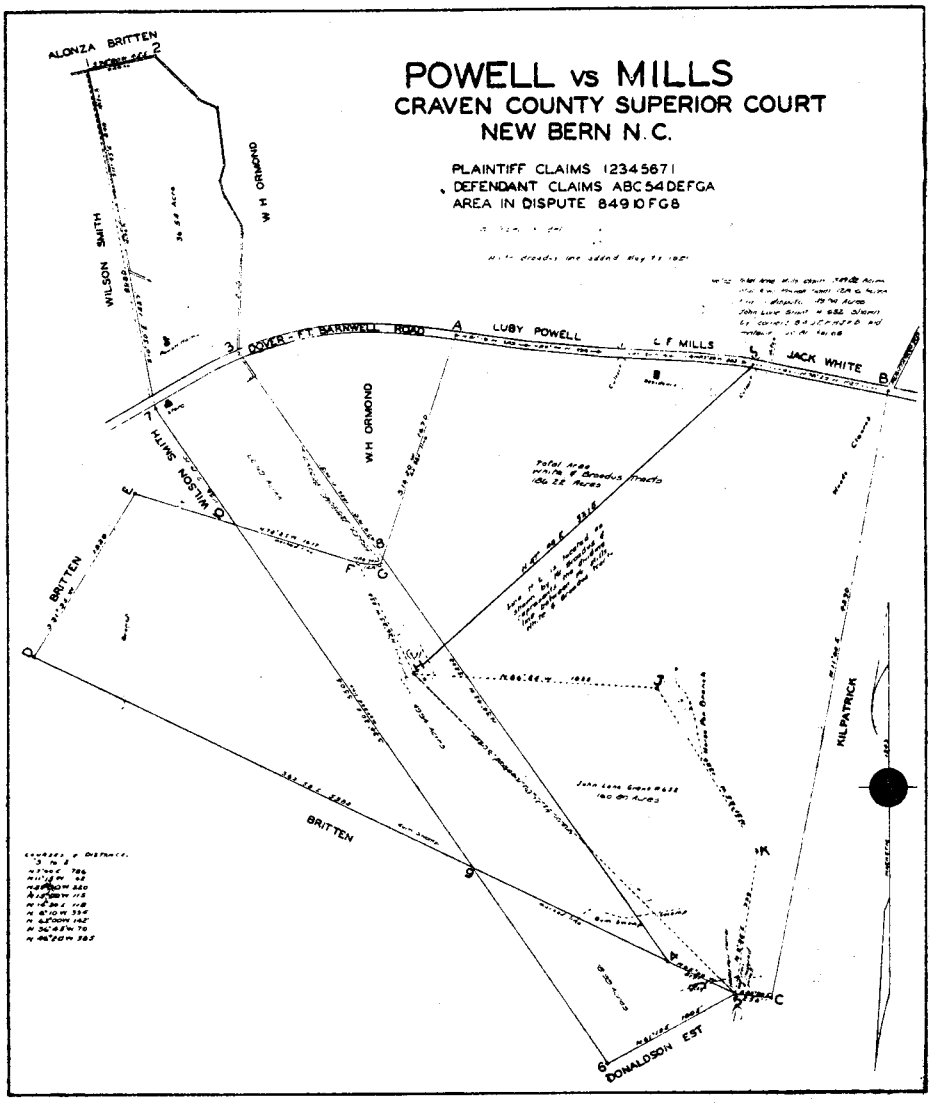
A compulsory reference was ordered at October Term, 1950.

Pending hearing before referee, Mrs. Zelphia Powell, wife of L. J. Powell, was made party plaintiff, and adopted as her complaint the complaint of her husband.

Upon the hearing before the referee plaintiff introduced into evidence, among others, (1) a deed from A. B. Hawkins and wife, Josephine Hawkins, to John Wilson and J. J. Boyd, dated 23 December, 1905, registered in Book 161 at page 177 of deed records of Craven County, and (2) a deed from John Wilson and wife and J. J. Boyd and wife to A. S. Powell, dated 10 September, 1907, registered in Book 165, at page 543, of deed records of Craven County, in each of which the description of the land purported to be conveyed thereby is the same as that set forth in the complaint of plaintiff, except that in the call "then with said line to B. F. Ormond's line in Poley Bridge Branch," as worded in the complaint, the preposition "in" is used in lieu of the preposition "of" appearing in the deed from Hawkins to Wilson and Boyd.

The court surveyor, as witness for plaintiff, identified the court map, and pointed out on it the plaintiff's contention as to the location of the land described in the above deeds, to be represented by figures 1 to 7, to 10, to 9, to 6, to 5, to 4, to 8, to 3, to 2, and back to 1. (A copy of the map is hereto attached.)

Plaintiff also offered in evidence two deeds from A. S. Powell and wife to L. J. Powell and wife Zelphia Powell, the first dated 3 December, 1917,



which contains specific description of a 35-acre tract of land purporting to be conveyed in which there are these calls: "then with the said S 28 E to Furney White's land, then with his line to Poley Bridge Branch, then with the said branch to the beginning,—the run of the said branch being the line"; and the second of which, dated 14 September, 1926, contains

the description of two tracts, one containing 15 acres, more or less, and the other containing 25 acres, more or less. The second of these tracts is described as being "known as the Boyd and Wilson tract of land," followed by a specific description substantially the same as that in the deeds from Hawkins to Wilson and Boyd, and from Boyd and Wilson to A. S. Powell, as above recited. The difference appears after the call "then south 36 E to the back line." There follows these calls: "then with said line to L. J. Powell's corner in said line; thence with L. J. Powell's line to his corner on Dover Road to L. J. Powell's line on said road on other corner." As to these deeds, plaintiff L. J. Powell testified: "I claim the property under the first deed, back to the back line and then to Poley Bridge Branch; that includes both pieces . . . I bought the first part of it and then bought the last part of it, and then I bought all of it . . . My father acquired this land from Boyd and Wilson . . . All the land in controversy came out of the land bought from Boyd and Wilson." And plaintiffs offered no evidence to locate the lines of the lands described in the deeds to them from A. S. Powell and wife—independent of their contention as to location of the lands as described in deed from Boyd and Wilson to A. S. Powell.

The surveyor pointed out on the map the W. H. Ormond land south of the Dover-Fort Barnwell Road, formerly owned by B. F. Ormond, as being represented by the letters A to G to figure 3. The evidence offered by plaintiff also tends to show that the Powell and the Ormond land as so represented adjoin. And there is some oral testimony tending to show that there was other B. F. Ormond land in the vicinity of Horse Pen Corner figure 5 on the court map.

And there is evidence tending to show that the head of Poley Bridge Branch is at the letter G shown on the map, and there is evidence that the head of it is near the figure 4. But, regardless of whether the head of it is at the letter G, or near the figure 4, all the evidence tends to show that Poley Bridge Branch runs in a northerly direction to and across the Dover-Fort Barnwell Road at 3, on to 2, and to 1—as shown on the map, and that it is the dividing line between the land claimed by Powell and the Ormond land, at least northerly from letter G shown on the map.

Plaintiffs offered evidence of acts of ownership exercised by them within the area represented on the map by the figures 10, to 9, to 6, to 5, to 4, to G, and back to 10. And there is evidence of acts of ownership exercised by defendants within the same area. It is unnecessary to undertake to recapitulate the testimony,—in view of the decision on this appeal.

After hearing, as above related, the referee filed report in which he made findings of fact, and reached conclusions of law in favor of defendants. Plaintiffs filed exceptions to both the findings of fact, and the

conclusions of law, and demanded a jury trial, upon these issues tendered by them, to wit:

"1. Are plaintiffs the owners of and entitled to the possession of the lands shown on the court map and bounded by a line beginning at the figure 10 and running thence to 6, thence to 5, thence to 4, thence to 8, thence to letter G, thence to letter F, and thence to figure 10?

"2. If so, have defendants trespassed upon said lands, as alleged by plaintiffs?

"3. What damages, if any, are plaintiffs entitled to recover of defendants?"

When the case came on for hearing in Superior Court at term time it was submitted to the jury upon these issues, and on the evidence offered by the parties and taken on the hearing before the referee.

The jury, for verdict, answered the first issue "Yes," the second "Yes," and the third "$225.00."

Thereupon the presiding judge rendered judgment adjudging that the plaintiffs are the owners of and entitled to the possession of the lands shown on the court map bounded as set out in the first issue, and ordered that a copy of the judgment, together with a copy of the map be certified by the Clerk of Superior Court to the register of deeds of Craven County, and that same be registered, and that plaintiffs recover of defendants the sum of $225.00, with interest, and the cost of the action to be taxed by the Clerk.

Defendants excepted thereto, and appeal to Supreme Court, and assign error.

L. T. Grantham, W. B. R. Guion, and R. A. Nunn for plaintiffs, appellees.

Henry P. Whitehurst, J. D. Paul, and Bland & Bland for defendants, appellants.

WINBORNE, J. While there are thirty-seven assignments of error based upon exceptions to rulings on matter of evidence adverse to defendants, and while the case on appeal discloses numerous rulings of the court on objections to matters of evidence to which assignments of error are not brought forward, from which it might be assumed that the rules of evidence were thrown to the winds, and the floodgates opened to admit incompetent testimony, the decision on this appeal turns on the assignments of error based upon exceptions to the rulings of the court in denying defendants' motions for judgment as of nonsuit at the close of plaintiffs' evidence, and renewed at the close of all the evidence. And these assignments effectively challenge the sufficiency of the description set out in the complaint to identify the land claimed by plaintiffs.

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 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; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692.

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. See also *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Smith v. Benson, supra,* and many others, including *Locklear v. Oxendine, supra,* and *Williams v. Robertson, supra.*

Moreover, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." *Williams v. Robertson, supra,* and cases cited. In the light of such presumption, apparently plaintiffs in the present action, assuming the burden of proof, have elected to show title in themselves by adverse possession, under known and visible lines and boundaries, and under color of title, which is a method by which title may be shown. But in pursuing this method a deed offered as color of title is such only for the land designated and described in it. *Davidson v. Arledge,* 88 N.C. 326; *Smith v. Fite,* 92 N.C. 319; *Barker v. R. R.,* 125 N.C. 596, 34 S.E. 701; *Johnston v. Case,* 131 N.C. 491, 42 S.E. 957; *Smith v. Benson, supra; Locklear v. Oxendine, supra; Williams v. Robertson, supra.*

Moreover, decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds, G.S. 22-2, must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers. The office of description is to furnish, and is sufficient when it does furnish means of identifying the land intended to be conveyed. Where the language is patently ambiguous, parol evidence is not admissible to aid the description. But when the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought. See *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E.

2d 889, where the authorities are cited. See also *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501; *Linder v. Horne, ante,* 129; *Cherry v. Warehouse, ante,* 362.

In *Smith v. Fite, supra,* this headnote epitomizes the opinion of the Court by *Smith, C. J.*: "Where a party introduces a deed in evidence, which he intends to be used as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession." In other words, the plaintiff must not only offer the deed upon which he relies, he must by proof fit the description in the deed to the land it covers,—in accordance with appropriate law relating to course and distance, and natural objects called for as the case may be.

The general rule as to this is that in order to locate a boundary of land, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line. *Lindsay v. Austin,* 139 N.C. 463, 51 S.E. 990; *Land Co. v. Lang,* 146 N.C. 311, 59 S.E. 703; *Hanstein v. Ferrall,* 149 N.C. 240, 62 S.E. 1070; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Locklear v. Oxendine, supra; Williams v. Robertson, supra.*

Now adverting to the description set out in plaintiffs' complaint, we are constrained to hold that it is too vague to admit of proof at least as to any land south or southeast of the Dover-Fort Barnwell Road. There does not appear to be any controversy as to the beginning corner, that is, that it is at the figure 1 north of the road. And it would seem that the next two calls, "south 14 deg. east to the end of said ditch, and thence south 12 deg. east 96 poles to a pine on the east side of said road" take the line to the pine, at point 7. But the terminus of the next call "thence south 36 deg. east to the back line" is vague and indefinite. Whose back line was intended? There is nothing in the description in the deed pointing to a source from which evidence *aliunde* may be sought to make certain such uncertainty in the call. Moreover, the next call "thence with said back line to B. F. Ormond's line in Poley Bridge Branch," in the light of the evidence, adds no clarity to the vagueness of the preceding call. B. F. Ormond's line, if it be the W. H. Ormond land, runs with Poley Bridge Branch north to the road, and the call to "B. F. Ormond's line in Poley Bridge Branch" might terminate at any point between the letter G and the road at figure 3,—if it be that the headwaters of Poley Bridge Branch is at the letter G. Indeed, if the headwaters be at the Horse Pen Corner, figure 5, and B. F. Ormond owned land down to that corner, the terminus of the call might be at any point from figure 5 to the

Dover-Fort Barnwell Road, figure 3. Furthermore, the next call "thence northwardly with Poley Bridge Branch to the line ditch between A. B. Hawkins and C. Marshburn" crosses the road, and terminates at point 2 north of it where Poley Bridge Branch intersects with the line ditch between A. B. Hawkins and C. Marshburn. This description may be sufficiently definite to admit of proof to make certain the terminus of this line. But even so, no distance is called for to reach the road at point 3. Hence by surveying the call in reverse, from figure 2, the road would be reached at point 3, but how far up the Poley Bridge Branch would the line continue? The description in the deed does not show how far. Thus there is no definite point in the description from which a survey in reverse would make certain the forward running of the lines.

In this connection, decisions of this Court hold that a deed which is inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative as color of title. *Katz v. Daughtrey,* 198 N.C. 393, 151 S.E. 879, and *Thomas v. Hipp,* 223 N.C. 515, 27 S.E. 2d 528, and cases cited.

In the *Katz case, supra, Stacy, C. J.,* writing for the Court expressed the principle in this manner: "If the land intended to be conveyed cannot be identified from the description contained in the deed, it follows as a necessary corollary, that as the deed is, for this reason, inoperative, it is equally inoperative as color of title. If the land cannot be identified for one purpose, how can it be for another?" Cases are cited in support.

Hence in the present action the description relied on by plaintiffs being inoperative as color of title, is equally inoperative to fix "known and visible lines and boundaries," G.S. 1-40, as basis for a claim of adverse possession for twenty years.

Finally, the amended answer of defendants is in effect a disclaimer to any land not embraced within the lines therein designated. See *Hipp v. Forester,* 52 N.C. 599; *Crawford v. Masters,* 140 N.C. 205, 52 S.E. 663. And plaintiffs, not having shown that the description relied on by them covers any part of the land so designated by defendants, the motion of defendants for judgment as of nonsuit on the issues tendered by plaintiffs should have been allowed. Therefore, the judgment below is

Reversed.

FIRST-CITIZENS BANK & TRUST COMPANY v. NEW AMSTERDAM CASUALTY COMPANY.

(Filed 29 April, 1953.)

1. Principal and Surety § 8—

A person lending money to the owner of land for the construction of houses thereon may not sue the surety on the bond executed by such owner as "principal" to a third person as "owner," since the lender is not a party to such contract.

2. Estoppel § 5—

As a general rule, a party cannot claim the benefit of the doctrine of estoppel *in pais* if his own failure to avail himself of information within his reach brings about the situation of which he complains.

3. Same—

As a general rule, a party may not claim the benefit of an estoppel *in pais* unless he relies upon the truth of the alleged misrepresentations not only at the time they were made but also at the time he acts upon them.

4. Principal and Surety § 8—Complaint held insufficient to invoke estoppel in pais to preclude surety from denying liability on bond.

The owner, in order to finance the construction of houses on the land, executed to the bank his promissory note secured by a deed of trust, and, in order to obtain a contractor's surety bond demanded by the bank, executed a contractor's surety bond, in which he was denominated the principal contractor and a third person, who had no interest in the land or the project of building houses thereon, was denominated "owner." The bond was delivered to the bank with the note and deed of trust. Upon the insolvency of the owner and the denial of liability by the surety, the bank had the houses completed at a stipulated cost for labor and material, and sought to hold the surety liable upon the doctrine of estoppel *in pais* on the ground that the surety knew or by reasonable diligence could have ascertained the true facts. *Held:* The surety's demurrer to the complaint was properly sustained since the bank had the bond and could itself have ascertained the facts, and further its expenditures in completing the houses were made after it had actual knowledge of the terms of the bond. Further, the bank could obtain no right by subrogation against the surety, since the surety was not liable for the obligation discharged by the bank.

5. Subrogation § 1—

The party paying certain obligations cannot obtain a right of subrogation against a party not liable for such obligations.

APPEAL by plaintiff from *Burney, J.*, at March Term, 1953, of WAKE.

Civil action heard upon a demurrer to a complaint invoking the doctrine of estoppel *in pais*.

For convenience of statement, K. R. Benfield and W. A. Harris are called by their respective surnames; the First-Citizens Bank & Trust

Company is characterized as the plaintiff; and the New Amsterdam Casualty Company is designated as the defendant.

The plaintiff prays judgment against the defendant for $16,215.35 upon a complaint making these averments:

1. Benfield and his wife owned land on the Hickory and Pecan Roads in or near the City of Raleigh. This land is hereafter referred to as the Hickory and Pecan Road tract.

2. On 1 August, 1950, the plaintiff and Benfield made a contract whereby plaintiff agreed to loan Benfield $70,000.00 on his promissory note, and whereby Benfield bound himself to secure the payment of his note by a first deed of trust on the Hickory and Pecan Road tract, to build upon the Hickory and Pecan Road Tract 14 houses conforming to Federal Housing Authority plans and specifications at a total cost of $70,000.00, and to give plaintiff, as obligee, a bond in the sum of $70,000.00 with surety conditioned on his performing his construction agreement, and paying all persons furnishing labor or materials in connection with it.

3. Subsequent to this event, Benfield, as "contractor," and Harris, as "builder," signed and sealed a paper writing dated 15 August, 1950, which recited that Benfield thereby contracted to build for Harris upon the Hickory and Pecan Road tract 14 houses conforming to Federal Housing Authority plans and specifications and costing a total of $70,000.00. The defendant procured this paper writing from Benfield and Harris, and retained it. In consequence, the plaintiff had no knowledge of its existence until after the institution of this action.

4. On 16 August, 1950, Benfield, as "principal," and defendant, as "surety," executed to Harris, "as owner," a bond in the sum of $70,000.00, which contained this recital: "Principal has executed contract with Owner, dated August 15, 1950, for construction of 14 houses on Hickory Road and Pecan Road for $5,000.00 each, to be built according to F. H. A. specifications." The condition of the bond was as follows: "If Principal shall faithfully perform such contract and pay all persons who have furnished labor or material for use in or about the improvement and shall indemnify and save harmless the Owner from all cost and damage by reason of Principal's default or failure to do so, then this obligation shall be null and void; otherwise it shall remain in full force and effect." The bond stipulated 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 was paid a premium of $700.00 for executing the bond as surety.

5. The defendant knew or by the exercise of reasonable diligence could have ascertained that Benfield and his wife held title to the Hickory and Pecan Road property; that Benfield alone proposed to erect houses upon

such tract; and that Harris had no interest in either the land or the project of building houses upon it. Moreover, the defendant knew that the plaintiff had made the procurement of a performance bond in the form specified in paragraph 2 a prerequisite to making the loan to Benfield, and that "the plaintiff would rely upon such bond in making said loan." Notwithstanding its knowledge in these particulars, the defendant executed the bond described in paragraph 4 and permitted Benfield to deliver it to the plaintiff without attaching to it "a copy of the purported contract between . . . Benfield and . . . Harris and without giving the plaintiff . . . any notice . . . that said bond was not in all respects genuine, regular, and in form which could be relied upon by the bank."

6. On 17 August, 1950, Benfield delivered these documents to the plaintiff: (1) His promissory note for $70,000.00; (2) a first deed of trust conveying the Hickory and Pecan Road tract to a trustee as security for the payment of the note; and (3) the bond described in paragraph 4. When these instruments were delivered to it by Benfield, the plaintiff did not read the bond. It merely examined the defendant's signature thereon, and in that way satisfied itself that the defendant had executed the bond. The plaintiff thereupon accepted and retained the note, deed of trust, and bond, and transferred the sum of $70,000.00 to Benfield as the proceeds of the loan evidenced by the note and secured by the deed of trust. In pursuing this course, the plaintiff assumed that the bond was in the form specified in paragraph 2.

7. Subsequent to these events, Benfield embarked upon the task of erecting the houses on the Hickory and Pecan Road tract. While so engaged, Benfield became insolvent. In consequence, Benfield was unable to finish the 14 houses, which were in various stages of construction.

8. The plaintiff insisted that the defendant was obligated by its bond to complete the houses, and made demand on the defendant accordingly. The defendant rejected the demand, denied any obligation on its part to complete the houses, and called the plaintiff's attention to the terms of the bond. The plaintiff then ascertained for the first time the terms of the bond.

9. The plaintiff thereupon caused the 14 houses to be completed "for its own protection" and with "a view of minimizing losses to all concerned." In so doing, the plaintiff paid five persons sums totaling $34,425.76 "for labor and material furnished in the completion of said houses, . . . and obtained from each an assignment of his claim." The plaintiff kept the defendant constantly advised of these activities and its intent to demand reimbursement from defendant for its outlays in connection with them.

10. Upon the completion of the houses, the Hickory and Pecan Road property was sold, and the proceeds of its sale was applied to Benfield's

note and to the outlays made by plaintiff subsequent to defendant's denial of liability. The proceeds of the sale fell $16,215.35 short of the amount required to satisfy these items. The defendant has spurned repeated demands of plaintiff for payment of this shortage.

11. The defendant is estopped by its conduct to deny liability to plaintiff for the $16,215.35.

The defendant demurred in writing on the ground that the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff against defendant. Judge Burney sustained the demurrer, and the plaintiff appealed.

Mordecai & Mills for plaintiff, appellant.
Bickett & Banks for defendant, appellee.

ERVIN, J. The bond described in paragraph 4 of the statement of facts is apparently the identical bond which was in suit in *Builders Corp. v. Casualty Co.*, 236 N.C. 513, 73 S.E. 2d 155.

This case is simplified if due heed is paid to the significant fact that Benfield had two separate contracts, one with the plaintiff and the other with Harris. The defendant was not a party to either contract. The only obligation of a contractual nature assumed by the defendant was that involved in the contract of suretyship incorporated in the bond. The defendant undertook by his contract of suretyship to perform Benfield's contractual obligation to Harris in the event Benfield failed to perform it. *Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826.

The plaintiff has no right to sue the defendant upon the contract of suretyship embodied in the bond for the very simple reason that the plaintiff was not a party to such contract.

This brings us to the question whether the complaint makes out a case for the plaintiff under the doctrine of estoppel *in pais*. *Long v. Trantham*, 226 N.C. 510, 39 S.E. 2d 384; *Self Help Corp. v. Brinkley*, 215 N.C. 615, 2 S.E. 2d 889; *Scott v. Bryan*, 210 N.C. 478, 187 S.E. 756; *Upton v. Ferebee*, 178 N.C. 194, 100 S.E. 310.

We are constrained to hold that this question must be answered adversely to plaintiff even if we accept as valid the somewhat dubious theory that the conduct of the defendant as set out in the complaint was tantamount to a representation by the defendant that the bond obligated the defendant to perform Benfield's construction agreement with the plaintiff in the event Benfield failed to perform it.

The complaint discloses that the bond was presented to the plaintiff before the loan was made; that in consequence the plaintiff had a full opportunity to read the bond, and ascertain its terms before the loan was made; and that the plaintiff nevertheless accepted and retained the bond

and made the loan without reading the bond. This brings the case within the rule that one cannot claim the benefit of the doctrine of estoppel *in pais* if his own failure to avail himself of information within his reach brings about the situation of which he complains. *Ricks v. McPherson,* 178 N.C. 154, 100 S.E. 330; *Hull v. Commissioner of Internal Revenue,* 87 F. 2d 260; *Haselden v. Schein,* 167 S.C. 534, 166 S.E. 634; 31 C.J.S., Estoppel, section 71. It is to be noted, moreover, that the plaintiff had actual knowledge of the exact terms of the bond before it employed the five persons mentioned in paragraph 9 of the statement of facts to complete the houses. "The truth respecting the representations must be unknown to the party claiming the benefit of the estoppel, not only at the time they were made but at the time they were acted on by him." *Self Help Corp. v. Brinkley, supra.*

The allegations of the complaint that the plaintiff paid the five persons sums aggregating $34,425.76 "for labor and material furnished in the completion of the houses, . . . and obtained from each an assignment of his claim" do not reveal any right on the part of the plaintiff to recover any part of such sums from the defendant by way of either conventional or legal subrogation.

These obligations were not incurred by the defendant or any person acting under the bond. The plaintiff engaged these five persons to complete the houses for its own benefit after the defendant had disclaimed any obligation to plaintiff to perform such work, and after the plaintiff had learned the exact terms of the bond. The plaintiff could not obtain a right of subrogation against the defendant by paying debts for which the defendant was not liable at all. *Publishing Co. v. Barber,* 165 N.C. 478, 81 S.E. 694; 60 C.J., Subrogation, section 25.

The judgment sustaining the demurrer is

Affirmed.

STATE v. BOB HONEYCUTT.

(Filed 29 April, 1953.)

1. Public Officers § 9—

In the absence of evidence to the contrary, it is presumed that the acts of a public officer are in all respects regular.

2. Arrest and Bail § 3—

In a prosecution for resisting arrest, the failure of the State to introduce evidence tending to prove the validity of the warrant of arrest does not justify nonsuit when defendant does not challenge the validity of the warrant, since, in the absence of a showing to the contrary, it will be presumed that the warrant and order of arrest were legally adequate. G.S. 14-223.

3. Criminal Law § 78e (2)—

A misstatement of the evidence or the contentions of the parties arising thereon must be called to the attention of the trial judge at the time so as to afford an opportunity for correction, and such inaccuracies may not be challenged for the first time on appeal.

4. Criminal Law § 78b—

The theory upon which a case is tried in the lower court must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions.

5. Arrest and Bail § 3—

In this prosecution for resisting arrest, the failure of the court to charge that the jury must be satisfied beyond a reasonable doubt that the arresting officer had in his possession a valid warrant of arrest *held* not reversible error in view of the theory of trial in the lower court, the validity of the warrant not having been challenged during the trial.

6. Criminal Law § 81b—

Verdicts and judgments are not to be set aside for mere error and no more, and appellant has the burden not only to show error but also that the alleged error is material and prejudicial.

7. Criminal Law § 78e (1)—

An exception to what the court did say does not necessarily challenge the court's omission to charge further on any related phase of the case.

APPEAL by defendant from *Sink, J.*, and a jury, at October Term, 1952, of AVERY.

Criminal prosecution tried upon bill of indictment charging the defendant with resisting arrest, in violation of G.S. 14-223. The bill follows the language of the statute. The jury returned a verdict of guilty as charged, and from judgment pronounced, imposing penal servitude of seven months, the defendant appealed, assigning errors.

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

Wade E. Brown and Trivette, Holshouser & Mitchell for defendant, appellant.

JOHNSON, J. First, the defendant urges that the evidence was insufficient to carry the case to the jury over his motion for judgment as of nonsuit made at the conclusion of all the evidence. This brings into focus the evidence relied on by the State.

Will J. Harmon testified: "I hold the position of Deputy Sheriff with Avery County. I was Deputy Sheriff on the 25th day of June, 1952. I know Bob Honeycutt. . . . On that day Mr. E. M. Harmon gave me a

warrant for him for a worthless check. I went up the road and . . . met him and his son in a car. . . . I went a little piece and turned around—came back down the road and overtook them—they was driving slow, and I blowed and they pulled out. His son was driving. . . . I parked my truck down in the middle of the road. It is a one-way road. I stopped in front of his truck and went back—had the warrant in the glove compartment of my truck—went back got it in my hand and went on the lefthand side of the car. Bob Honeycutt was on the lefthand side of the car. I said, 'Mr. Honeycutt, I have got a warrant for you,' . . . He said, 'What for, can't you read it?' I commenced reading it—read down to where it said worthless check. He said, 'you are scared too bad to read it'—snatched it out of my hand. . . . I opened the door and took Mr. Honeycutt by the arm and pulled him out. He said, 'I ain't going with you.' Well, I pulled him out, . . . the boy said to me, 'You are going to get your G— d— head beat off.' I said, 'I am a deputy sheriff and a sick man, besides,' and just went dragging him on down. He said, 'I ain't going, you will have to take me.' I got nearly down to the truck, the boy (defendant's son) come around back of the car. (Then followed a narrative account of the argument which ensued between officer Harmon and defendant's son) . . . the boy then hit me . . . I ran to get the key out of the car (defendant's); the boy grabbed me and held me. He told his daddy to get the key and his daddy got it. . . . they jumped on the car and run and I ordered them both under arrest and they both jumped in the car and run. . . . I ran them for three miles, they got away. . . . He (defendant) had the warrant when he left. I don't know what he done with it."

The defendant testified in part: ". . . We pulled out on the side of the road and he (Deputy Harmon) passed us and he come back by the side of the truck and said, 'Is this Bob Honeycutt?' and I answered, 'Yes.' He said, 'I have got a paper here for you,' and he read it and handed it to me. I layed it down on my lap, reached in to get my glasses. . . . (cross-examination) . . . When Mr. Harmon told me he had a warrant or paper for me, I did not tell him he was too scared to read it. He handed it to me in the car and said, 'Read it.' "

As bearing on the question of nonsuit, the defendant's chief contention is that the State's case fails for want of specific proofs respecting the facts in connection with the issuance and contents of the warrant, such as (1) who issued the writ, (2) whether it contained an order of arrest, (3) whether it was issued by a justice of the peace of Avery County, or some other county, and (4) if the latter, whether it was properly endorsed as required by G.S. 15-22. The defendant urges that in the absence of specific proofs in respect to these factors, the State failed to show that the arresting officer was acting under valid process.

As to this contention, it is noted from a perusal of the record that in the trial below the defendant did not challenge the validity of the warrant. And the rule is that in the absence of evidence to the contrary it is presumed that the acts of a public officer are in all respects regular. *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311; *S. v. Rhodes,* 233 N.C. 453, 64 S.E. 287; *S. v. Wood,* 175 N.C. 809, 95 S.E. 1050. Therefore the State had the benefit of the presumption that Deputy Sheriff Harmon was acting under a warrant and order of arrest which were legally adequate to authorize the arrest.

The evidence was sufficient to take the case to the jury, and the court below properly overruled defendant's motion for judgment as of nonsuit.

Assignments of error Nos. 3, 4 and 5 (based on Exceptions Nos. 6, 7, and 8) relate to the court's reference to the evidence and statement of contentions in charging the jury. However, as to these assignments, the record discloses that the matters complained of passed unchallenged below. The rule is that a misstatement of the evidence, or of contentions of the parties arising on the evidence must be called to the attention of the trial judge at the time so as to afford an opportunity for correction before the case is given to the jury. It is too late to challenge such inaccuracies for the first time on appeal. *In re Will of Kemp,* 236 N.C. 680, 73 S.E. 2d 906; *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143.

Next, the defendant assigns as error this excerpt from the charge of the court: "your minds must be satisfied to a moral certainty that Harmon was a deputy sheriff, that Harmon was in the performance of his duty on the occasion in question, that he arrested, or was in the attempt or process of arresting the defendant, and that by force, unlawfully and wilfully, by the aid of his son, or by his own resistance individually, prevented, delayed, obstructed the carrying out of the official duties of the said Harmon in the performance of his public duty, and if you are so satisfied it will be your duty to return a verdict of guilty."

The fault which the defendant finds with this instruction is, as pointed out in the brief, that it does not include a statement "that the jury must also be satisfied beyond a reasonable doubt that Harmon had in his possession a valid warrant of arrest for the defendant, before the jury could return a verdict of guilty."

The exception is without substantial merit. An examination of the record discloses as we have seen that the validity of the warrant was never challenged during the course of the trial. Officer Harmon testified he had a warrant and that it was snatched away from him (and kept) by the defendant. The defendant also testified that Harmon told him he had a paper for him and that "he read it and handed it to me." Nowhere in the defendant's evidence, or in the cross-examination of the State's witnesses, is there any intimation that the warrant was invalid.

Moreover, it is observed that the court in another part of its charge—when discussing the defendant's contention that the arresting officer was motivated by spite—told the jury: "if the witness Harmon is found by you, beyond a reasonable doubt, to have been (a) duly authorized and accredited officer of Avery County and had a warrant in his hand for the arrest of Honeycutt, that he had the right to make the arrest, regardless of any previous difficulties between them."

Accordingly, the challenged instruction to the jury that "your minds must be satisfied to a moral certainty that Harmon . . . was in the performance of his duty on the occasion in question, . . ." when considered contextually with the rest of the instructions and in the light of the theory of the trial may not be held as prejudicial error. The theory upon which a case is tried in the lower court must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions. *Parrish v. Bryant, ante,* 256, 74 S.E. 2d 726, and cases cited. Therefore, if it be conceded that the challenged instruction was technically incomplete, even so, an over-all study of the record leaves the impression that the oversight was not of sufficient moment to have changed the result of the trial. 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. Rainey,* 236 N.C. 738, 74 S.E. 2d 39, and cases cited.

Besides, an exception to what the court did say does not necessarily challenge its omission to charge further on a related phase of the case. *Karpf v. Adams* and *Runyon v. Adams, ante,* 106, 74 S.E. 2d 325. *Cf. S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867.

We have examined the rest of the defendant's exceptive assignments and find them to be without substantial merit.

On the record as presented prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

IN RE APPEAL OF WILLARD CALDWELL FROM CIVIL SERVICE COMMISSION FOR CLASSIFIED EMPLOYEES OF THE CITY OF ASHEVILLE.

(Filed 29 April, 1953.)

1. Municipal Corporations § 11f—

Under the provisions of Chap. 1000, secs. 10a and 11, Session Laws of 1951, where the employee's appeal from order of the Civil Service Commission contains no statement of the grounds for appeal or any specific exception to the findings of fact, the appeal to the Superior Court presents the single question whether the facts found by the Commission support its decision.

2. Appeal and Error § 6c (2)—

A general exception to the judgment presents for review the single question whether the facts found support the judgment.

3. Municipal Corporations § 11f—

Order of the Civil Service Commission of Asheville and judgment of the Superior Court affirming such order *held* supported by findings of fact that petitioner was discharged for insubordination, and therefore the order and judgment are upheld under the provisions of Chap. 1000, sec. 10a, Session Laws of 1951.

APPEAL by petitioner, Willard Caldwell, from *Gwyn, J.*, October Term, 1952, of BUNCOMBE.

This is a proceeding under Chapter 1000, Session Laws of 1951, known as The Classified Employees Civil Service Act of the City of Asheville (hereinafter referred to as the Civil Service Act), heard below on appeal of the petitioner, an employee in the City's Street Department, from discharge by Street Superintendent Greer Johnson on the ground of insubordination.

The matter was first heard before the Civil Service Commission for Classified Employees of the City of Asheville (hereinafter referred to as the Commission), on petitioner Caldwell's appeal from summary discharge by Street Superintendent Johnson.

The full Commission, after hearing the testimony and evidence offered both by the petitioner and by Street Superintendent Johnson, found facts and rendered its decision on 21 July, 1952.

These in substance are the pertinent facts found by the Commission:

1. On the morning of 6 May, 1952, Street Superintendent Johnson requested tractor driver Caldwell to perform certain duties. Caldwell advised Johnson that he could not perform the duties due to the fact that the tractor he operated the day before needed repairing. "There had previously been an order from the Director of Public Works requiring all employees to report any defects in the rolling stock of the City of

Asheville to the city garage when they finished the day's work. On May 5th when . . . Caldwell brought his tractor into the garage he failed to report the mechanical defect that he advised . . . Johnson about the next morning. An argument between the tractor driver and the Street Superintendent ensued and was witnessed by many employees in the City of Asheville, and Mr. Caldwell's general attitude of arrogance was prevalent all through the argument."

2. Thereupon Caldwell was relieved of his duties as tractor driver by Street Superintendent Johnson, and "after Caldwell was relieved of his duties . . . Johnson assigned another tractor driver to the task that had been assigned to Caldwell and the task was carried out without the tractor having to be repaired as had been stated by Caldwell." (The record also discloses that Street Superintendent Johnson reported the discharge to the Civil Service Commission by written report dated 16 May, 1952, as required by Section 11 of the Civil Service Act. The report sets out in detail the facts and circumstances as they appeared to Superintendent Johnson. The report also discloses that Caldwell was advised on 15 May "that he could return to work as a truck driver . . . However, Mr. Caldwell stated this was not satisfactory.")

3. ". . . Caldwell was advised by Street Superintendent Johnson to take his complaint to the City Manager if he so desired. This he did, but there is nothing in the record to show that any action was taken contrary to the action of Street Superintendent Johnson."

4. ". . . that Willard Caldwell violated Section 10 and Section 11 of House Bill 1061 of the General Session Laws of the State of North Carolina 1951 (Chapter 1000, Session Laws of 1951), and that Superintendent Greer Johnson was within his authority in relieving Mr. Caldwell of his duties in the Street Department on the morning of May 6th 1952."

Upon the foregoing findings the Commission concluded in substance: (1) "That . . . employee Caldwell was guilty at the time of insubordination and failure to do a task assigned to him in the best interest of the general public"; and (2) that Street Superintendent Johnson acted within his authority under the Civil Service Act. And thereupon it was adjudged that "The Commission . . . upholds the action of Street Superintendent Johnson in the case of Willard Caldwell, but desires to make a recommendation to the Street Superintendent, *i.e.*, due to the fact that Mr. Caldwell has many years service with the City of Asheville, it is recommended that he be demoted rather than completely relieved of his duties with the City of Asheville. Mr. Caldwell's request for pay since May 6th 1952 is denied."

From the foregoing decision, Caldwell gave notice of appeal to the Superior Court. And pursuant to the provisions of the Civil Service Act, transcript of the record of the hearing before the Commission, and of its

findings and conclusions, was certified to the Superior Court of Buncombe County.

However, no specific exceptions or assignments of error, or statement of grounds of appeal, 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 affirming the order of the Civil Service Commission.

The petitioner excepted to the judgment so entered and appealed to this Court.

Henry C. Fisher for petitioner, appellant.

Philip C. Cocke for Civil Service Commission of Employees of the City of Asheville, appellee.

JOHNSON, J. Decision here is controlled by the provisions of The Classified Employees Civil Service Act of the City of Asheville, Chapter 1000, Session Laws of 1951. Pertinent to decision are these portions of the Act:

"Sec. 10. . . . Any person holding office, place, position or employment in any of the classified services and subject to the provisions of this Act, may be removed, discharged, suspended without pay, demoted, reduced in rank, or deprived of vacation privileges or other special privileges for any one or more of the following reasons:

"(a) . . ., insubordination, . . . or any other act of omission or commission in the course of the employment tending to injure the public service."

"Sec. 11. Removal. . . . The director or foreman if such authority is delegated, may orally suspend, discharge or remove a member of his department pending the confirmation of the suspension, discharge or removal by the regular appointing power under this Act, but written report of such suspension, discharge or removal shall be made to the commission. Any person so removed, suspended or discharged, may within 10 days from the time of his removal, suspension or discharge, file with the commission a written demand for an investigation, whereupon the commission shall conduct such investigation. The investigation shall be confined to the determination of the question of whether such removal, suspension or discharge was or was not made for political reasons and was or was not made in good faith for cause. After such investigation the commission may, if in its judgment the evidence is sufficient, affirm the removal, suspension or discharge, or if it shall find that the removal, suspension or discharge was made for political reasons, or was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment

from which such person was removed, suspended or discharged, . . . The commission upon such investigation, in lieu of affirming the removal, suspension or discharge, may modify the order of removal, suspension or discharge by directing a suspension, without pay, for a given period, and subsequent restoration of duty, grade or pay; . . .

"All investigations made by the commission . . ., pursuant to the provisions of this Section, shall be by public hearing, after reasonable notice to the accused of the time and place of such hearing, at which the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his defense. At any such hearing the testimony of all witnesses shall be taken in writing and a record made of all proceedings, including the commission's findings of fact and its final order. The final order shall be signed by not less than two commissioners indicating concurrence therein. From said final order the accused may appeal to the Superior Court of Buncombe County, which appeal shall be taken within 10 days after the entry of such order by serving the commission with a written notice of appeal, *stating the grounds thereof,* and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such order, be filed by the commission in such court. The commission shall, within 10 days after the filing of such notice, make, certify, and file such transcript with such court. The Superior Court shall thereupon proceed to hear and determine such appeal; *provided, however, that such hearing shall be confined to the determination of whether the order of the removal, discharge or suspension made by the commission, was or was not made in good faith for cause, and no appeal to such court shall be taken except upon such ground or grounds.*" (Italics added.)

It is noted that the petitioner's appeal from the Civil Service Commission to the Superior Court contains no statement of the "grounds" of appeal as required by Section 11 of the Civil Service Act. Nor is the appeal supported by any specific exception to any finding of fact of the Commission. Therefore the petitioner's appeal carried up for review in the Superior Court the single question whether the facts found by the Commission support the decision upholding Superintendent Johnson's discharge of the petitioner. *Greene v. Board of Education, ante,* 336; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488; *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421.

And, in turn, the general exception to the judgment signed by Judge Gwyn brings here for review the single question whether the facts found support the decision upholding the discharge. *Greene v. Spivey, supra; 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.

It is manifest that both the order of the Commission and the judgment of Judge Gwyn are supported by the facts found. Chapter 1000, Sections 10 and 11, Session Laws of 1951. Therefore, the judgment below affirming the order of the Civil Service Commission will be upheld.

Affirmed.

STATE v. TRACY TRIPLETT.

(Filed 29 April, 1953.)

1. Automobiles § 28e—

The State's evidence tending to show that defendant, in an intoxicated condition, was driving 65 or 70 miles an hour in a zone limited to his knowledge to a speed not in excess of 35 miles per hour, and struck a five-year-old child with the left front of his car after the child had crossed his lane of travel and was about one and one-half feet to defendant's left of the center line of the highway, with other corroborating circumstances shown in evidence, *is held* sufficient to be submitted to the jury upon the question of defendant's culpable negligence in a prosecution for involuntary manslaughter. G.S. 15-144.

2. Criminal Law § 78e (1)—

An exception to the failure of the court to charge "the law on every substantial feature of the case embraced within the issues and arising on the evidence . . ." *is held* ineffectual as a broadside exception.

APPEAL by defendant from *Clement, J.,* and a jury, at September Term, 1952, of WATAUGA.

Criminal prosecution on bill of indictment charging the defendant with the felonious and willful killing of one Janice Lee Goodnight (G.S. 15-144), tried below on the charge of involuntary manslaughter.

On Saturday afternoon, 31 May, 1952, the defendant was driving his Ford automobile on U. S. Highway No. 421, going east about a mile from the Town of Boone, in a built-up settlement known as Perkinsville, when Janice Lee Goodnight, a little five-year-old girl, ran out in front of the defendant's car and was struck and killed.

The defendant's version of the occurrence is that he was driving along in a careful manner, not exceeding 35 or 40 miles per hour, approaching a house on the right which sits back only about eight feet from the edge of the highway, when suddenly a little dog ran out on the highway followed by the little girl, who was trying to catch the dog. As the defendant put it: "There was a hedge at that house and she came right out in the road. . . . The dog ran across the highway then the little girl right beside it. . . . she ran after the dog and she was right in front of the car when I saw her and I couldn't help striking her."

However, the evidence on which the State relies tends to make for a materially different state of facts. It discloses that the defendant, in an intoxicated condition, was driving 65 or 70 miles per hour in a 35-mile per hour speed zone; that there was no shrubbery near the edge of the highway opposite where the child was hit; that the little girl, after coming on the highway from the defendant's right, had entirely crossed his traffic lane and had reached a point about a foot and a half beyond the left of the center line when she was hit by the left front of defendant's car and knocked the rest of the distance across the pavement out on the left shoulder of the road. The State's evidence further discloses that at the point of collision the highway is straight for some considerable distance in both directions and slightly upgrade in the direction the defendant was traveling; that the weather was clear and the road dry. No cars were parked along the highway near the scene, and none was approaching the defendant at the time of the occurrence. No other pedestrians were on or near the highway at the time. The defendant's car, leaving a line of skid marks behind, came to a stop over on the right shoulder about 100 feet beyond the point of impact.

Frank Bolick, who was driving a car just behind the defendant, said the defendant overtook and passed him about 75 or 80 yards from the scene of the collision. This witness further testified: "I saw him on up at the scene of the accident. . . . I heard the car wheels begin to squeal, . . . and something flew out . . ., and when we got on up there, the little girl was lying there . . . about two feet off the hard surface . . . on the shoulder . . . on the lefthand side going east. . . . I was driving right behind the defendant's car. . . . The skid marks didn't show until after he hit the child and knocked it out of the road. . . . I couldn't tell whether the defendant's car increased or decreased speed from the time it passed me until the time of the accident. It just passed me awful fast. It is my opinion that the defendant was making not less than 65 or 70 miles per hour at the time the little girl was hit. The defendant was about one and one-half feet on the lefthand side of the white line in the highway . . . at the time the child was struck. . . . (Cross-examination) . . . I was following along (about 250 feet) behind him when it occurred. There was no car or anything else between us to obstruct our view. . . . I never saw the child until after it was hit by the car. The first thing I saw of it, the little girl bounced off the left fender just like something flew out of the car. She came from the east side of the car over to the left shoulder. . . . I don't think the defendant's car ever slowed its speed until after the child was hit."

The collision occurred near the front of the home of Mrs. Ervin Parsons. She testified: "There is no shrubbery . . . between the house and the highway. . . . There is a pine tree down from my house on the same

side. It is a small one about 5 or 8 feet high and then there is a large pine some thirty feet tall. These trees obstruct the view of my house as you approach it from the west."

Hoy Greene, who was standing a short distance (150 to 200 yards) from the scene of the collision, "heard the tires squeal" and ran up to where the little girl was lying. He testified that the defendant appeared to be "under the influence of an intoxicating beverage. . . . he talked kinda thick." This witness also testified that while there was "a good deal of shrubbery up in front of Parson's house . . . the accident occurred this side of Parson's."

Patrolman Roger Parker said there were 95 feet of skid marks extending from the rear wheels of defendant's car back toward where the child was hit. This witness further testified: "The skid marks were solid, then broken for a distance, then solid again . . . (indicating that the brakes had been released and then applied again) . . . The left front headlight of the car was knocked out. There was a small dent in the left front fender. . . . he (the defendant) was unsteady in his walk, and his eyes were very milky and bloodshot, and there was a film about his eyes, and he had a strong odor of alcohol about his person. . . . I have an opinion . . . that he was under the influence of alcohol at the time. . . . After we found out that the child was dead, I went to the jail. That was not much more than an hour later, with the Chief of Police here in Boone. . . . he (the defendant) was lying on a bunk asleep. I called to him twice and he didn't wake up. I opened the door and went in and shook him, and he got up and sat on the side of the bed. . . . He seemed in a daze and had a strong odor of alcohol. . . ."

Patrolman George Baker, who took the defendant to jail, testified: "He appeared to me that he was drinking heavily."

The defendant on cross-examination said he "never saw the child until she was in the road." He also said he knew he "was in a thirty-five mile speed zone."

The jury returned a verdict of guilty as charged, and from judgment pronounced, imposing a prison sentence of two years, the defendant appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Bowie & Bowie and Wade E. Brown for defendant, appellant.

JOHNSON, J. Was the evidence sufficient to carry the case to the jury over the defendant's motion for judgment as of nonsuit? We think so.

Evidence tending to show these crucial factors make for the State's *prima facie* case: The paved portion of the highway was 20 feet wide;

the little girl came on the highway from the defendant's right; she had crossed the defendant's traffic lane and was about one and one-half feet beyond the center line when hit; the defendant, in an intoxicated condition, was driving 65 or 70 miles per hour in a known 35-mile per hour speed zone; no cars were parked along the highway near the scene; there was no shrubbery near the edge of the highway opposite where the child was hit; and the defendant said he "didn't see the child until she was in the road."

This, with other corroborating circumstances shown in evidence, was sufficient to sustain the inference of culpable negligence of the defendant as the proximate cause of the little girl's death. The court below properly overruled the demurrer to the evidence. *S. v. Swinney,* 231 N.C. 506, 57 S.E. 2d 647; *S. v. Dills,* 204 N.C. 33, 167 S.E. 459; *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Palmer,* 197 N.C. 135, 147 S.E. 817; *S. v. Trott,* 190 N.C. 674, 130 S.E. 627; *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669; *S. v. McIver,* 175 N.C. 761, 94 S.E. 682. See also *Butler v. Allen,* 233 N.C. 484, 64 S.E. 2d 561.

The single remaining exception brought forward by the defendant challenges the sufficiency of the court's compliance with G.S. 1-180 in charging the jury. Here the defendant excepts for that the court "did not charge the jury as to the law on every substantial feature of the case embraced within the issues and arising on the evidence, . . ." This exception is untenable as a broadside exception. *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482; *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608. See also *Price v. Monroe,* 234 N.C. 666, 68 S.E. 2d 283.

In the trial below we find

No error.

FRANK PARKER v. R. SHELTON WHITE AND WIFE ELIZABETH K. WHITE, BELVIDERE BUILDING COMPANY, C. L. LAWRENCE, TRUSTEE, AND FIRST-CITIZENS BANK & TRUST COMPANY.

(Filed 29 April, 1953.)

1. Pleadings § 3a—

If plaintiff seeks to recover in one action on two or more causes of action, each cause must be separately stated. Rule of Practice in the Supreme Court 20 (2).

2. Same—

The complaint should contain a concise statement of the ultimate facts constituting the cause of action, G.S. 1-122 (2), together with a demand for relief to which plaintiff supposes himself to be entitled, G.S. 1-122 (3), but should not contain a narration of the evidential facts.

3. Same—

The complaint should not leave defendant in doubt as to the cause of action alleged against him but must sufficiently advise him so that he may know how to answer and what defense to make.

4. Pleadings § 19c—

The rule that the complaint must be liberally construed upon demurrer does not mean that plaintiff may dispense with the certainty, regularity and uniformity essential to an orderly administration of justice.

5. Same—

It being impossible to determine with any degree of certainty from the complaint, together with the prayer for judgment, the nature of the cause of action upon which plaintiff relies or whether more than one cause of action is sought to be set up therein, the judgment overruling defendants' demurrer is reversed and the cause remanded with direction that plaintiff be granted a reasonable time in which to reform and redraft his complaint.

APPEAL by defendants from *Nimocks, J.*, October Term, 1952, WAKE. Reversed.

Civil action heard on demurrer. The demurrer was overruled and defendants excepted and appealed.

Simms & Simms for plaintiff appellee.

Smith, Leach, Anderson & Dorsett for defendant appellants.

BARNHILL, J. The complaint must contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition . . ." G.S. 1-122 (2); *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47. It must likewise contain a demand for the relief to which the plaintiff supposes himself entitled. G.S. 1-122 (3). If the plaintiff seeks to recover in one action on two or more causes of action, each cause must be separately stated. Rule 20 (2). Rules of Practice in the Supreme Court, 221 N.C. 557; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648.

The function of a complaint is not the narration of the evidence but the statement of the substantive and constituent facts upon which the plaintiff's claim to relief is founded. *Guy v. Baer, supra.* Only the facts to which the pertinent legal or equitable principles of law are to be applied should be stated. *Spain v. Brown,* 236 N.C. 355. "The facts should be so stated as to leave the defendant in no doubt as to the alleged cause of action against him, so that he may know how to answer and what defense to make." *Hussey v. R. R.,* 98 N.C. 34; *Taylor v. R. R.,* 145 N.C. 400; *King v. Coley, supra.*

"Observance of these rules in drafting a complaint is essential to good pleading and a well prepared complaint is most helpful both to the court

and the jury. However, they are all too often honored in the breach." *Guy v. Baer, supra.* Such is the case here.

For us to attempt to summarize the multitudinous allegations in the complaint would serve only to render this opinion unnecessarily long. It consumes eighteen pages of the mimeographed record and consists of allegations, mostly evidentiary in nature, concerning acts and transactions extending from 1933 to sometime in 1951 without any attempt to state separately more than one cause of action, if indeed plaintiff so intended.

Suffice it to say that it contains allegations that plaintiff's father purchased a certain tract of land and plaintiff thereafter purchased the same from his father about 1933. This is followed by (1) a detailed account of plaintiff's efforts and expenditures over a period of approximately seventeen years to improve and develop said land for sale in lots and his ambitious plans for such development; (2) a detailed account of negotiations between plaintiff and defendant White for the sale of twenty acres of said land to White and various and sundry promissory representations made by White during such negotiations; (3) allegation of the sale to White of the said twenty acres in reliance on such promissory representations; (4) allegations of plaintiff's extended efforts to get information respecting White's plans for developing the property purchased by him and numerous promises and representations made by White in respect thereto; (5) appointment of plaintiff as representative of the U. S. Government as a part of the "Good Neighbor" policy; his extended trip to El Salvador, and his fruitless efforts while there to get information from defendant; (6) allegations as to the organization of the corporate defendant as a stooge or dummy corporation owned and dominated by White through which White effected nefarious breaches of promissory representations made to plaintiff; (7) allegations of various and sundry actions of defendants in development of land purchased by White in violation of the promissory representations made prior to the execution of the deed to him; (8) allegations that the water main installed by plaintiff was damaged or destroyed, the location of the streets across the land sold was changed, and a lake on plaintiff's land was contaminated.

We have read and reread this complaint in a fruitless effort to discover just what legal right plaintiff seeks to assert or what wrong he seeks to redress. In an amendment to the original complaint he alleges that the reservation of certain easements agreed upon in the preliminary negotiations was omitted from the deed from plaintiff to White by mutual mistake, but in a later amendment this allegation is stricken.

In the course of the oral argument, counsel for plaintiff stated that plaintiff was relying on fraud in the procurement of the deed in question. This position is untenable for the reason it is not alleged that White,

at the time he made the pleaded promissory representations, had no intention to execute his promises but made them for the purpose and with the intent to deceive and defraud plaintiff. Furthermore, plaintiff does not seek a cancellation of the deed.

Not being able to determine with any degree of certainty, from the body of the complaint, the nature of the cause of action upon which plaintiff relies, we turned hopefully to his prayer for relief for enlightenment, but we find his prayer as general and indefinite as the complaint. It is as follows:

"WHEREFORE, the plaintiff prays the judgment of the court for relief as hereinbefore set forth in detail in this complaint and for all such other and further relief as may be proper and necessary to protect the rights of the plaintiff, both in law and in equity, and that plaintiff recover of the defendants the cost of the action."

It appears, therefore, that what is said in *King v. Coley, supra,* may be aptly applied here.

"That a complaint must be liberally construed is axiomatic with us and requires no citation of authority. The rule is ordinarily invoked and is consistently applied when the sufficiency of a pleading is challenged by demurrer. But this does not mean that the pleader may dispense with the certainty, regularity, and uniformity which is essential in every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was required at common law. *Oates v. Gray,* 66 N.C. 442.

"The notion that the code of civil procedure is without order or certainty and that any pleading, however loose or irregular, may be upheld is erroneous. *Webb v. Hicks,* 116 N.C. 598."

The competency of evidence, the form of the issues, and the charge of the court are all controlled in very large measure by the nature of the cause of action alleged by plaintiff. Hence, the trial judge, as well as the defendant, must know the exact right plaintiff seeks to assert or the legal wrong for which he seeks redress before there can be any intelligent trial under the rules of procedure which govern our system of jurisprudence.

The complaint contains the germs of several causes of action. It may state some one cause of action. If so, its prolixity is such that we find it impossible to determine just what it is. And we are satisfied no judge could try the cause and frame the issues supposedly arising on the allegations made without committing error. Certainly this is true unless he submitted a score of issues directed to questions of fact rather than issues of fact—and a multiplicity of issues is the breeding ground of error.

Under the circumstances, therefore, we are constrained to reverse the judgment entered in the court below and remand the cause with direction that plaintiff be granted a reasonable time in which to reform and redraft

his complaint in conformity with this opinion and the rules relating to the form and contents of a complaint to which reference is herein made.

Reversed.

STATE v. W. T. LOESCH.

(Filed 29 April, 1953.)

1. Physicians and Surgeons § 8—

In a prosecution for the unauthorized practice of medicine, an indictment following the language of G.S. 90-18 is sufficient, and is not subject to quashal for failure to show on its face a compliance with G.S. 90-21, since G.S. 90-21 merely establishes a method whereby the Board of Medical Examiners may procure an investigation by the Attorney-General with respect to alleged violations of sections G.S. 90-18 to G.S. 90-20, but does not require any such action before a criminal prosecution may be instituted for a violation of these statutes.

2. Indictment and Warrant § 9—

An indictment for a statutory offense which charges the offense in the language of the Act or specifically sets forth facts constituting the offense so that it appears upon its face to be framed upon the statute, is sufficient.

3. Same—

An indictment will not be quashed for mere informality or for minor defects which do not affect the merits of the case, but an indictment will be held sufficient if it charges the offense in a plain, intelligible and explicit manner and contains sufficient matter to enable the court to proceed to judgment. G.S. 15-153.

4. Solicitors § 3: State § 1a—

A solicitor is a constitutional officer charged with the duty of prosecuting all criminal actions in the Superior Courts, Constitution of North Carolina, Art. IV, sec. 23; G.S. 7-43, and the Attorney-General has no constitutional authority to issue a directive to a solicitor concerning his legal duties, but may advise him in regard thereto. Constitution of North Carolina, Art. III, sec. 18; G.S. 114-2.

APPEAL by the State from *Crisp, Special Judge,* January Term, 1953, of MECKLENBURG.

Criminal prosecution upon an indictment charging the defendant with violating G.S. 90-18, which reads in pertinent part as follows:

"No person shall practice medicine . . . nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner prescribed in this article . . .

"Any person shall be regarded as practicing medicine or surgery within the meaning of this article who shall diagnose or attempt to diagnose,

treat or attempt to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: . . ."

Before pleading to the bill of indictment the defendant filed a motion to quash on the ground that the indictment is defective in that it does not show on its face a compliance with the following provisions of G.S. 90-21:

"In case of the violation of the criminal provisions of G.S. 90-18 to 90-21, the Attorney General of the State of North Carolina, upon complaint of the Board of Medical Examiners of the State of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the solicitor of the district in which the offense was committed to institute a criminal action against the offending persons. . . ."

The motion was allowed and the State appeals, assigning error.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State, appellant.

Welling & Welling for defendant, appellee.

DENNY, J. The bill of indictment follows the language of the statute and is sufficient in form to charge a violation of the provisions of G.S. 90-18. In fact, its sufficiency is not challenged except upon the ground that it fails to disclose that the Board of Medical Examiners of the State of North Carolina complained to the Attorney-General about the conduct of the defendant; that the Attorney-General conducted an investigation and directed the Solicitor to institute an action against the defendant.

The defendant contends that a strict compliance with the procedure outlined in G.S. 90-21, is a prerequisite to any prosecution for the violation of sections 90-18 to 90-20 of our General Statutes, and that a bill of indictment charging a violation of any of such sections must show upon its face that there has been a compliance with the provisions of G.S. 90-21. The contention is without merit. It would be unnecessary to include these averments as a prerequisite to the validity of a bill of indictment charging a violation of G.S. 90-18, even though the prosecution was instituted pursuant to a complaint filed by the Board of Medical Examiners with the Attorney-General.

"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." *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, 131 A.L.R. 143; *S. v. Mooney,* 173 N.C. 798, 92 S.E. 610; *S. v. Welch,* 129 N.C. 579, 40 S.E. 120; *S. v. Van Doran,* 109 N.C. 864, 14 S.E. 32.

However, we no longer sustain motions to quash for mere informality or minor defects which do not affect the merits of the case. *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Hardee,* 192 N.C. 533, 135 S.E. 345. All that we require in a bill of indictment is for it to be sufficient in form to express the charge against the defendant in a plain, intelligible and explicit manner and to contain sufficient matter to enable the court to proceed to judgment. G.S. 15-153; *S. v. Ratliff,* 170 N.C. 707, 86 S.E. 997; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Davenport, supra; S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313; *S. v. Stone,* 231 N.C. 324, 56 S.E. 2d 675.

In the case of *S. v. Baker,* 229 N.C. 73, 48 S.E. 2d 61, we upheld a conviction upon an indictment charging a violation of G.S. 90-18 and G.S. 90-19. The record did not reveal any action by the Board of Medical Examiners or the Attorney-General. The bill of indictment followed the language of the statutes. A motion to quash for indefiniteness was overruled in the trial court and we approved.

The case of *Committee on Grievances of Bar Association v. Strickland,* 200 N.C. 630, 158 S.E. 110, relied upon by the defendant, involved a prescribed statutory procedure for the disbarment of an attorney for alleged improper conduct. The factual situation there is clearly distinguishable from that presented on this appeal.

The provisions of G.S. 90-21 merely establish a method whereby the Board of Medical Examiners of the State of North Carolina may procure an investigation by the Attorney-General with respect to alleged violations of sections 90-18 to 90-20 of our General Statutes. When the Medical Board files a complaint with the Attorney-General pursuant to the provisions of G.S. 90-21, it then becomes his duty to investigate the charges preferred, and if in his judgment the law has been violated, to request the Solicitor of the district in which the offense was committed to institute a criminal action against the offending person or persons. There is nothing in Chapter 90 of our General Statutes which requires the Board of Medical Examiners or the Attorney-General to take any action before a criminal prosecution may be instituted against a person for violating the criminal provisions of General Statutes, sections 90-18 to 90-20.

Furthermore, there is nothing in Chapter 90 of the General Statutes which would or could deprive the solicitor of his constitutional authority and sworn duty to prosecute violations of the criminal laws of the State. Article IV, Section 23, of our State Constitution provides for the division of the State into solicitorial districts, for each of which a solicitor shall be elected by the qualified voters thereof, "who shall . . . prosecute on behalf of the State in all criminal actions in the Superior Courts, and advise the officers of justice in his district." The duty to prosecute all

criminal actions in the Superior Courts is likewise enjoined upon the several solicitors by G.S. 7-43.

The Attorney-General and the several solicitors of the State are constitutional officers and their duties are set forth in the Constitution and the statutes. In Article III, Section 18, of the Constitution of North Carolina, the General Assembly is authorized and empowered "to create a Department of Justice under the supervision and direction of the Attorney General, and to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the State."

Pursuant to the above authority, the General Assembly enacted G.S. 114-2 prescribing the duties of the Attorney-General. Subsection 4 of this section reads as follows: "To consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office." Therefore, the duty of the Attorney-General in so far as it extends to the solicitors of the State is purely advisory. The Attorney-General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties.

The ruling of the court below is

Reversed.

H. H. MOORE v. JAMES C. GREENE, TRADING AS JAMES C. GREENE COMPANY.

(Filed 29 April, 1953.)

1. Compromise and Settlement § 1—

Settlement of business disputes is favored by the law, and where a check is tendered in full settlement of a disputed item, the acceptance of the check and use of the proceeds will be regarded as complete satisfaction of the claim. G.S. 1-540.

2. Same—Evidence held to show settlement of disputed item.

After termination of employment, the employer tendered the employee a statement showing the amount the employer contended was due under the contract of employment, together with a check for the amount with the words written on its face "For Settlement." After some days the employee wrote the employer setting out his claim for an additional amount, but after waiting three weeks, cashed the check and received the money tendered. *Held:* The employee made his election when he cashed the check obviously intended to evidence a final settlement, and in his action instituted some two years later to recover the additional amount claimed nonsuit should have been entered upon uncontroverted evidence disclosing such facts.

3. Same—

A check given in full settlement of a disputed item as to the employee's right to a part of the profits under his contract of employment will not bar the employee's right to recover the amount of a deduction from his salary check for the last month of the employment when the check was deposited to the employee's credit in his absence.

APPEAL by defendant from *Nimocks, J.*, October Term, 1952, of WAKE. Modified and affirmed.

Action to recover balance alleged to be due on a contract of employment.

It was admitted that plaintiff was employed by the defendant in his insurance adjusting business for the year beginning 1 July, 1946, at a salary of $6,500, and for the succeeding year ending 1 July, 1948, at a salary of $7,500 plus one-third of the net profits of the business for that year.

Before the end of the second year the defendant notified the plaintiff that his contract would terminate 1 July, 1948, and plaintiff's employment ended on that date. In order to determine one-third of the net profits due plaintiff from the business for that year the defendant employed an accountant, and on 6 October, 1948, mailed plaintiff a statement of the net profits, showing one-third thereof to be $1,179.39, and enclosed a check for that amount with the words written on the face of the check "For Settlement under terms of employment contract 7-1-47 to 7-1-48."

On 18 October, 1948, plaintiff in reply wrote defendant objecting to the deduction from income of three items which totaled $769.45, and insisting that he was entitled to his share of the net income without those deductions. Accordingly plaintiff claimed he was entitled to $256.48 more than the amount shown on the check. He wrote, "If you will pay me the additional amounts referred to above within a reasonable time, I will accept it in full payment and close the issue." However, the plaintiff, having had no further communication from the defendant, on 10 November, 1948, cashed the check and received the amount thereof. Two years later plaintiff instituted this action.

For a second cause of action plaintiff alleged that $83.33 had been wrongfully deducted from his salary for the month of June, 1948, and the reduced amount deposited to his credit in his absence.

On issues submitted the jury rendered verdict in favor of plaintiff on both causes of action for $256.48 and $83.33, and from judgment on the verdict defendant appealed.

A. L. Purrington, Jr., for plaintiff, appellee.

T. Lacy Williams for defendant, appellant.

DEVIN, C. J. The policy of the law favors the settlement of business disputes. By statute it is provided that the acceptance of a less amount than that claimed, in satisfaction, shall operate as a complete discharge thereof. G.S. 1-540.

The principle is well recognized and enforced in this jurisdiction that when in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim. One party will not be allowed to accept the benefit of the check so tendered and at the same time retain the right to sue for an additional amount. *Kerr v. Sanders,* 122 N.C. 635, 29 S.E. 943; *Ore Co. v. Powers,* 130 N.C. 152, 41 S.E. 6; *Aydlett v. Brown,* 153 N.C. 334, 69 S.E. 243; *Rosser v. Bynum,* 168 N.C. 340, 84 S.E. 393; *Mercer v. Lumber Co.,* 173 N.C. 49, 91 S.E. 588; *Blanchard v. Peanut Co.,* 182 N.C. 20, 108 S.E. 332; *DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419; *Lawson v. Bank,* 203 N.C. 368, 166 S.E. 177; *Durant v. Powell,* 215 N.C. 628 (634), 2 S.E. 2d 884. "Under a uniform construction of our statute, C.S. 895 (now G.S. 1-540), as announced in a long line of decisions, it is held with us that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt." *Blanchard v. Peanut Co., supra.*

In the case at bar a controversy had arisen as to the amount due plaintiff for his one-third share in the net profits of the business for the year ended 1 July, 1948. The defendant tendered him a statement showing the amount the defendant contended was due, together with a check for the amount with the words written on the face of the check "For Settlement." Obviously the defendant intended the check to evidence a final settlement of the matter of plaintiff's share in the net profits of the business. The plaintiff's services had been terminated. The business relations between the parties had ceased. The only thing remaining was to determine the amount due plaintiff under the contract. For this purpose the defendant employed an accountant, made up the final settlement, and on 6 October, 1948, mailed it to plaintiff with check for the amount he claimed to be due. The plaintiff after some days of consideration wrote defendant setting out his disagreement and his conflicting claim, and stating the condition under which he would accept the check in settlement and "close the issue." The plaintiff had a right to decline the proffered settlement and sue for the full amount he claimed was due. But after waiting three weeks he cashed the check and received the money

tendered. Two years later he instituted this action. We think he made his election when he cashed the check and may not now be allowed to change his position and avoid the effect of his acceptance of the check tendered him by the defendant.

The facts material to the question here presented were not controverted. They appear from plaintiff's testimony. We think the defendant was entitled to the allowance of his motion for judgment of nonsuit as to plaintiff's first cause of action.

As to plaintiff's second cause of action a different conclusion is indicated. The jury found that the sum of $83.33 was improperly deducted from plaintiff's salary for the month of June, 1948, and judgment was rendered accordingly. The result will not be disturbed. The check for the diminished salary was deposited to plaintiff's credit in his absence and there was no reason why he should not sue to recover the amount thus improperly deducted. The trial was free from error.

The judgment below will be modified in accordance with this opinion.

Modified and affirmed.

STATE v. LUTHER MESSIMER.

(Filed 29 April, 1953.)

Assault § 14b—

Where defendant in a prosecution for assault relies upon a plea of self-defense, an instruction to the effect that defendant would be guilty if he struck the prosecuting witness and committed an assault upon him as defined by the court, without reference or qualification as to his plea, must be held for prejudicial error notwithstanding later instructions pertaining to the law of self-defense, especially when the erroneous instruction is thereafter again repeated.

APPEAL by defendant from *Crisp, Special Judge,* at 19 January, 1953, Extra Criminal Term, of MECKLENBURG.

Criminal prosecution upon warrant issued out of the Recorder's Court of the city of Charlotte, North Carolina, charging that Luther Messimer "with force and arms . . . did willfully, maliciously and unlawfully commit an assault on the person of Garland Pridgen with hands and fists where serious injury was inflicted on Garland Pridgen a broken jaw . . .," tried in Superior Court on appeal thereto from judgment of Recorder's Court on plea entered, and verdict found.

In Superior Court defendant pleaded not guilty, and upon trial *de novo:* The State offered evidence tending to support the charge against

defendant, as alleged in the warrant. On the other hand, defendant offered evidence that he struck Garland Pridgen under circumstances detailed, and in defense of himself.

The jury returned a verdict of "Guilty of simple assault, inflicting serious damage."

Thereupon the judge presiding entered judgment "that the defendant serve a term of eighteen (18) months in the common jail of Mecklenburg County, to be assigned to work the roads, under the supervision of the State Highway and Public Works Commission. This sentence is suspended upon condition that the defendant pay the costs of this action, and upon the further condition that the defendant pay into the Clerk of Court's office (1) the sum of $700 to compensate the prosecuting witness (Garland Pridgen) for loss of time from his work; (2) $125.00 to cover hospital expenses in connection with having the dental surgeon treat his broken jaw, and (3) $100.00 to take care of future treatments that will be necessary for him to have "the total amounting to $925.00"; and the "judgment is suspended upon condition that the defendant shall be of good behavior and not violate any of the laws of the State of North Carolina for a period of five (5) years from the date of this judgment. Capias to issue, upon motion of the Solicitor, if it shall be made to appear that the defendant has failed to comply with the terms of this judgment."

Defendant excepted and appeals to Supreme Court, and assigns error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Charles G. Powell, Jr., Member of Staff, for the State.

Marvin Lee Ritch for defendant, appellant.

WINBORNE, J. Defendant presents on this appeal various assignments of error, some of which reveal prejudicial error. Of these it is sufficient to point to Exception 5.

In the course of his charge to the jury the trial judge instructed in substance that if the jury find from the evidence beyond a reasonable doubt that the defendant struck the prosecuting witness with his fist, and committed an assault upon him, by so striking him, as the court has defined an assault to mean, it would become the duty of the jury to return a verdict of guilty. The instruction is a complete paragraph without reference or qualification as to the plea of self-defense relied upon by defendant. It is misleading to the jury, and prejudicial to defendant. It is true, however, that later in the charge the court gave instructions pertaining to the law of self-defense. Yet there is exception to the sufficiency of such instruction. But even if this latter exception be not well founded, the court immediately after adverting to the law of self-defense repeated, in brief, the instruction to which exception 5 relates.

Since there must be a new trial for error pointed out, other assignments of error need not be considered. The matters to which they relate may not recur upon another trial.

New trial.

S. D. ELLISON v. J. W. HUNSINGER; CRESPI COTTON COMPANY, A CORPORATION; PLANTERS & MERCHANTS WAREHOUSE, INC.; J. E. NOGGLE, MANAGER OF PLANTERS & MERCHANTS WAREHOUSE, INC.; A. B. FAIRLEY, STATE WAREHOUSE SUPERINTENDENT; AND BRANDON P. HODGES, TREASURER OF THE STATE OF NORTH CAROLINA.

(Filed 6 May, 1953.)

1. Courts § 14—

In an action to determine title to personalty sold to an innocent purchaser for value by a wrongdoer who obtained possession from the true owner by false pretense, the law of the state of the *situs* of the personalty controls, and will be applied in an action instituted in this State unless contrary to the public policy of this State.

2. Sales § 12½—

Under the law of South Carolina, which is in accord with the general rule, a person who obtains possession of personalty from the true owner by false pretense has no title and cannot transfer title even to a *bona fide* purchaser for value without notice, unless some principle of estoppel intervenes. This rule of law will be applied in this State under the doctrine of comity, since it is not contrary to public policy of this State.

3. Courts § 14—

The *lex loci* will be applied under the doctrine of comity unless it is made to appear that it is against good morals or natural justice or that for some other reason the enforcement of it would be prejudicial to the general interest of the citizens of the forum, and therefore against public policy.

4. Sales § 12½: Principal and Agent § 7c—True owner held not estopped to assert title as against bona fide purchaser from wrongdoer obtaining possession of personalty by false pretense.

A wrongdoer obtained possession of a number of bales of cotton by false pretense from the true owner in South Carolina, by representing that he was agent of a reputable dealer and was taking possession for such dealer who would pay the true owner for the cotton. The wrongdoer then stored the cotton in a warehouse and sold the cotton to an innocent purchaser for value without notice by transfer of the warehouse receipts. *Held:* The wrongdoer having obtained possession of the cotton from the true owner by false pretense, was not in any way an agent for the true owner in the sale of the cotton, and the mere fact of his possession of the cotton is insufficient to estop the true owner from asserting his title even against the innocent purchaser who dealt with the wrongdoer on the faith of his apparent ownership or apparent authority to sell.

5. Warehousemen § 3d—Where true owner is deprived of title to his cotton by operation of G.S. 106-442, he must be compensated therefor under due process of law.

A wrongdoer obtained possession of certain bales of cotton by false pretense, stored the cotton in a warehouse and obtained negotiable receipts from the warehouse without being required to sign the certificates of ownership on the bottom thereof (G.S. 106-442). The wrongdoer then transferred the cotton by negotiating the receipts to an innocent purchaser for value without notice, and appropriated the proceeds of sale. *Held:* By virtue of G.S. 106-442 the purchaser obtained absolute title to the cotton, but the true owner may not be deprived of his property without due process of law, and is entitled to recover the value of the cotton against the bond of the warehouse manager and the warehouse if the loss were occasioned by any default in the faithful performance of their obligations (G.S. 106, Art. 38), or the bond of the State Warehouse Superintendent if the loss were occasioned by any default by him in the faithful performance of his duties, or, if the loss is not covered by such bonds, then under the indemnifying or guarantee fund created by G.S. 106-435.

6. Appeal and Error § 50—

Where the agreed statement of facts is insufficient to enable the Court to determine the questions presented by the appeal, the cause must be remanded.

7. Same—

Where parties necessary for a final determination of the cause are not parties of record, the cause will be remanded.

8. Judgments § 18—

Where one of the parties files no pleading, does not consent to the agreed statement of facts or to the hearing by the judge in chambers in another county, the court has no jurisdiction to sign judgment against him.

9. Appeal and Error § 1—

The Supreme Court will take notice of a defect of jurisdiction *ex mero motu.*

APPEAL by plaintiff from *Rudisill, Resident Judge* of the 16th District, in Chambers in the courthouse in Catawba County, 30 December, 1952. CLEVELAND.

This is a civil action instituted in Cleveland County to recover 43 bales of lint cotton, or if recovery of the cotton cannot be had for its market value, possession of said cotton having been allegedly obtained from the plaintiff by the crime of false pretense by Hunsinger. The action came on to be heard before the Resident Judge in Catawba County in chambers upon an agreed statement of facts, by consent of all the parties, except the defendant Hunsinger, who was a party defendant, but filed no answer, and is now serving a three-year sentence in the Penitentiary in South Carolina for obtaining this cotton by false pretense from the plaintiff.

For the sake of brevity the Crespi Cotton Company will be called the Cotton Company, and the Planters & Merchants Warehouse, Inc., the Warehouse, Inc. The plaintiff instituted suit against Hunsinger, the Cotton Company, and the Warehouse, Inc. Upon motion of the Cotton Company, A. B. Fairley, State Warehouse Superintendent, and Brandon P. Hodges, Treasurer of the State of North Carolina, in their official capacity were made defendants, and the Cotton Company filed a cross-action against Fairley and Hodges, in their official capacity, and against the Warehouse, Inc. Upon motion of Fairley and Hodges, J. E. Noggle, Manager of the Warehouse, Inc., and the surety upon his bond, the Indemnity Insurance Company of North America, were made defendants. Noggle filed an answer. The plaintiff filed an amendment to his complaint. Then Noggle and the Indemnity Insurance Company of North America filed a demurrer to the plaintiff's complaint and its amendment and to the further answer and defense of Fairley and Hodges for alleged failure to state any cause of action against either of them. The demurrer was heard by Crisp, J., at the September 1952 Term of the Cleveland County Superior Court, and Crisp, J., sustained the demurrer of the Insurance Company and overruled the demurrer of Noggle. To this judgment upon the demurrer the plaintiff and the defendants, the Cotton Company, Fairley and Hodges excepted and appealed to the Supreme Court. The appeal has not been perfected by any of them.

On 13 February, 1951, the Cotton Company and the plaintiff entered into the following agreement: In order for the Cotton Company to sell the 43 bales of cotton it is agreed that if the plaintiff is entitled to recover the cotton on the grounds of fraud practiced by Hunsinger, and that title did not pass to Hunsinger, then the plaintiff shall recover the present market value of the cotton from the Cotton Company in place of recovering the actual cotton. This agreement is made so that the Warehouse, Inc., may turn over the actual cotton to the Cotton Company without the plaintiff admitting any right of the Cotton Company to the cotton.

Later on the plaintiff, the Cotton Company, the Warehouse, Inc., Fairley and Hodges, by their counsel of record, signed an agreed statement of facts, and by consent of all parties, except Hunsinger, the case was heard upon the agreed statement of facts by Rudisill, J., in chambers. The agreed statement of facts was signed by Joseph C. Whisnant, attorney for Planters & Merchants Warehouse, Inc., alone. The judgment of Rudisill, J., states that this cause by consent of all parties, except Hunsinger, came on to be heard upon an agreed statement of facts and upon the pleadings filed by all the parties hereto and was heard. The agreement as to what should constitute the case on appeal was signed by Joseph C. Whisnant, as joint counsel for Planters & Merchants Warehouse, Inc., and J. E. Noggle, Manager of Planters & Merchants Ware-

house, Inc. A brief was filed by Joseph C. Whisnant as joint counsel for the Warehouse, Inc., and J. E. Noggle, Manager of the Warehouse, Inc., as appellees. The defendant Noggle makes no contention in his brief that he did not consent to the agreed statement of facts. Therefore, it would seem that Noggle, who as a defendant, filed an answer with Joseph C. Whisnant as his attorney, consented to the agreed statement of facts.

This is a summary of the agreed statement of facts:

1. The plaintiff lives in Fairfield County, South Carolina. About 18 January, 1951, Hunsinger came to his house, and represented that he wanted to get some samples of cotton for V. F. Cooley, a cotton broker of Spartanburg, South Carolina. The plaintiff gave him the samples, and thereafter talked by telephone with Cooley relative to purchasing said cotton. Cooley had sent Hunsinger to the plaintiff to get cotton samples, and during his conversation with the plaintiff, Cooley asked the plaintiff to telephone him in Spartanburg at a given number to talk further about a sale of the cotton after Cooley had seen the samples. Hunsinger left with the samples. Later the plaintiff called this telephone number, and Hunsinger came to the telephone, and informed the plaintiff "We have decided to buy the cotton and will come for it tomorrow." That afternoon Hunsinger arrived at the plaintiff's home with one truck with North Carolina plates on it. Hunsinger told the plaintiff that Cooley had sent him for the cotton, which had been sold to a mill in North Carolina, and that the cotton would be taken to Shelby, North Carolina, and put in a warehouse there. Hunsinger told the plaintiff that Cooley was worried about the cotton being in the open; that it was raining in Spartanburg. Hunsinger told the plaintiff of numerous trips he had made for Cooley buying cotton at various points. 43 bales of lint cotton owned by the plaintiff were loaded on the truck, and Hunsinger left.

2. Hunsinger carried the 43 bales of cotton to the Planters & Merchants Warehouse, Inc., in Shelby, North Carolina, a bonded warehouse operating under the provisions of G.S., Ch. 106, Art. 38, and the Warehouse, Inc., issued warehouse certificates therefor, as set out in exhibits attached to the complaint, under date of 19 January, 1951, in the name of Hunsinger. At the time of issuance of said negotiable warehouse receipts the Warehouse, Inc., did not require Hunsinger to sign the certificates of ownership on the bottom of each of said receipts.

3. Hunsinger carried the 43 warehouse receipts, together with samples of the cotton represented by the receipts, to the office of the Crespi Cotton Company in Charlotte, North Carolina, and sold the cotton to the Crespi Cotton Company receiving from it its cheque dated 19 January, 1951, in the amount of $8,878.85—representing the sale of the cotton at the price of 44.75c per pound. At the same time Hunsinger endorsed each of the

43 warehouse receipts, and delivered them to the Cotton Company. The endorsement above the signature of Hunsinger bears the following words: "Each of the undersigned hereby certifies on the date stated that he is the owner of the cotton covered by this receipt and that, other than the warehouseman's lien evidenced on the face of this receipt and the following, there are no liens, mortgages, or other encumbrances on said cotton." Nothing else appeared below Hunsinger's signature except the date 19 January, 1951.

4. The Cotton Company bought this cotton from Hunsinger by its agent, Otto Lylerly, who had bought cotton from Hunsinger for about 8 years. Hunsinger represented to Lylerly that the 43 bales of cotton were his cotton, and that the Cotton Company purchased this cotton in good faith and without notice of any defect in the title of Hunsinger.

5. On 23 January, 1951, Noggle, Manager of the Warehouse, Inc., telephoned one Johnston of the Cotton Company in Charlotte, North Carolina, and said that he was trying to find out who had bought some cotton from Hunsinger in the past day or two. Johnston informed Noggle that the Cotton Company had purchased some cotton from Hunsinger within the past few days. The next day the plaintiff came to Charlotte, North Carolina, and advised Johnston how Hunsinger had obtained possession of his cotton. Immediately after Noggle's conversation with Johnston the Cotton Company endeavored to stop payment on its cheque to Hunsinger, but the bank had already paid the cheque.

6. Hunsinger did not obtain possession of the cotton from the plaintiff for Cooley, and was not acting as agent for Cooley at the time; and Cooley had no knowledge that Hunsinger had procured possession of the plaintiff's cotton or that Hunsinger over the telephone had agreed to purchase the cotton from the plaintiff on behalf of Cooley.

7. On 4 September, 1951, Hunsinger, in the Court of General Sessions for Fairfield County, South Carolina, pleaded guilty to a bill of indictment for false pretense in obtaining said cotton from the plaintiff; in that he did falsely represent that he was purchasing the cotton for Cooley; that Cooley would pay the plaintiff the agreed price, and that he was sent by Cooley to the plaintiff to get the cotton, and that by said false pretense and representations he did get the cotton from the plaintiff. Whereupon Hunsinger was sentenced by said Court to serve three years in the State Penitentiary of South Carolina, and he is now serving his sentence. Hunsinger has not filed an answer or other pleading in this action.

8. Before Hunsinger obtained possession of the 43 bales of cotton, he falsely represented to the plaintiff that he was getting the cotton for Cooley, and that Cooley would pay for the cotton at the agreed price when the same was delivered for Cooley at the warehouse and weighed; that Cooley would not accept the ginner's weight, and that payment would be

made by Cooley immediately by cheque upon the basis of the warehouse weights; that the plaintiff would not have turned his cotton over to Hunsinger but for these representations, because the plaintiff had previously investigated the reputation of Cooley as to payments in carrying out his agreements, and found that Cooley was reliable and financially able to meet his obligations; that the plaintiff believed he was delivering the cotton to Hunsinger for Cooley; and because of Hunsinger's false representations and because he had previously sent samples of his cotton to Cooley, and he had talked with Cooley over the telephone about the cotton, and Cooley had requested him to call him back, and also because Hunsinger represented over the telephone that Cooley would take the cotton, the plaintiff delivered the cotton to Hunsinger for Cooley. The plaintiff has never received payment for his cotton, and he has been damaged in the amount equal to the market value of the cotton on said date.

Upon the agreed statement of facts the Court signed the judgment that the plaintiff have and recover from the defendant Hunsinger $8,878.85 with interest from 18 January, 1951; that the plaintiff recover nothing from all the other defendants, and dismissed the action as to them; and taxed Hunsinger with the costs.

From the judgment signed the plaintiff appeals to the Supreme Court, assigning error.

D. Z. Newton, Peyton McSwain, and George F. Coleman for plaintiff, appellant.

Tillett, Campbell, Craighill & Rendleman for defendant Crespi Cotton Company, appellee.

Joseph C. Whisnant for defendants Planters & Merchants Warehouse, Inc., and J. E. Noggle, Manager of Planters & Merchants Warehouse, Inc., appellees.

Attorney-General McMullan and Assistant Attorney-General Bruton for defendants A. B. Fairley, State Warehouse Superintendent, and Brandon P. Hodges, Treasurer of the State of North Carolina, appellees.

PARKER, J. Each state has the right to regulate the transfer of property within its limits. The prevailing modern theory is that the law of the *situs* in general controls transfers of personalty. All the transactions between the plaintiff Ellison and Hunsinger occurred in South Carolina; the 43 bales of cotton were situated in South Carolina; according to Hunsinger's representations, Ellison was to be paid by Cooley's cheque; Cooley lived in Spartanburg, South Carolina. Hunsinger obtained possession of the 43 bales of cotton from Ellison by the crime of false pretense—to which crime he pleaded guilty, and is now serving a prison

sentence in South Carolina. Whether Hunsinger acquired title to this cotton is to be determined according to the laws of the State of South Carolina, and the South Carolina law on the doctrine of comity in the forum will be enforced in the Courts of North Carolina, unless contrary to the public policy of this State. *Motor Co. v. Wood, ante,* 318, 75 S.E. 2d 312; *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592; 11 Am. Jur., Conflict of Laws, Sec. 66.

The facts in relation to one Hinson obtaining a Buick Convertible Coupe from Russell Willis, Inc., in the case of *Russell Willis, Inc., v. Page,* 213 S.C. 156, 48 S.E. 2d 627, are strikingly similar to Hunsinger obtaining this cotton from Ellison. On 11 May, 1947, Mrs. E. F. Stacker, H. J. Saltzman and one Bernard Hinson, the owner, general manager, and employee, respectively, of Farnsworth-Stacker, a reputable company, engaged in various lines of business at Clarksville, Tenn., a distance of about 40 miles from Nashville, Tenn., came into Russell Willis, Inc.'s place of business for the purpose of purchasing one or more Buick automobiles. At that time Russell Willis, Inc., had on hand a new four-door Buick Sedan and also a Buick Convertible Coupe. Mrs. Stacker purchased the four-door Sedan. While there Mrs. Stacker and especially Saltzman seriously considered buying the Convertible Coupe, which was priced to them at $3,595.00. As they were leaving Saltzman said: "He would send back and get the Buick Convertible for $3,595.00."

On 29 May, 1947, Hinson walked into the office of Russell Willis, Inc., and stated that he had come after the Buick Convertible Coupe for Saltzman. Hinson delivered to Russell Willis, Inc., a Farnsworth-Stacker printed cheque signed "E. F. Stacker," payable to Russell Willis, Inc., in the sum of $3,595.00. The signature to this cheque was a forgery.

Baker, C. J., speaking for the Court, said: "The trial judge has very succinctly stated the governing law of this case as applied in South Carolina, and we quote therefrom. 'There can be no doubt that the plaintiff did not divest itself of title to said automobile by the purported sale to H. J. Saltzman upon the false and fraudulent representation of Hinson that he was authorized by Saltzman to purchase said car for and on his behalf. It follows that the defendant, Page, acquired no title in the purchase of the car from Hinson. Under such circumstances, ordinarily, the original seller is entitled to the recovery of his property even as against a subsequent *bona fide* purchaser for value and in good faith. See annotations contained in 13 L.R.A., N.S., at page 413, and L.R.A. 1916-D, 801. See, also, *M. Brotchiner & Sons, Inc., v. M. Ullman, Inc.* (141 Misc. 102), 252 N.Y.S. 244' . . . The law of neither the State of Tennessee nor that of the State of Virginia having been pleaded, we must assume that it is the same as in this State, and therefore the law of the forum will govern."

The annotation contained in 13 L.R.A., N.S., at page 416, states: "There are numerous other cases holding that title will not pass where the alleged purchaser has falsely represented himself to be an agent for some third party, as in that case there is no meeting of the minds." (Citing numerous authorities.)

In the annotation L.R.A. 1916-D, 801, it is said in part: "The reputation of a certain person or firm may be such that the party desires to contract with him and him only. If a mistake arises and such a party contracts with another in the belief that he is contracting with the desired person, the contract may be avoided. It is more accurate to say that no contract exists."

In *M. Brotchiner & Sons, Inc., v. M. Ullman, Inc.,* (141 Misc. 102), 252 N.Y.S. 244, a man represented himself to be a brother of Victor Goodman, a reputable fur dealer in Toronto, Canada, for whom he said he was authorized to make purchases of furs, and purchased a number of furs from the plaintiff by a cheque which purported to be signed by V. Goodman. The cheque was forged. The purported purchaser sold these furs to the defendant. On 11 May, 1929, the same individual, now representing himself to be Victor Goodman, appeared in Buffalo at the factory where the defendant is engaged in manufacturing and trading in furs. He stated that on account of delays incident to importation into Canada he desired to sell the furs at cost. In confirmation he exhibited the receipted bills received from the plaintiff, showing the sale of the furs to V. Goodman for $1,451. He gave also the name of his hotel in Buffalo. Inquiry by the defendant showed that a Victor Goodman was registered there. The defendant finally agreed to buy the furs for $1,400 and delivered its check for this amount, which was immediately paid. The plaintiff, having thereafter ascertained that the defendant was in possession of the furs, made demand for them, and, the demand having been rejected, began this suit. The New York Court said: "It is entirely clear under the circumstances here that the imposter acquired no title to the merchandise, and consequently that no title passed to the defendant. The imposter was only intrusted by the plaintiff with possession of the merchandise for transmission to his alleged principal. The plaintiff never sold nor did it intend any sale to him."

In *Chiplock v. Steuart Motor Co.,* Mun. Court of Appeals for the District of Columbia, 91 A. 2d 851, the Court said: "We think it is correct to say that when a seller purports to transfer title to one who is in fact a stranger to the transaction, no title (void, voidable, or otherwise) flows from the seller to a wrong doer who has fraudulently held himself out as agent of such stranger. This is so because one of the supposed parties to the legal transaction is actually wanting. In such a situation the seller may usually follow the property and recover it from an innocent pur-

chaser. *Russell Willis, Inc., v. Page,* 213 S.C. 156, 48 S.E. 2d 627, and citing other authorities."

The South Carolina law that one who has acquired possession of property by a crime such as false pretense cannot transfer a better title than he himself has, even to a *bona fide* purchaser, unless some principle of estoppel comes into operation, is in accord with the general rule. 46 Am. Jur., Sales, Secs. 459 and 460.

It is stated in 77 C.J.S., Sales, page 1103: "The defrauded owner of goods can recover them from a *bona fide* purchaser under one who has obtained them from the true owner by a pretended purchase for, or in behalf of, another person or of a firm, which representation of authority is false and fraudulent." C.J.S. cites as authority for its statement *Russell Willis, Inc., v. Page, supra; Petty v. Borg,* 106 Utah 524, 150 P. 2d 776.

Under the South Carolina law title to the 43 bales of cotton remained in the plaintiff Ellison, and never passed to Hunsinger. On the doctrine of comity in the forum this South Carolina law will be enforced in North Carolina, unless contrary to the public policy of this State. This Court has said in *In re Chase,* 195 N.C. 143, at p. 148, 141 S.E. 471: "As pointed out in *R. R. v. Babcock,* 154 U.S. 190, 38 Law Ed., 958, to justify a court in refusing to enforce a right which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens (citing authorities). And this is a matter which each state must decide for itself." We find nothing in our own laws which declares it against public policy, good morals, or natural justice, or prejudicial to the general interest of our own citizens to recognize as a matter of comity the South Carolina law that the title to the 43 bales of cotton remained in the plaintiff, and never passed to Hunsinger.

It is a universal and fundamental principle of our law of personal property that the owner of such property cannot be divested of his ownership without his own consent, except, of course, by due process of law. *Dows v. Nat. Exch. Bank of Milwaukee,* 91 U.S. 618, 23 Law Ed. 214. The general rule of law is that a sale by a person who has no right to sell is not valid against the rightful owner. Even a *bona fide* purchaser obtains no title or right by a purchase from one who is not the owner, or not authorized to sell, which he can assert as against the true owner in the absence of some element of estoppel. It is a general rule that the fact that the owner has entrusted someone with mere possession and control of personal property is not sufficient to estop the real owner from asserting his title against a person who dealt with the one in possession on the faith of his apparent ownership or apparent authority to sell. *Motor Co.*

v. Wood, supra; 46 Am. Jur., Sales, Secs. 458 and 460. Hunsinger acquired possession of the 43 bales of cotton from the plaintiff by the crime of false pretense: that is not sufficient to estop the plaintiff from asserting his title to the cotton against anyone who dealt with Hunsinger on the faith of his apparent ownership or apparent authority to sell.

"Consent of both principal and agent is necessary to create an agency. The principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them. With respect to third persons, an agency may arise by necessity, from acts and appearances which lead others to believe that such a relation has been created, *i.e.,* by estoppel; or from operation of law." 2 Am. Jur., Agency, Sec. 21. Hunsinger obtained possession of the plaintiff's cotton by the crime of false pretense. That did not in any way make Hunsinger his agent as contended for by the defendants, the Warehouse, Inc., and Noggle, in their brief, and as contended by Fairley and Hodges in their brief.

G.S. Ch. 106, Art. 38, was enacted by the General Assembly to provide a modern system whereby cotton and other agricultural commodities might be more profitably marketed, and to give these products the standing to which they are justly entitled as collateral in the commercial world, a warehouse system for cotton and other agricultural products in the State of North Carolina is established. G.S. 106-432 provides that the provisions of this article shall be administered by the State Board of Agriculture, through a suitable person to be selected by said board, and known as the State Warehouse Superintendent; the State Board of Agriculture is empowered to make and enforce such rules and regulations as may be necessary to make effective the purposes and provisions of this article. G.S. 106-433 provides that the Board of Agriculture shall have authority to employ a warehouse superintendent, necessary assistants, local managers, etc., to carry out the provisions of this article. G.S. 106-434 provides that the State Warehouse Superintendent shall give bond to the State of North Carolina in the sum of $50,000.00 to guarantee the faithful performance of his duties; and the said superintendent shall, to safeguard the interests of the State, require bonds from local managers, etc., authorized in G.S. 106-433, in amounts as large at least as he may find ordinary business experience in such matters would suggest as ample. G.S. 106-435 states in substance: in order to provide a sufficient indemnifying or guarantee fund to cover any loss not covered by the bonds of the State Warehouse Superintendent and of others required by G.S. Ch. 106, Art. 38, to give bonds, and in order to provide the financial backing which is essential *to make the warehouse receipts universally acceptable as collateral,* and in order to provide that a state warehouse system intended

to benefit all cotton growers in North Carolina shall be supported by the class it is designed to benefit; that on each bale of cotton ginned in North Carolina during a certain period 25 cents shall be collected through the ginner of the bales, and paid into the State Treasury to be held there as a special guarantee or indemnifying fund to safeguard the state warehouse system against any loss not otherwise provided: this fund shall be held in the State Treasury to the credit of the state warehouse system. G.S. 106-439 provides that the State Warehouse Superintendent shall have power to lease for stated terms property for the warehousing of cotton; and that it shall be his duty to foster and encourage the erection of warehouses in the various cotton-growing counties of the State for operation under the terms of this chapter and article, and to provide an adequate system of inspection, and of rules, forms, and reports to insure the security of the system, such matters to be approved by the State Board of Agriculture; and that cotton may be stored in such warehouses by persons owning it, and they shall receive all of the benefits accruing from such State management; and for such storage such persons shall pay to the manager of the warehouse such sums for storage as may be agreed upon subject to the rules of the State Board of Agriculture by the manager and owner of the cotton. G.S. 106-440 provides that the State Warehouse Superintendent shall have the power to sue, or to be sued, in the Courts of this State in his official capacity, but not as an individual, except in case of tort or neglect of duty, when the action shall be upon his bond.

G.S. 106-441 provides that when cotton has been stored in such warehouses official negotiable receipts of the form and design approved by the Board of Agriculture shall be issued for such cotton under the seal and in the name of the State of North Carolina, stating the location of the warehouse, the name of the manager, etc., so that on surrender of the receipt the identical cotton for which it was given may be delivered. The warehouse manager shall fill in the receipts, and they shall be signed by him or by the State Warehouse Superintendent or his duly authorized agent. If the local manager cannot issue a negotiable receipt complete for the cotton, he shall issue nonnegotiable memorandum receipts therefor.

G.S. 106-442 provides that the official negotiable receipt issued for cotton stored in such warehouse is to be transferable by written assignment and actual delivery, and the cotton which it represents is to be deliverable only upon a physical presentation of the receipt. *The said official negotiable receipt carries absolute title to the cotton,* it being the duty of the local manager accepting the cotton for storage to satisfy himself as to the title to the same by requiring the depositor of the cotton to sign a statement appearing on the face of the official receipt to the effect that there is no lien, mortgage, or other valid claim outstanding against

such cotton, and any person falsely signing such a statement shall be punished as provided for false pretense.

The indemnifying or guarantee fund held in the State Treasury is to cover any loss not covered by the bonds required to be given by G.S. Ch. 106, Art. 38. If a loss is covered by such bonds, then the bonds are the primary fund from which to make good the default of their respective principals. G.S. 106-435; *Lacy v. Indemnity Co.,* 189 N.C. 24, 126 S.E. 316.

Speaking of G.S. Ch. 106, Art. 38, this Court said in *Bickett v. Tax Commission,* 177 N.C. 433, at p. 438, 99 S.E. 415: "There was a 'Warehouse Receipts Act' enacted by the last General Assembly, ch. 37, Laws 1917, but it lacked (like a similar statute in S.C.) the essential feature of the tax of 25 cents per bale, which will raise probably $200,000 a year as a guarantee fund behind the warehouse certificates to guarantee such certificates and make them acceptable as collateral as it will insure the title of the cotton against litigation arising out of liens (which might be recorded in another county than where the mortgagee resides) or any other defects." Later on in the same case the Court said, at page 440: ". . . the act provides that every bale of cotton can be stored, but requires that the real owner must first be determined and the warehouse receipts shall be in the name of such owner. It is true there may be some mistakes made, and for that reason the fund is provided to guarantee the holders of the warehouse certificates against loss." When this opinion was written Ch. 168, Sec. 12, Public Laws of North Carolina 1919, provided that it was the duty of the manager accepting cotton for storage, by inspection of the Register of Deeds office, to ascertain whether there were on file crop mortgages or liens for rent or laborers' liens covering said cotton before he accepted it and issued a receipt.

The General Assembly in 1921 enacted Ch. 137, Public Laws of North Carolina, and Sec. 12 provides: That it shall be the duty of the local manager accepting cotton for storage to satisfy himself as to the title to the same by requiring the depositor of the cotton to sign a statement appearing on the face of the official receipt to the effect that there is no lien, mortgage or other valid claim outstanding against such cotton. This section is now codified as G.S. 106-442.

These facts are admitted by the agreed statement of facts: (1) Hunsinger obtained possession of the plaintiff's 43 bales of cotton by the crime of false pretense; (2) the Warehouse, Inc., was a bonded warehouse operating under the provisions of G.S. Ch. 106, Art. 38, and J. E. Noggle was its manager; (3) on 19 January, 1951, Hunsinger stored these 43 bales of cotton in the warehouse of the Warehouse, Inc., and on said date the Warehouse, Inc., issued official negotiable receipts for the said cotton in the name of J. W. Hunsinger, and at the time of issuing said receipts the

Warehouse, Inc., did not require the said Hunsinger to sign the statement appearing on the face of the official receipt to the effect that there is no lien, mortgage, or other valid claim outstanding against the 43 bales of cotton; (4) that Hunsinger on 19 January, 1951, sold the 43 bales of cotton represented by these official negotiable receipts to the Cotton Company for $8,878.85, and transferred to the Cotton Company the said receipts by written assignment and actual delivery, and Hunsinger cashed the said cheque and received the money for the same; (5) this cotton was purchased in the ordinary course of business by the Cotton Company for value, in good faith and without notice of any defect in the title of Hunsinger.

Upon these agreed facts the title to the 43 bales of cotton remained in the plaintiff, and never passed to Hunsinger under the laws of South Carolina, and such law will be enforced in this forum; and further the plaintiff is not estopped to assert his title, nor was Hunsinger his agent. The authorities for these statements have been set forth before in this opinion. However, upon the agreed facts, by virtue of G.S. 106-442 the Cotton Company obtained absolute title to these 43 bales of cotton. *Lacy v. Indemnity Co.,* 193 N.C. 179, 136 S.E. 359; *Northcutt v. Warehouse Co.,* 206 N.C. 842, 175 S.E. 165.

As G.S. 106-442 divests the plaintiff of title to his 43 bales of cotton, and puts absolute title to the bales of cotton in the Cotton Company, it would be a taking of plaintiff's cotton without due process of law, and this section of the statutes would be unconstitutional, unless G.S. Ch. 106, Art. 38, provided that the plaintiff shall be paid full compensation for his cotton. G.S. Ch. 106, Art. 38, makes such provision for the payment of full compensation to the plaintiff for his cotton by making (1) the bond of Noggle, local Manager of the Warehouse, Inc., and his employer, the Warehouse, Inc., primarily responsible for the plaintiff's loss, if there has been any default of Noggle and the Warehouse, Inc., in the faithful performance of their obligations in operating a warehouse under the terms of G.S. Ch. 106, Art. 38; and if they are not responsible by making (2) the bond of Fairley, State Warehouse Superintendent, liable for plaintiff's loss, if there has been any default by him in the faithful performance of his duties as State Warehouse Superintendent; and (3) if the plaintiff's loss, or any part of it, is not covered by such bonds, and by the liability of the Warehouse, Inc., then the indemnifying or guarantee fund created by G.S. 106-435 and held in the State Treasury to the credit of the warehouse system is responsible to the plaintiff for his loss, or any part of his loss not covered by such bonds. *Lacy v. Indemnity Co.,* 189 N.C. 24, 126 S.E. 316; G.S. 106-434; 106-435; 106-439. This provision is made "in order to provide the financial backing which is essential to

make the warehouse receipt universally acceptable as collateral." G.S. 106-435.

The bonds of Noggle and Fairley are not part of the agreed facts. In the record is the form of a local Warehouse Manager's Bond purporting to be executed by the Indemnity Ins. Co. of North America, payable to the State, conditioned upon a local warehouse manager faithfully performing his obligations as a warehouseman, and setting forth the amount of Noggle's bond at $15,000.00.

Noggle, as local manager of the Warehouse, Inc., knew the risks involved if he issued official negotiable receipts for cotton stored in the Warehouse, Inc., in the name of one not the true owner; and if Noggle, as local manager, failed to use such diligence as would be used by an ordinarily prudent person under the same circumstances and charged with a like duty to satisfy himself as to the title to this cotton by requiring Hunsinger, the depositor of the cotton, to sign a statement appearing on the face of the official receipt to the effect that there is no lien, mortgage, or other valid claim outstanding against the said cotton, and issued official negotiable receipts for this cotton not in the plaintiff's name, then he failed in the faithful performance of his duties as local manager, and he and his bond, and his employer, the Warehouse, Inc., are liable to the plaintiff for the fair market value of his 43 bales of cotton as of 19 January, 1951. 50 Am. Jur., Suretyship, Sec. 337; Annos. 43 A.L.R. 980; 46 A.L.R. 977; 62 A.L.R. 412; 77 A.L.R. 862; 98 A.L.R. 1266.

If Noggle and the Warehouse, Inc., are not liable, and if Fairley, as State Warehouse Superintendent, failed in the faithful performance of his duties, then he and his bond are liable to the plaintiff for his loss. If Noggle and his bond, and the Warehouse, Inc., and Fairley and his bond are not liable to the plaintiff for all of his loss, then the loss to the plaintiff, or any part of it not covered as above set forth, must be paid by Brandon P. Hodges out of the guarantee or indemnifying fund held in the State Treasury. The plaintiff's loss is the fair market value of his 43 bales of cotton as of 19 January, 1951, with interest until paid—the day when the Warehouse, Inc., issued official negotiable receipts for this cotton in the name of Hunsinger, and Hunsinger sold the cotton to the Cotton Company and received payment for it.

The agreed statement of facts are insufficient for us to determine as between Noggle and his bond and his employer, the Warehouse, Inc.; Fairley and his bond and Brandon P. Hodges, Treasurer of the State of North Carolina and custodian of the indemnifying or guarantee fund, who shall pay the plaintiff for his loss. Therefore, this action must be remanded to the lower court for further proceedings in accordance with this opinion.

In order that these issues may be clearly presented, it would be preferable to redraft the pleadings.

The surety upon the bond of Noggle and the surety upon the bond of Fairley are necessary parties for a final determination of this action.

Hunsinger filed no answer or other pleading. He did not consent to the agreed statement of facts. He did not consent to the hearing in chambers in Catawba County. The Court had no jurisdiction to try the case against him, and sign judgment against him for $8,878.85 and costs, in chambers when and where it did. The trial of the case against him must be had in term time in Cleveland County, unless he consents that it be done elsewhere. We notice this *ex mero motu,* even though Hunsinger has no defense according to the facts as they appear in the record before us. *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252.

The result, then, is that the judgment will be affirmed as to the Crespi Cotton Company; and error and remanded as to the Planters & Merchants Warehouse, Inc., J. E. Noggle, Manager of Planters & Merchants Warehouse, Inc., A. B. Fairley, State Warehouse Superintendent, and Brandon P. Hodges, Treasurer of the State of North Carolina.

Judgment against J. W. Hunsinger—Error and remanded.

Plaintiff's appeal as to Crespi Cotton Company—Affirmed.

Plaintiff's appeal as to Planters & Merchants Warehouse, Inc., J. E. Noggle, Manager of Planters & Merchants Warehouse, Inc., and A. B. Fairley, State Warehouse Superintendent, and Brandon P. Hodges, Treasurer of the State of North Carolina—Error and remanded.

STATE v. CHARLES B. McGEE.

(Filed 6 May, 1953.)

1. Municipal Corporations § 36—

A municipal corporation has only such police powers as are delegated to it by the Legislature.

2. Constitutional Law § 11—

The police power is as extensive as required for the protection of the public health, safety, morals and general welfare.

3. Municipal Corporations § 38—

The City of Charlotte has been delegated the power to enact ordinances requiring the observance of Sunday by general law, G.S. 160-52, G.S. 160-200 (6) (7) (10), and by its charter, Chap. 336, sec. 32, Public-Local Laws of 1939.

4. Same—

Chap. 73, Session Laws of 1951, which repealed G.S. 103-1 and all laws and clauses of laws in conflict therewith, does not repeal the powers granted to municipalities by G.S. 160-52 and G.S. 160-200 (6) (7) (10), or charter provisions authorizing the enactment of ordinances to require the observance of Sunday.

5. Same—

In enacting ordinances requiring the observance of Sunday, a municipality is vested with discretion in determining and classifying the kinds of pursuits, occupations or businesses to be included or excluded, and such ordinances will not be declared invalid as arbitrary or discriminatory if the classifications are based upon reasonable distinctions and have some reasonable relationship to the public peace and welfare, and affect equally all persons within a class. Fourteenth Amendment to the Federal Constitution; Art. I, sec. 17, of the Constitution of North Carolina.

6. Same—

A municipal ordinance prohibiting the operation of any place of amusement or the conduction of any show, game or sport where a fee is charged spectators or participants, during the hours from 6:30 p.m. to 9:00 p.m. on Sunday, is not discriminatory as applied to a motion picture theatre or drive-in theatre because radio and television stations are permitted to operate during such hours, since no fee is involved in regard to the latter pursuits and the classification is reasonable.

7. Same—

Municipal ordinances requiring the observance of Sunday may not be upheld if arbitrary and unreasonable.

8. Same—

A municipal ordinance prohibiting on Sunday the operation of any place of amusement or the conduction of any show, game or sport where a fee is charged spectators or participants except between the hours of 1:30 p.m. and 6:30 p.m. and after 9:00 p.m. *is held* not arbitrary or unreasonable with respect to the hours of regulation, since the determination of the local governing authorities with personal knowledge of the local conditions will not be interfered with by the courts unless palpably unreasonable and oppressive.

9. Same—

A municipal ordinance proscribing on Sunday the operation of places of amusement except between the hours of 1:30 p.m. and 6:30 p.m. and after 9:00 p.m. will not be held invalid in its application to a drive-in theatre on the ground of deprivation of constitutional rights because it limits such theatre to one show on Sunday.

10. Same: Constitutional Law § 19½—

A municipal ordinance proscribing the operation of places of amusement during the hours of 6:30 p.m. and 9:00 p.m. on Sunday will not be held invalid as contravening the First Amendment of the Federal Constitution or Art. I, sec. 26, of the Constitution of North Carolina, since even though the governing body of the city, in determining the hours during which

commercial amusements should be proscribed, may have taken into consideration the fact that churches usually have religious services at such hours, such ordinance neither purports to compel nor to deny the observance of any religious duty, and therefore does not impinge upon the freedom of conscience.

APPEAL by defendant from *Pless, J.*, February Term, 1953, of MECKLENBURG.

Criminal prosecution on a warrant charging the violation of a city ordinance.

The defendant was tried and convicted in the Recorder's Court of the City of Charlotte, and from the judgment imposed, appealed to the Superior Court.

Section 46, Article 3, Chapter 19, of the Code of the City of Charlotte reads as follows:

"It shall be unlawful to conduct, operate or engage in, or carry on within the City of Charlotte on the Sabbath Day, called 'Sunday,' any business except: Hotels, Restaurants and Boarding Houses, Drug Stores, Newspapers, and the Sale Thereof, Emergency Repair Service, Public Utilities, Including Street Railways, Gas, Telephone, Telegraph and Radio, Railroads, Buses, Trucks, Taxicabs, Gasoline Service Stations, Refrigeration, Dairy Products, Bakeries, Magazine Stands, Ice and the Sale Thereof, Shoe Shine Parlors for the Purpose of Shining Shoes only.

"Or to engage in or operate any place of amusement, show, game or sport where a fee is charged for admission as a spectator, or to participate in any game, sport or amusement where an admission fee is charged, whether such admission fee be upon a club basis or otherwise, and it shall be unlawful to operate any poolroom or bowling alley in the City of Charlotte on Sunday: Provided, however, it shall be lawful on Sunday, between the hours of 1:30 P.M. and 6:30 P.M., Eastern Standard Time, and after the hour of 9 P.M., Eastern Standard Time, for persons, firms and corporations to open and operate, and charge a fee for admission as a spectator to motion picture and other theatres, tennis courts, squash courts, golf courses, swimming pools, baseball grounds, football grounds and outdoor athletic courts, parks and grounds, and it shall be lawful to participate in any amusement given or game or sports played therein, regardless of whether or not a fee is charged for participating in such amusement, game or sport, or attending same as a spectator."

It was stipulated that on 8 February, 1953, police officers of the City of Charlotte arrested the defendant, Charles B. McGee, and thereafter procured the issuance of a warrant, charging him with violating the above ordinance. That at the time of the arrest, the defendant was engaged in the operation of a motion picture theatre within the corporate limits of the City of Charlotte between the hours of 6:30 p.m. and 9:00 p.m. It

was further stipulated, that the theatre is known as "North 29 Drive-In Theatre," and that the defendant was, at the time, the manager of the said theatre and was personally present and in charge thereof; and at the time mentioned in the warrant, the defendant McGee, as manager of the theatre was charging a fee for admission by spectators.

At the close of the State's evidence, counsel for defendant moved for judgment as of nonsuit on the following grounds:

(1) That the City of Charlotte has no authority to enact or enforce the ordinance in question, under the grant of powers to it by the General Assembly of North Carolina.

(2) That the ordinance is unconstitutional and void, for that it is an unreasonable and unwarranted exercise of the police power; that it is arbitrary, unreasonable, and discriminatory, and unlawfully deprives the defendant of his rights, liberties, and freedoms guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States, and by Article I, Section 17, of the Constitution of North Carolina.

(3) That the ordinance is void in that it offends the First Amendment to the Constitution of the United States, and Article I, Section 26, of the Constitution of North Carolina in that it is an attempt to legislate respecting religion.

The motion was denied. It was likewise denied upon its renewal at the close of all the evidence.

The jury returned a verdict of guilty and from the judgment imposed thereon, the defendant appeals, assigning error.

Attorney-General McMullan, Assistant Attorney-General Love, and Gerald F. White, Member of Staff, for the State.

Richard M. Welling and Maurice A. Weinstein for defendant, appellant.

DENNY, J. The right of a municipality to enact and enforce ordinances relative to the observance of Sunday must be delegated, if it exists, by the Legislature. Municipal corporations have no inherent police powers and can exercise only those conferred by statute. *Kass v. Hedgepeth,* 226 N.C. 405, 38 S.E. 2d 164; *Rhodes, Inc., v. Raleigh,* 217 N.C. 627, 9 S.E. 2d 389; *S. v. Dannenberg,* 150 N.C. 799, 63 S.E. 946; *S. v. Ray,* 131 N.C. 814, 42 S.E. 960; McQuillin, Municipal Corporations, Third Edition, Volume 6, Section 24.189, page 768, *et seq.* It is well settled, in view of the increasing scope of municipal power for the benefit of the public that the police power is as extensive as may be required for the protection of the public health, safety, morals and general welfare of the people. *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469, citing

Camfield v. United States, 167 U.S. 518, 42 L. Ed. 260, and *Bacon v. Walker,* 204 U.S. 311, 51 L. Ed. 499. Likewise, in *Moore v. Greensboro,* 191 N.C. 592, 132 S.E. 565, this Court said: "The enforcement of police regulations is a governmental function, . . . and it has been said that upon the exercise of this power depend the life, safety, health, morals, and the comfort of the citizen, the enjoyment of private and social life, the beneficial use of property, and the security of social order. *Slaughter-house cases,* 16 Wall, 62."

The power to enact ordinances requiring the observance of Sunday has been delegated to municipalities of the State by G.S. 160-52, G.S. 160-200 (6) (7) (10); and in addition to these general powers granted to all municipalities of the State, the Charter of the City of Charlotte, being Chapter 366 of the Public-Local Laws of 1939, provides in section 32, that, "In addition to the powers now or hereafter granted to municipalities under the general laws of the State of North Carolina, the City of Charlotte shall have and retain those express powers granted to it by Section 48 and the subsections thereof of Chapter 342 of the Private Laws of 1907 which, together with certain other additional powers hereby granted to said city are as follows: (13) To pass ordinances for the due observance of Sunday and for the maintenance of order in the vicinity of churches and schools."

The defendant contends, however, that the powers granted in the above statutes to enact and enforce the observance of Sunday have been withdrawn from all municipalities in the State by the repeal of G.S. 103-1 by Chapter 73 of the Session Laws of 1951. Section 1 of this act is in the following language: "G.S. 103-1 is hereby repealed in its entirety." Section 2 of the act reads as follows: "All laws and clauses of laws in conflict with this Act are hereby repealed." It is contended that since G.S. 160-52 provides that the governing body of a municipality "shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and *the law of the land* (italics ours), as they may deem necessary; and may enforce them by imposing penalties on such as violate them; and may compel the performance of the duties imposed upon others, by suitable penalties," the repeal of G.S. 103-1 makes any and all ordinances with respect to the observance of Sunday contrary to "the law of the land." In other words, the defendant insists that by the repeal of G.S. 103-1, which was originally adopted in 1741, forbidding work in ordinary callings on Sunday, the State established a new policy with respect to Sunday labor and the conduct of business enterprises on that day.

It should be kept in mind that a violation of G.S. 103-1, while it was in force, did not constitute an indictable offense but made the violator subject to a pecuniary fine or penalty, recoverable by summary proceeding

before a justice of the peace. *S. v. Williams,* 26 N.C. 400; *S. v. Brooksbank,* 28 N.C. 73; *Rodman v. Robinson,* 134 N.C. 503, 47 S.E. 19, 65 L.R.A. 682, 101 Am. St. Rep. 877. Moreover, while this statute was in effect it was held not to be in conflict with ordinances enacted by municipalities requiring the observance of Sunday. *S. v. Medlin,* 170 N.C. 682, 86 S.E. 597; *S. v. Davis,* 171 N.C. 809, 89 S.E. 40.

Ruffin, C. J., in the case of *S. v. Williams, supra,* in pointing out that a violation of the Act of 1741 (subsequently codified as G.S. 103-1) did not constitute an indictable offense, made this observation: "The Legislature has hitherto thought the penalties given in the Act of 1741, sustained by public sentiment, adequate securities for the decent observance of the day. The event has, upon the whole, justified that opinion. . . . For even the few persons whose own principles, as moral and religious persons, might not have restrained them from the profanation of the day have been restrained by a willingness to obey the law as enacted in the statute of 1741, or by a just respect for the opinions and feelings of their fellow-citizens, to whom, as a body, secular labor on Sunday is a scandal and offense." This statute had been in effect for 103 years when *Chief Justice Ruffin* made his observation. However, 107 years later it had become apparent that the statute was no longer effective as a deterrent to the profanation of the Sabbath. In fact, for many years prior to its repeal it had been almost completely ignored. But its repeal in no sense should be construed as a legislative intent to place the stamp of approval upon the profanation of the Sabbath. To the contrary, in addition to the ineffectiveness of the act, its repeal may have been motivated by the fact that the more effective method of enforcing measures for the observance of Sunday is to make the violation thereof an indictable offense. And the fact that the Lgislature has passed no State-wide act on this subject since the repeal of the 1741 Act (G.S. 103-1), does not impair the police powers heretofore granted to municipalities to adopt ordinances requiring observance of Sunday. For, after all, the need for regulation in this respect is usually within areas embraced within the corporate limits of our towns and cities, rather than in the rural areas of the State.

Therefore, we hold that neither the repeal of G.S. 103-1 nor the provision with respect to the repeal of all laws and clauses of laws in conflict therewith, have the effect of repealing police powers granted to municipalities by G.S. 160-52 and G.S. 160-200 (6) (7) (10), and to the City of Charlotte in its Charter.

Municipal ordinances prohibiting the pursuit of all occupations generally on Sunday, except those of necessity or charity, have been uniformly held constitutional in this jurisdiction. *S. v. Weddington,* 188 N.C. 643, 125 S.E. 257, 37 A.L.R. 573; *S. v. Burbage,* 172 N.C. 876, 89 S.E. 795; *S. v. Davis, supra; S. v. Medlin, supra.* This view seems to be in accord

with the decisions generally throughout this country. *Hennington v. Ga.*, 163 U.S. 299, 41 L. Ed. 166; *Petit v. Minn.*, 177 U.S. 164, 44 L. Ed. 716; *Rosenbaum v. City & County of Denver*, 102 Colo. 530, 81 P. 2d 760; *S. v. Cranston*, 59 Idaho 561, 85 P. 2d 682; *City of Harlan v. Scott*, 290 Ky. 585, 162 S.W. 2d 8; *Ex parte Johnson*, 77 Okla. Cr. App. 360, 141 P. 2d 599; *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939; *Ex parte Johnson*, 20 Okla. Cr. App. 66, 201 P. 533; *Komen v. City of St. Louis*, 316 Mo. 9, 289 S.W. 838; Anno. 29 A.L.R. 402; McQuillin, Municipal Corporations, Third Edition, Volume 6, Section 24.188, page 767; 50 Am. Jur., Sundays & Holidays, Section 9, page 808.

Consequently, we hold that the ordinance of the City of Charlotte, now under attack, is not invalid for lack of power in its governing body to enact or enforce any ordinance requiring the observance of Sunday.

The second reason assigned upon which the defendant challenges the validity of the ordinance is on the ground that it is arbitrary, unreasonable, and discriminatory; that it deprives him of his rights, liberties, freedoms and property without due process of law; and denies him the equal protection of the law; all in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, section 17, of the Constitution of this State.

It is a fundamental rule that the governing body of a municipality, clothed with power to enact and enforce ordinances for the observance of Sunday, "is vested with discretion in determining the kinds of pursuits, occupations, or businesses to be included or excluded, and its determination will not be interfered with by the courts provided the classification and discrimination made are founded upon reasonable distinctions and have some reasonable relation to the public peace, welfare, and safety." 50 Am. Jur., Sundays & Holidays, section 11, page 810.

Barnhill, J., in speaking for this Court in *S. v. Trantham*, 230 N.C. 641, 55 S.E. 2d 198, said: "Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. *Magoin v. Bank*, 170 U.S. 283, 42 L. Ed. 1037; *S. v. Davis, supra.* They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. *Smith v. Wilkins*, 164 N.C. 135, 80 S.E. 168. The very idea of classification is inequality, so that inequality in no manner determines the matter of constitutionality. *Bickett v. Tax Commission*, 177 N.C. 433, 99 S.E. 415; *R. R. v. Matthews*, 174 U.S. 96, 43 L. Ed. 909. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. *City of Springfield v. Smith*, 322 Mo. 1129."

The defendant does not claim that the ordinance discriminates against him in so far as it applies to any other person or persons similarly situ-

ated and engaged in the theatre business. But he insists the ordinance is invalid because during the hours from 6:30 p.m. to 9:00 p.m. on Sunday, while he is not permitted to operate his Drive-In theatre, it permits radio and television stations to operate in the City of Charlotte.

In our opinion, the operation of a motion picture theatre is an entirely different business from that of operating a radio or television station, and these operations may be placed in different classifications. Moreover, the ordinance forbids the operating, during certain hours, of any place of amusement, or the conducting of any show, game, or sport where a fee is charged for admission as a spectator, or a fee is charged to participate in any game, sport or amusement. No fee is required to be paid before one can listen to his radio or watch a television show. There is no merit in the contention that the ordinance is discriminatory in this respect.

We now consider whether it is arbitrary and unreasonable. Ordinances of this character cannot be upheld if arbitrary and unreasonable, but must rest upon a reasonable exercise of existing police power. In 50 Am. Jur., Sundays & Holidays, section 9, page 808, it is said: "According to the present view, Sunday laws are based on the experience of mankind as to the wisdom and necessity, for both the physical and moral welfare of man, of having at stated intervals a day of rest from customary labor. Consequently, such laws have been uniformly recognized as a legitimate exercise of the police power. Since the purpose of Sunday statutes is to promote the physical and moral nature of man, the right to prohibit secular pursuits on Sunday is not affected by the fact that they may be noiseless and harmless in themselves."

In McQuillin, Municipal Corporations, Third Edition, Volume 6, section 24.189, page 768, *et seq.*, the author says: "It has been said that laws and ordinances respecting Sunday observance clearly are within the genius of our institutions and the spirit of our national life. . . . The majority rule is that municipal competence to regulate Sunday observance and prohibit certain businesses and activities on that day or during certain hours on Sunday may be predicated on the municipal police, general or public welfare power. A Sunday regulation is designed to conserve the peace, good order and health by compelling a day of rest each week, and it may be sustained as a measure contributing to public morality." This same author, in his work on municipal corporations, same edition, Volume 7, section 24.218, page 45, says: "Ordinances forbidding, or regulating the time of operation of, theatres, or the showing of motion pictures on Sunday have been upheld as constitutional and valid. The enactment of such an ordinance is within the municipal police power. Such an ordinance is authorized by delegated power to regulate motion picture shows," citing *West Coast Theatres v. Pomona,* 68 Cal. App. 763, 230 P. 225; *Ames v. Gerbracht,* 194 Iowa 267, 189

N.W. 729; *City of West Monroe v. Newell,* 163 La. 409, 111 So. 889; *Power v. Nordstrom,* 150 Minn. 228, 184 N.W. 967; *Ex parte Johnson, supra* (201 P. 533); *Blackledge v. Jones,* 170 Okla. 563, 41 P. 2d 649; *Hicks v. City of Dublin,* 56 Ga. App. 63, 191 S.E. 659.

In *S. v. Medlin, supra,* the Town of Zebulon had adopted an ordinance which prohibited keeping any shop or store open on Sunday for the purpose of buying and selling (except ice), but provided that "drug stores may be kept open at all times on Sunday for the sale of drugs and medicines; and from 6 to 9:30 o'clock in the morning and from 1 to 4:30 o'clock in the afternoon, for the sale of drugs, medicines, mineral waters, soft drinks, cigars and tobacco only." The defendant who did not operate a drug store, opened his grocery store between the hours of 6 and 8 o'clock a.m., on Sunday, 18 January, 1915, while the above ordinance was in full force and effect, and sold cigars, cigarettes and Coca-Cola to several purchasers and received cash payments therefor. At this same time, a drug store in Zebulon was open for the sale of these same articles. The Court said: "This ordinance, which prohibits keeping open stores and other places of business for the purpose of buying or selling, except ice, drugs and medicines, and permits the drug stores to sell soft drinks and tobacco for a limited time in the morning and afternoon, as a convenience to public customs, is not an unreasonable exercise of the police power. Neither does it cover the same ground as Revisal, 2836 (later codified as G.S. 103-1). Such local regulations are within the powers conferred on town authorities in their exercise of the police power, and if not satisfactory to the community such regulations will doubtless be changed at the instance of their constituents or by the election of a new board of commissioners. Public sentiment in this regard varies in different localities, and the power of making these local regulations is simply an exercise of 'home rule,' which is wisely vested in the town commissioners to conform to the sense of public decency and peace and order, which is observed by compliance with the sentiments of their constituents. Such regulations are neither already provided by the general law nor are they forbidden by any statute." This decision has been followed and cited with approval in *S. v. Davis, supra; S. v. Burbage, supra; Lawrence v. Nissen,* 173 N.C. 359, 91 S.E. 1036; *S. v. Kirkpatrick,* 179 N.C. 747, 103 S.E. 65; *S. v. Weddington,* 188 N.C. 643, 125 S.E. 257, 37 A.L.R. 573.

In the case of *S. v. Weddington, supra,* the facts were that the governing authorities of the Town of Faith enacted an ordinance providing, "that it shall be unlawful for any person or persons, merchants, tradesmen or company to sell or offer for sale on Sunday any goods, wares, drinks or merchandise of any kind or character, except in case of sickness or absolute necessity, in the town of Faith." The defendant, a restaurant operator, sold a Coca-Cola as a part of a lunch. It was urged on appeal

to this Court that the ordinance was unreasonable, oppressive, in derogation of common right, and to this extent should be declared void and of no effect, as transcending the bounds of a reasonable exercise of the police power of the Town of Faith. *Stacy, J.* (later *Chief Justice*), in speaking for the Court in upholding the ordinance, said: "The defendant's position is not without force, because the suggested exception strongly appeals to the common judgment of men as being meet and proper under such conditions, but it must be remembered that we are dealing with the exercise of an unquestioned police power, and whether it transcends the bounds of reason—not with its wisdom or impolicy. *S. v. Vanhook,* 182 N.C. 831; *S. v. Austin,* 114 N.C. 857. The peculiar conditions and evils to be remedied in the town of Faith can best be understood by the commissioners of that town, and the courts are permitted to check their acts only when they are palpably unreasonable and oppressive."

The ordinance under consideration not only applies to picture shows, but to other theatres, tennis courts, squash courts, golf courses, swimming pools, baseball games, football games, and other outdoor athletic courts, parks, etc. The City of Charlotte permits all these places of amusement and sports activities, which are operated or conducted for private gain, to operate or be conducted between the hours of 1:30 p.m. and 6:30 p.m. on Sunday, but to close from 6:30 p.m. to 9:00 p.m. For all practical purposes, this closes substantially all these places of amusement except theatres, and prevents the sport activities, except to a very limited extent, after 6:30 p.m. Doubtless, very few people care to play tennis or squash after 9:00 p.m.; no baseball or football games are ordinarily scheduled to begin after 9:00 p.m. on Sunday. Certainly golf would not be played after that hour. And except in extremely warm weather, it is doubtful that swimming pools could attract sufficient patronage after 9:00 p.m. to justify their remaining open.

After all, the governing body of the City of Charlotte has determined in the exercise of its police power that certain classified places of amusement may be operated and certain designated sports activities may be held or participated in within the City of Charlotte from 1:30 p.m. to 6:30 p.m., and after 9:00 p.m. on Sunday. And in view of the many secular pursuits sought to be regulated, coupled with the fact that the local town and city authorities are in a position to know the peculiar conditions and evils that need to be regulated in their respective municipalities, we do not think the provisions of the ordinance under consideration, with respect to the hours of regulation, may be held arbitrary and unreasonable. *S. v. Medlin, supra; S. v. Weddington, supra.*

Furthermore, the mere fact that the defendant operates an outdoor theatre and may be unable to exhibit more than one show on Sunday, is

insufficient to sustain his contention that the ordinance deprives him of his constitutional rights without due process of law.

The defendant has certainly not shown that the ordinance is "palpably unreasonable and oppressive." *S. v. Weddington, supra; Komen v. City of St. Louis, supra* (ordinance requiring bakeries to close after 9:00 a.m. on Sunday, held valid); *Ex parte Johnson, supra* (201 P. 533, held the regulation or prohibition of Sunday amusements, including moving picture shows, not unconstitutional); *Hicks v. City of Dublin, supra* (upheld ordinance limiting the time motion picture shows could be open on Sunday); *Richman v. Bd. of Commissioners of City of Newark,* 122 N.J.L. 180, 4 A. 2d 501 (upheld an ordinance prohibiting the sale of groceries on Sunday between the hours of 1:00 p.m. and 12:00 o'clock midnight).

We now consider the final question raised by the defendant. Does the fact that most of the churches in the City of Charlotte have religious services at some hour between 6:30 p.m. and 9:00 p.m. on Sunday, make the ordinance subject to successful attack as offending the First Amendment of the Constitution of the United States and Article I, Section 26, of the Constitution of this State? Conceding that the governing body of the City of Charlotte may have taken this fact into consideration in determining the hours during which places of amusement would be permitted to open on Sunday, this does not perforce mean that the ordinance was not enacted pursuant to the legitimate exercise of the police power. We have numerous provisions in our statutes prohibiting the establishment of various business activities near churches. The influence that led to the enactment of those measures was the respect and consideration the legislators had for churches as religious institutions, and the wholesome influence they exert in their respective communities; but the power to enact those measures was derived from civil authority and not from religious motives or considerations. *Clark, C. J.,* in speaking for this Court in *Rodman v. Robinson, supra,* said: "It is incorrect to say that Christianity is a part of the common law of the land, however it may be in England, where there is union of church and state, which is forbidden here. The beautiful and divine precepts of the Nazarene do influence the conduct of our people and individuals, and are felt in legislation and in every department of activity. They profoundly impress and shape our civilization. But it is by this influence that it acts, and not because it is a part of the organic law, which expressly denies religion any place in the supervision or control of secular affairs."

In our opinion, the ordinance is not subject to attack on the ground assigned. There is nothing in it that offends the First Amendment of the Constitution of the United States, or that attempts to interfere with the natural and inalienable right of man to worship Almighty God according to the dictates of his own conscience, as vouchsafed to all citizens in

Article I, Section 26, of our State Constitution. The ordinance contains no provision that may be construed as impinging upon the freedom of conscience. It neither purports to compel nor deny the observance of any religious duty.

It so happens that the great majority of people desire to observe Sunday as the day of rest. And measures for its observance do not come from a desire to impose upon the conscience of any individual, but rather to promote the public health, the general welfare, safety and morals of the people and to give them an opportunity to rest from their secular activities.

Long before civil governments undertook to exercise their police power to enforce the observance of Sunday as a means of promoting the public health, the general welfare, safety, and morals of the people, Christians had chosen this day in commemoration of the Resurrection, in lieu of the Old Testament Sabbath which fell on Saturday. And the fact that an ordinance may require the cessation of secular pursuits on Sunday during the hours in which churchgoing people usually attend religious services, will not be held unconstitutional, if otherwise reasonable and valid.

After a careful consideration of the questions raised on the record, and the authorities bearing thereon, we are of the opinion that the challenged ordinance is constitutional and, therefore, the verdict below must be upheld.

No error.

MISS LAURA YOUNG, MRS. CLARA YOUNG PRESNELL AND HUSBAND, ROBERT PRESNELL, MRS. GRACE YOUNG PRESNELL AND HUSBAND, W. A. PRESNELL; A. A. YOUNG AND WIFE, PEARL YOUNG; MRS. MARY YOUNG BLANKENSHIP, MRS. MYRTLE YOUNG MURPHY AND HUSBAND, W. C. MURPHY; GUY YOUNG AND WIFE, ZORA YOUNG; MISS ZOE YOUNG, CHARLES YOUNG AND WIFE, MARTHA YOUNG, v. SOUTHERN MICA COMPANY OF NORTH CAROLINA, INC.

(Filed 6 May, 1953.)

1. Landlord and Tenant § 24—Under terms of mining lease, lessee held liable for dumping of waste material on other lands of lessors.

The mining lease in question provided that lessee should not be liable for waste material "dropped" while in transit through flume lines on other lands of lessor, but that lessee was not authorized "to dump" waste material upon such bottom lands. Evidence tending to show that the flume line choked up and waste material poured over and piled up on the bottom lands and that waste material was shoveled from the flume line onto the bottom lands higher than the flume line, *is held* to show "dumping" within the meaning of the lease, and lessee's motion to nonsuit lessors' action to recover damages for such dumping was properly overruled. Further, the court's instruction *is held* to have properly charged the jury that defend-

ant would be liable if it deposited waste on the lands in a manner that amounted "to dumping," and the charge was not prejudicial on lessee's appeal.

2. Contracts § 8—

Where the language of a contract is free from ambiguity, the ascertainment of its meaning and effect is for the court, and it is the duty of the court to instruct the jury as to its meaning.

3. Appeal and Error § 39f—

A technical inaccuracy in the charge will not be held for reversible error when it could not have prejudiced appellant.

4. Jury § 4½: Trial § 48—

The fact that a person whose citizenship has been forfeited by service of a term in prison serves as a juror does not *ipso facto* vitiate the verdict, and motion made after verdict to set the verdict aside for such disqualification is addressed to the discretion of the trial court, even though movant had no knowledge of the disqualification, provided the facts were not concealed, and denial of the motion will not be disturbed in the absence of a showing of prejudice or abuse of discretion.

APPEAL by defendant from *McLean, Special Judge,* and a jury, August Term, 1952, of YANCEY.

Civil action to recover damages for alleged breach of mining lease.

By the terms of the lease sued on the defendant, Southern Mica Company, was granted the right to continue processing scrap mica ore on plaintiffs' land. This lease superseded a previous one under which the defendant had been operating.

The defendant's processing plant was located on plaintiffs' land some distance uphill from the South Toe River. At the plant the scrap mica ore was poured into a jig where under water pressure the mica was screened from the soil. The screened mica fell into a bin located under one end of the jig; the waste dirt was washed out of the jig into a flume line—an elevated trough arrangement—through which it was conveyed by water away from the processing plant.

In the instant case the flume line extended from the jig plant across the plaintiffs' "bottom land" to the South Toe River. The flume line was some 12 or 15 feet above the ground most of the way, but sloped downward and was only 4 or 5 feet high at the end of the line at the river.

The pertinent provisions of the lease may be summarized as follows:

1. The plaintiffs' "bottom land adjoining South Toe River" was expressly excepted from the lands leased for mining operations.

2. The defendant was granted the right "to construct, maintain and repair flume lines," on and over the leased property, "as well as the bottom land."

3. "The . . . flume lines shall be constructed, maintained and repaired by the Lessee (defendant) . . ."

4. ". . . The Lessee (Southern Mica Company) . . . shall not be liable for damages to the Lessors (plaintiffs) . . . for any waste material dropped on their lands while in transit through the flume lines . . ."

5. It was agreed that the defendant should be permitted to use the property under lease for the purpose of processing any ore taken from adjoining lands.

6. The lease stipulates: "The said mining operations do not authorize the Lessee (Mica Company) to dump any waste upon any of the lands of the Lessors (plaintiffs)."

The defendant finished processing scrap mica on plaintiffs' land on 31 December, 1949, and thereafter began processing ore taken from adjoining lands. This operation was continued until 21 February, 1952.

The gravamen of the plaintiffs' cause of action, as alleged in the complaint, is that during this period of about two years, while defendant was processing mica ore from adjoining lands, it failed to maintain and keep in repair the flume line across the plaintiffs' "bottom land" and dumped or allowed to be dumped and piled thereon great quantities of waste dirt and materials covering a large part of the "bottom land," and rendering it practically valueless.

The plaintiffs' evidence may be summarized as follows: After defendant started processing ore from adjoining lands, it "didn't keep up the flume line." The "waste . . . just washed out and spread out and piled up on the bottom land. . . . it was supposed to go into the river. . . . instead of being dumped into the river it was dumped into the bottom. . . . they didn't keep the flume line up at all. . . . the mud . . . sand and material they separated the mica from, . . . washed out and spread out and piled up on the bottom land there. . . . They let it fall in the bottom, . . . just dumped it in the bottom. As a result it ruined the bottom or covered at least two-thirds of it, it just piled up there 12 or 15 feet high, and rolled off there."

The defendant's version of the case may be gleaned from the testimony of George Edge, Superintendent of the defendant corporation, and Will Shook, an employee. Superintendent Edge testified in part: "During that period of time South Toe River was very low. The flume line was extended right on the bank on the river. . . . the river just dammed up with sand and it had no place to go, and it kept backing up to the flume line. The sand that is deposited on that land kept dropping off there a little bit at a time over a period of a couple of years, . . ."

Witness Shook testified: ". . . the river filled up down there and back(ed) up . . . in the flume line. We built extra troughs and put on it at the lower end and run it in the river. . . . We built where the flume

line first went into the river and built some more and put over the top of the sand where it dammed up at the lower end. . . . and when we couldn't get it out down there we shoveled it out. . . . When the sand was removed from the flume line by shovel it was placed right beside the flume line."

It is also noted that the plaintiffs amplified their case in cross-examining defense witnesses: Charlie Wilson, on cross-examination, testified in part: ". . . The flume line would have carried the sand and water if there had been force in the river to move it on, but there come a dead end, and it piled up and as it piled up it emptied from the flume line onto this bottom. . . . The dead-end was caused by the Southern Mica Plant and others, Fred Deenen had a mine, a jig; there was one above and below the Southern Mica plant; all of them put it (waste material) in the river and the river couldn't carry it out and the sand piled up, it started at the river and come all the way back."

Superintendent Edge made these admissions: ". . . We kept two men down there all the time, . . . trying to keep that flume line open. They had shovels and were taking it out of the flume line and dropping it on the bottom, . . . They shoveled it out, . . . South Toe River filled up there at the end of the flume line with waste—we filled it up. There is material there to this day piled higher than the flume line which we shoveled out of the flume line. We raked and shoveled it out trying to keep it open."

Will Shook, cross-examination: ". . . it (the waste material) was bound to go somewhere. . . . When the flume line choked up it just poured over and piled over the flume line and went over in the bottom. . . . It didn't have enough water (in the river) to take it, so . . . it overflowed and went over in the bottom."

By consent the jury was permitted to view the premises.

These issues were submitted to the jury and answered as indicated:

"1. Did the Southern Mica Company breach the contract between it and the plaintiffs, as alleged in the complaint? Answer: Yes.

"2. If so, what amount of damages are the plaintiffs entitled to recover of the defendant? Answer: $3,000."

From judgment entered upon the verdict the defendant appealed, assigning errors.

W. E. Anglin for plaintiffs, appellees.

Fouts & Watson for defendant, appellant.

JOHNSON, J. First, the defendant insists that its motion for judgment as of nonsuit should have been allowed.

Here the defendant relies on the clause in the lease which provides that it shall not be liable to the plaintiffs "for any waste material dropped on their lands while in transit through the flume lines . . ."; whereas the plaintiffs point to the provision in the lease which stipulates that the mining operations do not authorize the defendant "to dump waste" upon any of the lands of the plaintiffs.

This language is clear. "Drop" means "to fall like a drop"; whereas "dump" means "to deposit something in a heap, . . . to let fall in mass." Webster's New International Dictionary, Second Edition, 1951.

Manifestly, the parties intended that the waste dirt should not be dumped on plaintiffs' land, but rather that it should be moved off the plaintiffs' land through the flume line. It was contemplated that small quantities from time to time might drop while in transit through the flume line. For this the defendant was not to be liable.

But here there is evidence tending to show that the flume line "choked up" at the river end, and that thereafter the waste materials "poured over," "piled up," and were "shoveled over" the bottom land until "it piled up there 12 or 15 feet high," where Superintendent Edge said: "We shoveled it out of the flume line."

This was "dumping" within the clear meaning of the lease, and the motion for nonsuit was properly overruled.

Next, the defendant excepts to this portion of the charge to the jury:

"Now, the court charges you that if you find from the evidence, and by the greater weight, the burden being upon the plaintiff to so satisfy you, that the defendant, in transferring the waste from the mining operations, the jigging plant, into South Toe River, caused the deposit of sand and waste from the jigging operation by shoveling the same from the flume line upon the bottom land of the plaintiffs or if you find from the evidence, and by the greater weight, that the defendant, by reason of the flume line breaking down, permitted the waste to flow upon the land of the plaintiffs, *thereby causing it to be dumped upon the areas that have been described to you,* then, and in that event, or either event, the court charges you that that would constitute dumping within the meaning of the term of this contract, and it would be your duty to answer the first issue yes." (Italics added.)

Here, the defendant contends that the court gave to the word "drop" the meaning of "dump," and that therefore the charge is in conflict with the provision of the lease which exempts the defendant from liability for damage caused by ". . . waste materials dropped while in transit through the flume lines."

The contention is untenable. The rule is that where the language of a contract is free from ambiguity, the ascertainment of its meaning and effect is for the court, and not for the jury. *Hilley v. Insurance Co.,* 235

N.C. 544, 70 S.E. 2d 570; *Sellars v. Johnson,* 65 N.C. 104. We find no ambiguity or uncertainty in the language of the contract before us. Accordingly, it was the duty of the court to declare its meaning. This the court did. *Festerman v. Parker,* 32 N.C. 474.

The court placed on the plaintiffs the burden of proving that the defendant deposited the waste on plaintiffs' land in a manner that amounted to "dumping," by shoveling it from the flume line, or by permitting, after failure to keep the flume line up, the waste to flow upon the bottom land, and left it to the jury to find the facts from the evidence.

True, the expression of the court which appears in italics amounts to a technical invasion of the province of the jury. However, on the record as presented it is not perceived that this expression could have been prejudicial to the defendant. In effect, it was but a short-hand statement of uncontroverted phases of the evidence, including statements made by defense witnesses to the effect that when the flume line choked up the waste materials "just poured over and piled over the flume line and went over in the bottom," and admissions of Superintendent Edge that the dirt was shoveled out of the line in great quantities and piled in places higher than the flume line itself. The challenged instruction may not be held as prejudicial error.

Another exception brought forward by the defendant presents the question whether the verdict was vitiated because of the presence on the jury of a person who had forfeited his citizenship by reason of conviction of a criminal offense.

The presiding judge, in response to the defendant's motion to set aside the verdict, found in substance these facts: that the juror in question was a regular juror, drawn from the panel and summoned by the sheriff, and passed by the defendant; but that when passed the defendant did not know the "juror had forfeited his citizenship by service of a term in prison." The court further found that the juror had filed a petition to have his citizenship restored under the provisions of G.S. 13-1, and that immediately after the "rendition of the judgment in this case, . . . counsel for the juror called the matter to the attention of the court and offered his witnesses for restoration of citizenship, . . . and that a judgment was signed . . . restoring the citizenship of said juror. . . ." Upon the facts found, the defendant's motion to set aside the verdict was overruled, and the defendant excepted.

It may be conceded that the facts here shown would have been ground for challenge of the juror for cause (G.S. 9-1, as rewritten by Chapter 1007, Session Laws of 1947). Nevertheless, his disqualification as shown does not *ipso facto* vitiate the verdict; nor do the disqualifying facts entitle the defendant to have the verdict set aside as a matter of law or right.

True, the judge found that the defendant did not know of the disqualifying facts until after trial. But even in such a case, in the absence of a showing that the juror on the *voir dire* examination falsely denied or concealed matters which would have established his disqualification, the motion first made after verdict was addressed to the discretion of the trial judge, and in such a case, in the absence of a showing of actual prejudice amounting to abuse of discretion, the ruling of the trial judge is not reviewable.

Our investigation discloses no decision of this Court dealing with the precise question here presented, *i.e.*, whether criminality of a juror, as distinguished from other disqualifying causes, first discovered after verdict, vitiates the verdict and furnishes ground for a new trial as a matter of right. However, the conclusion here reached is supported in principle by numerous authoritative decisions of this Court; and the great weight of authority in other jurisdictions on the precise question of criminality of a juror supports the view here expressed. See *S. v. Crawford,* 3 N.C. 298 (juror not a freeholder); *S. v. Patrick,* 48 N.C. 443 (juror not a slave owner (1856)); *S. v. Douglass,* 63 N.C. 500 (Sheriff who summoned jurors disqualified for having served as Sheriff during War between States); *S. v. White,* 68 N.C. 158 (juror a nonresident of the county); *S. v. Davis,* 80 N.C. 412 (juror an atheist); *S. v. Lambert,* 93 N.C. 618 (juror under twenty-one years of age and not a freeholder); *Baxter v. Wilson,* 95 N.C. 139 (juror related to plaintiff); *S. v. Council,* 129 N.C. 511, 39 S.E. 814 (juror sworn in improper manner); *S. v. Maultsby,* 130 N.C. 664, 41 S.E. 97 (juror related to prosecuting witness); *S. v. Lipscomb,* 134 N.C. 689, 47 S.E. 44 (juror under twenty-one years of age); *S. v. Drakeford,* 162 N.C. 667, 78 S.E. 308 (juror member of grand jury which found former bill which was fatally defective); *S. v. Levy,* 187 N.C. 581, 122 S.E. 386 (history of right of challenge reviewed by *Stacy, J.* (later *C.J.*)); *S. v. Sheffield,* 206 N.C. 374, 174 S.E. 105 (bias of juror); *Commonwealth v. Wong Chung,* 186 Mass. 231, 71 N.E. 292; *Raub v. Carpenter,* 187 U.S. 159, 47 L. Ed. 119 (juror under age of twenty-one years and also "several times . . . convicted of the crime of petit larceny); *S. v. Powers,* 10 Ore. 145, 45 Am. Rep. 138 (juror previously convicted of crime involving moral turpitude). See also *S. v. Greenwood,* 2 N.C. 141 (juror a nonresident of the State); *Wassum v. Feeney,* 121 Mass. 93, 23 Am. Rep. 258; *Kohl v. Lehlback,* 160 U.S. 300, 16 Sup. Ct. Rep. 304; Annotations: 18 L.R.A. 473, p. 478; 50 L.R.A., N.S. 933, pp. 939 and 976; 31 Am. Jur., Jury, Sec. 119; 39 Am. Jur., New Trial, Sections 39 and 42; 66 C.J.S., New Trial, Sections 22 and 23.

In *S. v. White, supra,* where the juror was a nonresident of the county, it is said: "This was a good cause of challenge, but as it was not taken in apt time we must consider it as waived. But the defendant replies

that he did not know it until after verdict. He could have known it, had he challenged the juror when tendered. The fact that an incompetent juror was permitted by the defendant to try his case does not vitiate the verdict."

In *S. v. Davis, supra,* where the juror was an atheist, it is said, with *Ashe, J.,* speaking for the Court: ". . . their (defendants') objection comes too late. It is well settled by English authorities sanctioned by the uniform practice of centeries and by numerous decisions in this state, that no juror can be challenged by the defendant without consent after he has been sworn, unless it be for some cause which has happened since he was sworn. . . . where the challenge is to the poll, made for good cause, in apt time—that is before the juror is sworn—it is strictly and technically a ground for a *venire de novo;* if made after the juror is sworn the court may in its discretion allow the challenge; but its refusal to do so is no ground for a *venire de novo,* because the prisoner has lost his legal right by not making his objection at the proper time."

In *S. v. Lipscomb, supra,* where the juror was under twenty-one years of age, it is said, with *Walker, J.,* speaking for the Court: ". . . there is an apt time for each and every step in all legal proceedings, and every objection must be made and every privilege claimed at the proper time, or the party who should thus have asserted his right will be considered as having waived it. The objection to the juror in this case was not presented in apt time. . . . It came too late after verdict, and could then be addressed only to the discretion of the court."

In *S. v. Levy, supra,* with *Stacy, J.* (later *C.J.*), speaking for the Court, it is said: "Challenges to the polls, or objections to individual jurors, must be made in apt time, or else they are deemed to be waived. It is too late after the trial has been concluded. . . . The fact that an incompetent juror was permitted to sit on the case does not vitiate the verdict. . . . But when the incompetency is not discovered until after the verdict, it is then discretionary with the judge presiding as to whether he will, under the circumstances, order a new trial, and his action in this respect is final . . ."

In *Commonwealth v. Wong Chung, supra,* with *Knowlton, C. J.,* speaking for the Massachusetts Court, it is said: "While the duty of ascertaining that the persons drawn as jurors are properly qualified rests primarily upon the commonwealth, through its designated officers, the parties to trials in court have an interest in the same subject, and upon them rests a responsibility for the proper protection of their own rights. It is expected that they will consider somewhat the qualifications of those who are to sit in judgment in their causes. Our system provides for challenges by the parties, both in civil and criminal cases, which may be peremptory as well as for cause. If, notwithstanding the efforts of public

officers to perform their duties, and such efforts as the parties choose to make for the protection of their rights in regard to qualifications of jurors, it is discovered after a verdict that a disqualified person has joined in the decision, the interests of justice require that the irregularity or accident shall be treated like other irregularities. The responsibility for it should be treated as resting in part upon the parties, while primarily it is upon the public authorities. If, in the opinion of the presiding judge, the disqualification of a juror has operated injuriously, and has tended to the return of an erroneous verdict, or has otherwise worked injustice, a new trial should be granted. A motion for a new trial for such a cause, like motions for new trials generally, should be addressed to the discretion of the court."

In the case at hand there is no suggestion of actual prejudice or abuse of discretion. Therefore, it follows from what we have said that the defendant's exception to the discretionary ruling of the trial court is untenable. The exception is overruled.

The decisions cited and relied on by the defendant are distinguishable. In *Hinton v. Hinton,* 196 N.C. 341, 145 S.E. 615, the case more nearly in point, an alien sat on the jury. There the defendant's motion to set aside the verdict was allowed as a matter of law, and the ruling was upheld by this Court. However, pertinent to decision were these crucial facts found by the trial judge: (1) that counsel for the defendant on the *voir dire* asked the juror "if he was a citizen of the United States" and was told that he was, when in fact he was not; and (2) that if the juror had given a truthful answer, counsel would have rejected him. Thus, in the *Hinton case* there was a false concealment of facts which would have established the juror's disqualification and led to his challenge. Hence the case comes squarely within the exception recognized by the rule applied in the instant case.

We have examined the rest of the defendant's exceptive assignments of error and find them to be without substantial merit.

The verdict and judgment below will be upheld.

No error.

MARTHA MELL G. SWEATT, WIDOW OF WILLIAM ERNEST SWEATT, DECEASED, v. RUTHERFORD COUNTY BOARD OF EDUCATION AND/OR THE NORTH CAROLINA BOARD OF EDUCATION.

(Filed 6 May, 1953.)

1. Schools § 8e: Master and Servant § 40a—

The liability of the State for compensation for injuries or death caused by accident suffered by employees paid from State school funds is limited to those arising out of and in the course of their employment in connection with the State operated nine months school term in accordance with G.S. 115-370, which must be given the same interpretation as G.S. 97-2 (f).

2. Master and Servant § 40a—

The phrases "arising out of" and "in the course of" are not synonymous, but involve two ideas and impose a double condition, both of which must be satisfied in order to render an injury or death compensable.

3. Master and Servant § 40c—

The words "arising out of" as used in the Workmen's Compensation Act refer to the cause or origin of the accident, and require that the injury must spring from or have its origin in the employment.

4. Master and Servant § 40d—

The words "in the course of" as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which the injury occurs.

5. Master and Servant § 40c—

Proof that an employee was at his place of employment and doing his work at the time of the injury, without more, is insufficient to support an award of compensation, since an accident which occurs in the course of the employment does not necessarily or inevitably arise out of it.

6. Same—Evidence held insufficient to support finding that murder of high school principal by student arose out of school employment.

The evidence tended to show that an orphanage and the public school authorities jointly own and maintain a building in which a high school is conducted, and that the children of the orphanage attend the public school, G.S. 115-67. The evidence further tended to show that the principal of the high school was paid exclusively out of school funds but also discharged duties as superintendent of the private institution, and that he reprimanded an inmate of the private institution for violating a rule of the institution, and that as a result thereof the inmate shot and killed the principal about 9:30 at night while the principal was in his office and discharging his duties as principal. *Held:* While the principal was fatally injured during the course of his employment, there is no evidence tending to show any causal connection between his employment by the school authorities and the fatal injury so as to support a finding that the injury arose out of the employment, and judgment awarding compensation is reversed.

APPEAL by defendants from *Phillips, J.*, at September Term, 1952, of RUTHERFORD.

Proceeding under Workmen's Compensation Act for compensation claimed by the widow of William Ernest Sweatt, deceased principal of the Union Mills High School, who was murdered by one Hugh Justice on the night of 12 March, 1951.

The pertinent facts developed by the evidence may be summarized as follows:

1. William Ernest Sweatt, deceased, was employed by the defendants as principal of the Union Mills High School at Union Mills in Rutherford County. The deceased also served as Superintendent of Alexander School, Inc., a private corporation which conducts an orphanage or boarding school at Union Mills.

2. The Union Mills High School is conducted in a building located within the boundaries of the campus of Alexander School, Inc. However, the schoolhouse and lot on which it is situate are owned jointly by Alexander School, Inc., and the Board of Education of Rutherford County. The high school was attended by about 300 private students from the Alexander School, Inc., and by some 200 public school students from the surrounding area of Rutherford County.

3. The salary of the deceased William Ernest Sweatt was paid entirely by the defendant State Board of Education, self-insurer.

4. The deceased customarily commenced his duties about 8:00 o'clock in the morning and continued in the performance thereof throughout the day and frequently into the evening and night. His office was located in the high school building.

5. The Union Mills High School was conducted during the usual school hours and on the usual school days—Monday through Friday. The public or county students went home after school hours in the afternoon. As to these students, the usual school hours were kept. However, a supervised study hall was conducted each evening on school days from 7:00 to 9:00 o'clock. The high school students from Alexander School, Inc., were required to attend this supervised study hall. The students residing in the county, not students at the Alexander School, were not required to attend the study hall, and it does not appear that any of the county students ever attended the study hall.

6. The deceased customarily supervised this evening study hall. He also customarily performed some of the duties incident to his position as principal of the Union Mills High School—such as filling out records and reports—in the evenings during the study hall hours. He usually divided his time between supervision of the study hall and the performance of his other duties in his office.

7. Hugh Justice was a boarding student of Alexander School, Inc., and lived in one of its dormitories on the campus. He was also a student in the Union Mills High School.

8. An older girls' dormitory was maintained by Alexander School, Inc., on the campus; and rules had been promulgated by Alexander School, Inc., restricting and limiting the conduct of the older boys with respect to visiting at this dormitory.

9. On the night of 12 March, 1951, at about 7:00 o'clock, the supervisor of the older girls' dormitory, who was also a teacher in the Union Mills Grammar School, saw Hugh Justice talking to a girl near the dormitory at a time and place in violation of one of the regulations of the Alexander School, Inc. She immediately reported the violation to Mr. Sweatt. The supervised study hall was being conducted at that time. Thereafter, in the presence of the supervisor, Mr. Sweatt reprimanded Justice for the infraction of the rule. Justice appeared to be very angry at the reprimand, jumped up, slammed the door, and left the office. There was no evidence that the boy had previously demonstrated any ill-will toward the deceased.

10. Hugh Justice, after the reprimand, left the high school premises, borrowed a 22-caliber rifle from an acquaintance under the pretext that he wished to shoot rats, and returned with the rifle to the high school building.

11. Mr. Sweatt continued to supervise the evening study hall until about 9:00 p.m. He then called several students into his office to consult with them about their work as students in the Union Mills High School, and remained in his office until about 9:30 o'clock. After the last student had left and when he was preparing to leave the building, Hugh Justice entered the office and, by reason of his anger resulting from the reprimand previously administered, committed a murderous assault upon Mr. Sweatt by shooting him just below the left eye, with the bullet coursing inward and upward through the brain and causing his death a few hours later.

12. On deceased's desk were records, such as daily reports from home room teachers and lunch room reports, used by the deceased in making out his monthly reports as high school principal.

The Industrial Commission awarded compensation. The pertinent supporting findings and conclusions of the Commission may be summarized as follows:

1. "As principal of the high school, the deceased reprimanded Hugh Justice for a violation of the rules. . . ."

2. "As a result of the reprimand, Hugh Justice became angry, obtained a lethal weapon, and murderously assaulted the deceased, causing his death."

3. "The rule violated was formulated by the Alexander School, Inc. However, . . . this is of no importance. The reprimand was administered by the deceased as principal of the Union Mills High School to a student in that school. It cannot be said that in administering the reprimand, the deceased went beyond his employment as principal."

4. That the deceased came to his death as a result of an injury by accident arising out of and in the course of his employment by the defendants as principal of Union Mills High School.

The defendants in apt time excepted to the determinative findings and conclusions and to the award of the Commission, and appealed to the Superior Court.

When the case came on for hearing in the Superior Court, the defendants moved the court "that the cause be remanded to the North Carolina Industrial Commission for a more specific finding of fact as to the relationship existing between Professor . . . Sweatt and Alexander School, Incorporated . . ." The motion was overruled and the defendants excepted. Thereupon, the court, after hearing the defendants' exceptions to the findings and conclusions of the Commission, entered judgment overruling the exceptions and approving and confirming the findings and conclusions of the Commission and in all respects sustaining and affirming the award.

The defendants excepted and appealed to this Court, assigning errors.

Hamrick & Jones for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorney-General Love for defendants, appellants.

JOHNSON, J. Under the free public school system of this State the responsibility for providing and maintaining school buildings and physical plant facilities rests primarily on the local units of government; whereas the financial responsibility of operating the State-wide school system, including payment of teachers' salaries, rests primarily on the State, with the duties of fiscal control and management being administered by and through the State Board of Education. Article IX, Section 8, Constitution of North Carolina; Chapter 115, General Statutes of North Carolina.

It is expressly provided by statute, State-wide in scope, that children living in and cared for by private institutions, like Alexander School, Inc., operated for the purpose of rearing orphan children, are considered residents of the local school administrative unit in which the institution is located, "and are permitted to attend the public school or schools of such unit . . ." G.S. 115-67.

In the case at hand it is noted that while the building in which the Union Mills High School is conducted is located on the campus of Alexander School, Inc., it is owned and maintained jointly by the Board of Education of Rutherford County and Alexander School, Inc., by virtue of a special act of the General Assembly. Chapter 676, Session Laws of 1945. *Cf.* G.S. 115-88. This joint ownership of the school building no doubt has proved mutually beneficial to both local agencies. However, it is noted that the special act authorizing joint ownership of the building did not extend the scope of the decedent's duties as high school principal under his employment by the State Board of Education.

True, the record here discloses that the local county board of education knew the deceased was serving in the dual roll as superintendent of Alexander School, Inc., and as principal of the Union Mills High School, with his entire salary being paid by the State Board of Education. Nevertheless, such permissive arrangement did not merge his duties as superintendent of the private institution with those as principal of the high school, nor extend the orbit of liability of the State Board of Education under the Workmen's Compensation Act and the School Machinery Act to cover his duties as superintendent of the private institution.

As to this, it is significant that G.S. 115-370 (1951 Supplement) marks out the bounds and limits of liability of the State with respect to employees who are "paid from state school funds." The statute expressly provides: "Liability of the State for compensation shall be confined to school employees paid by the state from state school funds for injuries or death caused by accident arising out of and in the course of their employment in connection with the state operated nine months school term."

The expression "arising out of and in the course of their employment . . .," as used in the foregoing section of the School Machinery Act (G.S. 115-370) carries the same meaning and calls for the same interpretation and application as does the similar expression appearing in the text of the Workmen's Compensation Act. G.S. 97-2 (f). And, in interpreting and applying the meaning of the expression, "arising out of and in the course of the employment," as it appears in the Workmen's Compensation Act, it has been uniformly held by this Court that the phrases "arising out of" and "in the course of" are not synonymous but involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the Act. *Davis v. Veneer Corp.*, 200 N.C. 263, 156 S.E. 859; *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751; *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320; *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173. See also 58 Am. Jur., Workmen's Compensation, Section 709.

The words "arising out of" refer to the cause or origin of the accident; they involve the idea of causal connection between the employment and

the injury, and impose the condition that an injury in order to be compensable must spring from or have its origin in the employment. *Vause v. Equipment Co., supra; Duncan v. City of Charlotte,* 234 N.C. 86, 66 S.E. 2d 22; *Matthews v. Carolina Standard Corp.,* 232 N.C. 229, 60 S.E. 2d 93; *Hegler v. Mills Co.,* 224 N.C. 669, 31 S.E. 2d 918.

The term "in the course of" relates more particularly to the time, the place, and the circumstances under which the injury occurs. *Hollowell v. N. C. Department of Conservation and Development,* 206 N.C. 206, 173 S.E. 603; *Berry v. Furniture Co.,* 232 N.C. 303, 60 S.E. 2d 97; *Withers v. Black,* 230 N.C. 428, 53 S.E. 2d 668; *Conrad v. Foundry Co.,* 198 N.C. 723, 153 S.E. 266.

And in interpreting and applying the meaning of the complete expression, "arising out of and in the course of the employment," it must be kept in mind that while an accident arising out of an employment usually occurs in the course of it, it does not necessarily or invariably do so. *Bolling v. Belk-White Co.,* 228 N.C. 749, 46 S.E. 2d 838; *Withers v. Black, supra.* See also *Morrow v. State Highway and Public Works Commission,* 214 N.C. 835, 199 S.E. 265. Nor does an accident which occurs in the course of an employment necessarily or inevitably arise out of it. *Harden v. Furniture Co.,* 199 N.C. 733, 155 S.E. 728; *Beavers v. Power Co.,* 205 N.C. 34, 169 S.E. 825; *Hollowell v. N. C. Department of Conservation and Development, supra; Walker v. Wilkins,* 212 N.C. 627, 194 S.E. 89; *Plemmons v. White's Service, Inc.,* 213 N.C. 148, 195 S.E. 370; *Bryan v. T. A. Loving Co., supra; Matthews v. Carolina Standard Corp., supra; Vause v. Equipment Co., supra; Bell v. Dewey Bros. Inc.,* 236 N.C. 280. See also 58 Am. Jur., Workmen's Compensation, Section 210.

Therefore proof that an employee was at his place of employment and was doing his usual work at the time of the injury, without more, is insufficient to support an award of compensation. *Plemmons v. White's Service, Inc., supra; Walker v. Wilkins, supra; Harden v. Furniture Co., supra.*

Here there is evidence tending to show that the deceased customarily went to his office in the high school building at night and there performed work in the regular course of his employment as principal of the Union Mills High School, such as working on records and filling out reports. The evidence further indicates that on the night in question he was in his office, and books and records were found on his desk indicating that he had been at work on them. Therefore, on the record as presented it is readily inferable that he was at the place of his employment and was about the performance of his usual duties as principal of the Union Mills High School at the time of the murderous assault. Accordingly, the record supports the finding and conclusion of the Commission that the

fatal shooting occurred "in the course of" the deceased's employment as principal of the Union Mills High School.

The mooted question is whether there is any evidence to support the finding and conclusion of the Commission that the deceased came to his death as a result of an "injury arising out of . . . his employment" as principal of the Union Mills High School, *i.e.*, whether there is any evidence of causal connection between the murderous assault and his employment as high school principal.

The Commission rightly found that the deceased was murderously assaulted by Hugh Justice "as a result of the reprimand," and that the rule for the enforcement of which the reprimand was administered "was formulated by the Alexander School, Inc."

However, it is manifest that this record does not support the finding that the reprimand was administered by the deceased "As principal of the high school."

The rule to which the reprimand was addressed was designed not for the government of Union Mills High School but solely to prohibit the older boys from Alexander School, Inc., from visiting within a certain distance of the older girls' dormitory during evening hours. It applied in no way to any of the public school students, who at the time of its application had gone home.

It is true that at certain times Hugh Justice was a student at Union Mills High School. Nevertheless, he was a patron of Alexander School, Inc., a private child care or orphanage institution. He lived in a dormitory maintained by this institution. After the close of the regular school day and with the advent of nightfall, he was subject solely to the disciplinary rules of the orphanage, and in no manner to those governing the State-supported public school system.

The finding and conclusion reached by the Industrial Commission, approved and confirmed by the court below, that the deceased in enforcing a regulation of a private institution was acting within the scope of his duties as principal of Union Mills High School is without supporting evidence or sanction of law.

In this view of the case we think it would serve no useful purpose to remand the case for further findings of fact with respect to the relationship between Alexander School, Inc., and the deceased at the time of his fatal injury. Whether or not the deceased received from Alexander School, Inc., the equivalent of compensation in the form of living quarters, transportation facilities, or the like, is not of material significance one way or the other, in view of the clear showing that the injury which caused his untimely and tragic death arose wholly and solely out of the enforcement of a regulation of a private institution, without semblance

of connection, in fact or in law, with the performance of his duties as a high school principal employed by the State of North Carolina.

It follows from what we have said that the award below being unsupported by the requisite proof of causal relation between the deceased's employment as high school principal and his death, the judgment below is

Reversed.

GEORGE E. BIDDIX, EMPLOYEE, v. REX MILLS, INC., #1, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 6 May, 1953.)

1. Master and Servant § 45—

The Industrial Commission is primarily an administrative agency of the State, and while it is also a special judicial agency, its judicial authority is limited, and its administrative and judicial functions are separate and distinct.

2. Same—

The judicial authority of the Industrial Commission must be invoked either by the filing of a claim, G.S. 97-24, or by the submission of a voluntary settlement for approval by the Commission, G.S. 97-87, and the Commission has no authority to make an award of any type until its jurisdiction as a judicial tribunal has been invoked in some manner prescribed in the Act.

3. Master and Servant § 51—

The Industrial Commission must base its award upon admissions, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court after all parties have been given full opportunity to be heard, and it may not consider records, files, evidence or data not presented in court for consideration.

4. Master and Servant § 43—

The Compensation Act requires or permits an employer to pay bills for medical and other treatment of an employee, and the payment of such bills, approved by the Commission, G.S. 97-26, even without a formal denial of liability, cannot have the effect of an admission of liability by the employer or constitute a waiver of the requirement of filing timely claim by the employee, G.S. 97-24. Such facts are insufficient to invoke the doctrine of estoppel which applies in compensation proceedings upon a proper showing as in all other cases.

5. Same—

Chap. 823, sec. 1 (6), Session Laws of 1947, amends G.S. 97-47 relating exclusively to the time within which an employee may file a petition for a review of an award for changed conditions, and the amendatory act does not affect G.S. 97-24, and therefore where the employee fails to file claim within one year of the date of the accident, the claim is barred notwith-

standing that the employer may have paid bills for medical treatment approved by the Commission less than a year prior to the filing of claim.

6. Appeal and Error § 51c—

A decision of the Supreme Court must be interpreted in the light of the facts of the case in which it is rendered and the questions of law therein presented for decision.

APPEAL by defendants from *McLean, Special Judge,* October Term, 1952, GASTON. Reversed.

Claim for compensation under Workmen's Compensation Act.

On 14 September 1951 the Industrial Commission received from plaintiff notice of claim for compensation for disability due to an injury to his back allegedly suffered by him by accident on 15 June 1950.

The claim was heard by Commissioner Scott on stipulations of the parties as follows: If claimant has suffered any compensable disability by accident arising out of and in the course of his employment, the accident occurred 15 June 1950. Claimant filed no claim with the Industrial Commission prior to 12 September 1951 on which date he wrote the Commission requesting a hearing. This letter was received 14 September 1951. Defendants paid medical bills for treatment of the claimant, the last payment being made 16 January 1951. The jurisdictional facts were admitted.

The defendants having pleaded the provisions of G.S. 97-24 in bar of claimant's right to prosecute his claim, it was further stipulated and agreed "that this point of law, that is as to whether or not the claimant is barred by Section 24 of the Act, shall be determined, and if it shall be determined in favor of the claimant, then and in that event the case will be reset to take further testimony as to the nature of the injury."

The hearing commissioner found as a fact and concluded as a matter of law "that this claim is barred by the provisions of G.S. 97-24 (a)" and entered an award denying compensation. Claimant appealed to the full Commission.

At the hearing before the full Commission, a majority thereof found certain facts in addition to the facts stipulated by the parties and concluded (1) "that by the enactment of Chapter 823, Session Laws of 1947, it was the legislative intent to give an injured employee twelve months from the date of the last payment of bills for medical or other treatment, in cases in which only medical or other treatment bills are paid, within which to request a review of his case for the purpose of ascertaining his rights under the Compensation Act;" (2) that the payment of the medical bills, the reports thereof, and the failure to enter any formal denial of liability "constitute waiver of the requirement for making or filing timely

claim, such recognition of liability by the employer eliminating the question of whether a claim for compensation on (*sic*) has been made;" and, (3) "in all events, payment of medical bills under the provisions of the Compensation Act over an extended period of time under circumstances revealed by this record is calculated to lull an injured employee into a false sense of security, and lapse of time ought not to bar the employee's claim unless such be the clear mandate of the law."

It thereupon reversed the conclusions and award of the hearing commissioner and ordered that the claim be set for hearing on its merits. Defendants excepted and appealed to the Superior Court.

The opinion of the Industrial Commission disclosed that the employer reported a total of $85.55 to have been paid for medical treatment of claimant. There were two reports of payment.

When the appeal came on for hearing in the court below, the judge presiding overruled defendants' exceptions and affirmed the order of the Industrial Commission. Defendants excepted and appealed.

Jones & Small for defendant appellants.

George E. Biddix in propria persona.

BARNHILL, J. The hearing commissioner made his award on the stipulations made at the hearing at a time when the claimant was represented by competent counsel. He correctly concluded that the claim for compensation was not filed with the Commission within the time required by law. A majority of the Commission reversed on the ground that the defendants, by their conduct, lulled plaintiff into a sense of security and are now estopped to plead the statute, G.S. 97-24. To reach this conclusion, they had resort to matters appearing in the files of the Commission which constitute no part of the evidence in the case or the record in the cause. As the court below affirmed, the exceptive assignments of error raise serious questions which, while perhaps not decisive here, should be decided before the concept of the statute and our decisions evidenced by the majority opinion of the Commission becomes too deeply rooted in the administration of the Workmen's Compensation Act.

The Industrial Commission is primarily an administrative agency of the State charged with the duty of administering the provisions of the Workmen's Compensation Act. As such, it has many ministerial and administrative duties to perform. See *Whitted v. Palmer-Bee Co.*, 228 N.C. 447 (concurring opinion at p. 453), 46 S.E. 2d 109. While it is a special judicial agency, its judicial authority is limited. And these distinctions in the functions of the Commission must always be kept in mind.

The underlying spirit and purpose of the Act is to encourage and promote the amicable adjustment of claims and to provide a ready means of

determining liability under the Act when the parties themselves cannot agree. The Industrial Commission stands by to assure fair dealing in any voluntary settlement and to act as a court to adjudicate those claims which may not be adjusted by the parties themselves.

But the Commission has no authority—statutory or otherwise—to intervene and make an award of any type until its jurisdiction as a judicial tribunal has been invoked in the manner prescribed in the Act under which it operates.

The claim is the right of the employee, at his election, to demand compensation for such injuries as result from an accident. If he wishes to claim compensation, he must notify his employer within thirty days after the accident, G.S. 97-22, 23, and if they cannot agree on compensation, he, or someone on his behalf, must file a claim with the Commission within twelve months after the accident, in default of which his claim is barred. G.S. 97-24. Thus the jurisdiction of the Commission, as a judicial agency of the State, is invoked. *Lineberry v. Town of Mebane,* 218 N.C. 737, 12 S.E. 2d 252; *Winslow v. Carolina Conference Association,* 211 N.C. 571, 191 S.E. 403; *Lilly v. Belk Brothers,* 210 N.C. 735, 188 S.E. 319; *Wilson v. Clement Co.,* 207 N.C. 541, 177 S.E. 797; *Wray v. Woolen Mills,* 205 N.C. 782, 172 S.E. 487; *Whitted v. Palmer-Bee Co., supra.*

There is one further method provided by the Act. Where an employer and employee agree upon a settlement in which compensation is granted before a claim is filed, the Commission must approve the settlement. G.S. 97-82. This provision was inserted in the statute to protect the employees of the State against the disadvantages arising out of their economic status and give assurance that the settlement is in accord with the intent and purpose of the Act. Therefore, in approving the settlement in which compensation is awarded, the Commission acts in a judicial capacity. The voluntary settlement as approved becomes an award enforceable by a court decree. G.S. 97-87; *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109.

In a judicial proceeding the determinative facts upon which the rights of the parties must be made to rest must be found from admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. Recourse may not be had to records, files, evidence, or data not thus presented to the court for consideration. It follows that the Commission erred in basing its decision on information it says its files do or do not disclose. Even so, considering all the facts cited in the opinion of the Commission, they neither separately nor in combination support the conclusion reached or the award entered.

It cannot be said that when an employer does what the Act requires or permits him to do, he thereby perforce admits liability and waives the protective provisions of a statute enacted in his behalf. G.S. 97-25.

There are accidents which produce no injury. Others inflict injuries for which no compensation can be claimed. Still others produce compensable disability within the meaning of the Act. The employer is required to report them all to the Commission without regard to the nature of the accident or the compensability of the injury. He is, however, under no duty to file with the Commission prior to the presentation of a claim for compensation, any formal denial of liability, and his failure to do so is not a circumstance to be considered adversely to him in any hearing before the Commission.

A commendably large number of our employers provide prompt medical examination, first aid, and hospital care for their employees in case of accident without regard to the nature of the injury, if any, that may result. Frequently, it is purely precautionary. When liability for the medical care of an employee who has suffered an accident is voluntarily incurred by the employer, the bills therefor must be approved by the Commission before the employer can demand reimbursement from its insurance carrier. In this manner such expenditures are kept within the schedule of fees and charges adopted by the Commission. G.S. 97-26.

This humanitarian conduct on the part of the employers of the State is permitted by the statute. And aside from any statutory provision on the subject, we are committed to the view that such conduct cannot in any sense be deemed an admission of liability. *Brown v. Wood,* 201 N.C. 309, 160 S.E. 281; *Barber v. R. R.,* 193 N.C. 691, 138 S.E. 17; *Norman v. Porter,* 197 N.C. 222, 148 S.E. 41; *Patrick v. Bryan,* 202 N.C. 62, 162 S.E. 207.

The Good Samaritan placed an injured and unfortunate man upon his own beast, poured wine and oil into his wounds, and paid his maintenance charges at the inn. He generously promised to give even more, if necessary, upon his return. Even so, through the ages, no man has yet suggested that he, by his conduct, impliedly admitted that he was liable for the injuries the poor man sustained. *Brown v. Wood, supra.*

"It was an act of mercy which no court should hold in any respect was an implied admission or circumstance tending to admit liability. If a court should so hold, it would tend to stop, instead of encourage, one injuring another from giving aid to the sufferer. It would be a brutal holding, contrary to all sense of justice and humanity." *Barber v. R. R., supra.*

Incidentally, the medical bills in this cause amounted to only $85.55, and although the last amended report was filed 17 August, it was expressly stipulated at the hearing that the last payment was made 16 January 1951.

It must not be understood that we hold an employer may not by his conduct waive the filing of a claim within the time required by law. The law of estoppel applies in compensation proceedings as in all other cases. We merely hold that the facts here appearing, including those found by the full Commission, are insufficient to invoke the doctrine in this case. *Wilson v. Clement Co., supra; Lilly v. Belk Brothers, supra; Jacobs v. Manufacturing Co.,* 229 N.C. 660, 50 S.E. 2d 738; *Lineberry v. Town of Mebane, supra; Whitted v. Palmer-Bee Co., supra.*

This brings us, rather circuitously, to the crux of the controversy. The Commission concluded that in enacting ch. 823, Session Laws 1947, section 1 (6) (now a part of G.S. 97-47) "it was the legislative intent to give an injured employee twelve months from the date of the last payment of bills for medical or other treatment in cases in which only medical or other treatment bills are paid, within which to request a review of his case for the purpose of ascertaining his rights under the Compensation Act," and that the "payment of medical bills was tantamount to acceptance of liability and plaintiff is entitled to use the date of the last of these payments as the time when the statute commenced to run against him." Applying this interpretation of the statute to the facts in this case, the Commission concluded that as defendants voluntarily paid medical bills as late as 16 January 1951, and the claim was filed in September 1951, less than twelve months thereafter, it was filed in apt time. In so holding, the Commission, of necessity, concluded that this Act amends G.S. 97-24, and the voluntary payment of medical bills tolls the time limit therein prescribed for filing a claim. In this there was error.

That amendatory Act has no relation to the filing of original claims for compensation or the time within which such claims are to be filed. It amends G.S. 97-47 and it relates exclusively to the time within which an employee may file a petition for a review of an award theretofore made. *Whitted v. Palmer-Bee Co., supra; Tucker v. Lowdermilk, supra.*

G.S. 97-47 vests in the Industrial Commission "upon its own motion or upon the application of any party in interest on the grounds of a change in condition" authority to review any award and upon review to "make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided" in the Act. It provides, however, that "no such review shall be made *after twelve months from the date of the last payment of compensation pursuant to an award* . . ." (Italics applied.) The 1947 Act merely added a further exceptive limitation as follows: "except that in cases in which only medical or other treatment bills are paid no such review shall be made after twelve months from the date of the last payment of the bills for medical or other treatment, paid pursuant to this article." Thus the 1947 Act relates exclusively to the right of review of an award, and the time limit within

which the review may be had is tolled by the payment of medical bills, if at all, only when such payments are made under the mandate of an award duly entered by the Commission.

This section, G.S. 97-47, as thus amended, was correctly analyzed and construed by Commissioner Scott in his original opinion in the following language: "It is apparent that Section 47 cannot apply unless there has been a previous award of the Commission. If that award directed the payment of both compensation and medical expense, then the injured employee would have one year from the last payment of compensation pursuant to the award in which to file claim for further compensation upon an alleged change of condition. If the award directed the payment of medical bills only, then the injured employee would have one year from the date on which the last payment for medical (treatment) is made in which to file a claim for further compensation upon an alleged change of condition." *Whitted v. Palmer-Bee Co., supra.*

He thereupon correctly concluded that since there had been no final award of the Commission, G.S. 97-47 "is not applicable under the facts of this case, and that this claim is barred by the provisions of G.S. 97-24 (a)."

In making its award the Commission relied in part on what is said in the *Whitted case.* But when that opinion is read in the light of the facts in the case, it appears that the language there used is clear and explicit and leaves no room for doubt as to the law as therein stated. It is true that the opinion contains the statement "and the record does not disclose the payment of any medical bills since 5 July, 1944." But this statement was made in the discussion of G.S. 97-47. The Court was pointing out the fact the claimant had failed to bring his claim within the terms of that section. Furthermore, we do not write the law by implication.

What is here said applies in like manner to the opinion in *Tucker v. Lowdermilk, supra,* cited and relied on by the Commission.

The rigidity of the written word is such that no comprehensive remedial statute can be enacted which will not at times produce hardship cases. Occasionally an injury by accident produces no immediate discernible disability within the meaning of the Act. The disability may develop after the lapse of the time within which the injured employee must file his claim for compensation. Such was the fact in the *Whitted case.* But there is no legerdemain by which the court can extend or enlarge the requirements of the statute so as to include claims which are not filed within the twelve months' period prescribed by G.S. 97-24. For us to undertake to do so would only produce confusion confounded and eventually defeat the effective enforcement of this wise and beneficent Act.

For the reasons stated the judgment entered in the court below is

Reversed.

THOMAS PARK HOWLE v. TWIN STATES EXPRESS, INC., A CORPORATION.

(Filed 6 May, 1953.)

1. Actions § 2b: Constitutional Law § 18—

A nonresident has full right to bring an action in our courts as one of the privileges guaranteed the citizens of the several states by the Federal Constitution. Constitution of the United States, Art. IV, sec. 2.

2. Courts § 14—

Actions are transitory when the transaction on which they are based might take place anywhere, and are local when they could not occur except in some particular place.

3. Courts § 15—

An action to recover for personal injuries resulting from an accident occurring in another state between plaintiff's car and the truck of a motor freight carrier is a transitory cause which may be instituted here in the county in which the motor carrier maintains its principal place of business, G.S. 1-97, and in such action the *lex loci* governs all matters pertaining to the substance of the cause of action while all matters of procedure are governed by the *lex fori.*

4. Same: Abatement and Revival § 5½—

In an action instituted in South Carolina to recover for personal injuries sustained in an automobile accident occurring in that state, voluntary nonsuit was entered with limited prejudice to plaintiff to renew his action only in the same county of that state. *Held:* In an action instituted in this State the order of limited prejudice refers to a matter of procedure not binding here, and further the order will be interpreted as not extending beyond the territorial limits of the State of South Carolina and as solely relating to change of venue in that State, and therefore the order will not support a plea of abatement in the action instituted here.

5. Judgments § 33a—

A voluntary nonsuit is not *res judicata* in a subsequent action brought on the same cause of action.

6. Judgments § 34—

A court may not render a judgment which transcends the territorial limits of its authority.

APPEAL by plaintiff from *Sharp, Special Judge,* at 13 October, 1952, Extra Civil Term, of MECKLENBURG.

Civil action to recover damages for personal injuries sustained by plaintiff in an automobile collision on night of 26 July, 1949, just north of the city limits of Florence, South Carolina, as result of alleged actionable negligence of an agent of defendant in the course and scope of his employment.

Plaintiff alleges in his complaint that he is a resident of Montgomery County, Tennessee, and the defendant is a corporation duly organized and

existing under and by virtue of the laws of the State of North Carolina, with its principal office in the city of Charlotte, doing business as motor freight carrier in North and South Carolina. And the attorneys for the parties hereto stipulate that subsequent to the service of summons and complaint on defendant, Twin States Express, Inc., a corporation, and before time for pleading had expired, the Twin States Express, Inc., was duly adjudicated a bankrupt by the United States District Court for the Western District of North Carolina, the court having jurisdiction of the bankruptcy proceeding, and that F. T. Miller, Jr., has been duly appointed Receiver and Trustee in bankruptcy of Twin States Express, Inc., and authorized and ordered by the United States District Court aforesaid to enter appearance in, and to defend this action, and that he has been properly substituted as defendant in this action by order of the Superior Court of Mecklenburg County, North Carolina.

Defendant filed a plea in abatement on the ground that in a former action instituted in the Court of Common Pleas of the County of Florence and State of South Carolina, entitled "Thomas Parke Howle, plaintiff, *vs.* Ira E. Brown, Twin States Express, Inc., a corporation, and one 1947 Pontiac automobile bearing 1949 S. C. License No. D-88271, defendants," upon the same cause of action, plaintiff was granted the right to take a voluntary nonsuit, with limited prejudice, that is, to renew his action only in Florence County. The order therefor, dated 19 May, 1951, is attached and reference thereto is made. And a copy of the complaint, and a copy of the answer filed in the action in the Court of Common Pleas aforesaid are also attached as exhibits to the plea in abatement. And from the complaint there it appears that plaintiff was then a resident of the city and county of Florence, South Carolina.

In this order of 19 May, 1951, it is recited that "on or about October 7, 1949, the plaintiff commenced an action against the defendants for injuries sustained in an automobile accident occurring on July 26, 1949. At the call of the calendar for the May 1951 Term, plaintiff's counsel moved for a voluntary nonsuit, assigning as reasons therefor that plaintiff had suffered a cerebral hemorrhage, as a result of which he cannot speak, is partially paralyzed, and at the present time is totally incapable of being a witness in his own behalf."

Then, after setting out the contentions of the parties in respect to the motion, and giving a history of the case, it is recited that one of the affidavits filed by defendant contains "the statement that one of plaintiff's counsel several weeks ago stated that plaintiff and his mother, who lives in Darlington County, desired to have a dismissal of the case in this county so as to start the action anew in Darlington County." And the judge finds that "there is no denial of defendant's assertion that the underlying purpose of the voluntary nonsuit is to bring the action in another county."

Then after analyzing, and quoting from decisions of the Supreme Court of South Carolina, this follows: "Motions for nonsuit are addressed to the discretion of the Circuit Judge. The plaintiff, in his condition, cannot attend court in the capacity of witness, only as a silent plaintiff and as an exhibit. In this situation he should not be compelled to proceed with his action against the defendants, nor should he be compelled to take a nonsuit with prejudice. Under his existing physical condition the plaintiff should be permitted to take a voluntary nonsuit with *Limited prejudice,* that is, with the right to renew the action in this jurisdiction, if not barred by the statute of limitations, but without the right to bring the action in another county. Such ruling is in line with his request since he is seeking the nonsuit by reason of his physical condition. If a nonsuit is granted without prejudice and plaintiff brought a new action in a neighboring county it would certainly appear the purpose of the motion was for a change of venue."

And thereupon, the court "ordered that the plaintiff shall have the right, if he so desires, 'to take a voluntary nonsuit' with limited prejudice, that is, to renew his action in this county, if not barred by the statute of limitations, but the taking of such nonsuit shall be without right to institute the action in another county," and "in the event the plaintiff desires to avail himself of this nonsuit, he or his attorneys shall make written entry upon the record indicating that such nonsuit has been taken, otherwise, the case to remain open until it may be disposed of." And "It is further ordered that in the event there is a change in the legal situation of the parties such that plaintiff would be prohibited from reinstituting the action in this county, he may then apply to the court for modification of the terms and conditions."

And defendant set forth in the plea in abatement that since the entry and filing of the order referred to above, there has been written at the bottom of said order a statement by attorneys for the plaintiff therein, Thomas Park Howle, that they "take the nonsuit as provided and set forth in the foregoing order."

When the plea in abatement came on for hearing in Superior Court of Mecklenburg County, North Carolina, the presiding judge, upon admission of counsel in open court that the attorneys for plaintiff who made the entry as last above stated were at the time, and now are attorneys for plaintiff, and had authority to make the entry, and that the order aforesaid has not been modified, and that the cause of action in the instant case is the same cause of action as the cause of action instituted by plaintiff in the Court of Common Pleas of Florence County, South Carolina, made findings of fact in pertinent part following: (1) That the action was instituted in South Carolina, and the order was made, and the attorneys for plaintiff made the entry, all as hereinabove related. (2) That the

cause of action in the South Carolina case is the same as the cause of action in the instant case, and that the plaintiff there is the plaintiff here, and that the defendant there, Twin States Express, Inc., is the defendant here. (3) That the Court of Common Pleas of the County of Florence, South Carolina, is a court of competent jurisdiction and had jurisdiction of the subject matter involved in and of all the parties to the suit captioned as hereinabove stated, at the time the order of 19 May, 1951, was entered, and that the order has not been modified.

Upon such findings of fact, the presiding judge aforesaid being of opinion, and holding that under the order entered in the South Carolina case, and the entry of nonsuit in accordance therewith by attorneys for the plaintiff, "plaintiff is precluded thereby from instituting, prosecuting or maintaining this action in the Superior Court of Mecklenburg County, North Carolina, and that the plea in abatement of the defendant should be allowed," entered judgment in accordance therewith abating, and dismissing the action.

Plaintiff excepted, and appeals to Supreme Court and assigns error.

James P. Mozingo III and Bell, Horn, Bradley & Gebhardt for plaintiff, appellant.

Helms & Mulliss, Fred B. Helms, and Wm. H. Bobbitt, Jr., for defendant, appellee.

WINBORNE, J. The question presented: Can the North Carolina courts be ousted of jurisdiction of this transitory cause of action between plaintiff, a resident of Tennessee, and defendant, a North Carolina corporation, by an order of the Court of Common Pleas of Florence, South Carolina, entered under the circumstances shown therein, granting to plaintiff the right to take a voluntary nonsuit in an action formerly brought on same cause of action, and then pending in said court, with right to renew the action in Florence County, but without right to bring the action in another county? Careful consideration of all phases of the question lead this Court to negative answer.

A nonresident has full right to bring an action in our courts. See *McDonald v. MacArthur,* 154 N.C. 122, 69 S.E. 832, and cases cited. Also *Howard v. Howard,* 200 N.C. 574, 158 S.E. 101; *Steele v. Telegraph Co.,* 206 N.C. 220, 173 S.E. 583; *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562; *Alberts v. Alberts,* 217 N.C. 443, 8 S.E. 2d 523.

In the *McDonald case, supra, Clark, C. J.,* writing for the Court, had this to say: "Indeed, Const. U. S., Art. IV, Sec. 2, provides 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' The right to obtain justice by an action in the State courts is one of these privileges. Cooley Const. Law (7 Ed.)

37. In *Corfield v. Coryell,* 4 Wash. CC 380, cited by Judge Cooley, among such privileges and immunities is recited the right 'to institute and maintain actions of every kind in the courts of the State.' "

In the *Alberts case, supra, Clarkson, J.,* wrote that "Although plaintiff is a nonresident and the action is transitory, the doors of the courts of this State are open to her to determine her rights," citing *Howard v. Howard, supra; Steele v. Telegraph Co., supra; Ingle v. Cassady, supra.*

And in the *Cassady case, supra,* the Court said that "if . . . under the *lex loci,* a transitory cause of action accrues, it may be prosecuted in another jurisdiction unless forbidden by public policy or *lex fori,*" citing *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82.

Actions are transitory when the transaction on which they are based might take place anywhere, and are local when they could not occur except in some particular place. The distinction being in the nature of the subject of the injury, and not in the means used or the place at which the cause of action arises. Black's Law Dictionary. *Brady v. Brady,* 161 N.C. 324, 77 S.E. 235; see also *Blevens v. Lumber Co.,* 207 N.C. 144, 176 S.E. 262; *Bunting v. Henderson,* 220 N.C. 194, 16 S.E. 2d 836.

Indeed, it is a general rule of law that in actions for personal injury resulting from an accident occurring in another State the laws of the State in which the accident took place governs as to all matters pertaining to the substance of the cause of action, that is, *lex loci,* while matters relating to procedure are governed by the laws of the State wherein the action is brought, that is, *lex fori.* See *Wise v. Hollowell, supra,* and cases cited; also *Steele v. Tel. Co., supra; Ingle v. Cassady, supra; Russ v. R. R.,* 220 N.C. 715, 18 S.E. 2d 130; *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911; 148 A.L.R. 1126.

Moreover, in North Carolina, "for the purpose of suing and being sued the principal place of business of domestic corporation is its residence." G.S. 1-79. *Roberson v. Lumber Co.,* 153 N.C. 120, 68 S.E. 1064; *Oil Co. v. Fertilizer Co.,* 204 N.C. 362, 168 S.E. 411; *Trust Co. v. Finch,* 232 N.C. 485, 61 S.E. 2d 377.

And the words "principal place of business," as so used in the statute, G.S. 1-79, are regarded as synonymous with the words "principal office" as used in the statute G.S. 55-2 requiring the location of the principal office in this State to be set forth in the certificate of incorporation by which the corporation is formed. *Roberson v. Lumber Co., supra.*

In the light of these principles, and the provisions of the cited statutes, it is seen that the cause of action involved in the present action arose in the State of South Carolina, and is transitory in character,—it might have happened anywhere. And even though plaintiff is a nonresident of the State of North Carolina, nothing else appearing, the doors of the courts of this State are open to him to sue the defendant on this transi-

tory cause of action in the county in which defendant's place of business is located, that is, Mecklenburg County.

And in this action the laws of the State of South Carolina govern as to all matters pertaining to the substance of the cause of action, that is, *lex loci* governs, but matters relating to procedure are governed by the laws of the State of North Carolina wherein the action is brought, that is, *lex fori* governs.

But this right of plaintiff to sue in North Carolina is challenged by the plea in abatement filed by defendant,—based on the order of 19 May, 1951, entered in the action brought by plaintiff in the Court of Common Pleas of Florence County and State of South Carolina.

What then is the effect of the order of 19 May, 1951? It pertains to procedure, rather than to the substance of the cause of action.

Under the Code Laws of South Carolina, 1952, pertaining to venue the pertinent statute, Sec. 10-303, provides in material part that "the action shall be tried in the county in which the defendant resides at the commencement of the action, subject . . . to the power of the court to change the place of trial in certain cases as provided by law." And while the Supreme Court of South Carolina holds that "the right of a resident defendant to a trial in the county of his residence assured him under Section 422 of the Code of Civil Procedure (1932)," now Section 10-303 of the Code Laws of South Carolina, 1952, "is a substantial right," *Dunbar v. Evins,* 198 S.C. 146, 17 S.E. 2d 37, it is not made a constituent part of any given cause of action. Manifestly the statute pertains to the remedy and procedure, and not to the substance of the cause of action.

And in passing it may be of interest to note that in South Carolina an action against a motor vehicle carrier, licensed under Article 3 of Chapter 58, may be brought in any county through which the motor carrier operates.

Both plaintiff and defendant Ira E. Brown were residents of Florence County, South Carolina, and defendant Twin States Express, a corporation, was engaged in the business of transportation of goods via trucks, and doing business in said county,—as admitted by the pleadings, at the time plaintiff commenced the action in the Court of Common Pleas of that county.

Thus it would seem that Florence County was a proper venue for the action instituted by plaintiff, and at least defendant Brown had substantial right under the statute to a trial therein.

But when the order of 19 May, 1951, permitting plaintiff to take a voluntary nonsuit with limited prejudice, that is, with the right to renew the action "in this jurisdiction," Florence County, is read in connection with the statute, Sec. 10-303, and the charge, as contained in the affidavit to which the court refers, that plaintiff desired a dismissal of the case

in Florence County so as to start the action anew in Darlington County, it is clear that in the clause "without the right to bring an action in another county," the words "another county" were intended to mean another county in South Carolina. The intent is made clear in this sentence: "If a nonsuit is granted without prejudice and plaintiff brought a new action in a neighboring county it would certainly appear the purpose of the motion was for a change of venue." Indeed, a court may not render a judgment which transcends the territorial limits of its authority. 31 Am. Jur. 70, Judgments, Sec. 407. *In re DeFord,* 226 N.C. 189, 37 S.E. 2d 516; *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798.

Hence it will not be assumed that the South Carolina court intended to extend its order beyond the territorial limits of the State.

"Ordinarily a judgment of nonsuit is not a decision on the merits and is not a bar to a second action for the same cause. Nor will such judgment support a plea of *res judicata.*" 17 Am. Jur. 96, subject Dismissal and Discontinuance, Sec. 79.

Indeed, in *Starling v. Cotton Mills,* 168 N.C. 229, 84 S.E. 388, the Supreme Court of North Carolina, in opinion by *Clark, C. J.,* declared that "the fact that a nonsuit has been formerly taken is not *res judicata,*" citing cases. See also *Cooper v. Crisco,* 201 N.C. 739, 161 S.E. 310.

True, it appears that in South Carolina there is no statute or court rule governing the question as to when a plaintiff may take a voluntary nonsuit or dismiss or discontinue his action. "The question is said to be controlled wholly by the common law as announced or modified by decisions of the Court." *Parnell v. Powell,* 191 S.C. 159, 3 S.E. 2d 801.

In the *Parnell case, supra,* the Court said: "It is well settled that the plaintiff does not possess the unquestioned right at all times and under all circumstances to voluntarily terminate his action, without prejudice to the bringing of a new action by taking a voluntary nonsuit. His right to do so frequently depends upon the effect that it will have upon the defendant's rights. . . . If the discontinuance or dismissal before trial will not result in legal prejudice to the defendant, a plaintiff ordinarily has a right to discontinue any action commenced by him . . . In such a case, through the control which the court exercises over its order, there is discretion to refuse the discontinuance, but where nothing appears to show prejudice or violation of the rights or interests of the adverse party, the plaintiff may be granted a voluntary nonsuit, conditioned upon such terms and conditions as may be proper to protect the defendant . . . In our opinion the court should exercise its discretion in passing upon such motions, whether made prior to the commencement of the trial or after the trial has been entered upon."

To like effect is the case of *Romanus v. Biggs,* 217 S.C. 77, 59 S.E. 2d 645.

But, on the other hand, the decisions of the Supreme Court of South Carolina are to the effect that a voluntary dismissal or nonsuit brings about the same situation or result as if no suit had been brought. *Allen v. Atlanta & Charlotte Air Line R. Co.*, 216 S.C. 188, 57 S.E. 2d 249, 23 A.L.R. 2d 657; *S. c.*, 218 S.C. 291, 62 S.E. 2d 507. *Kay v. Meadors* (1950), 216 S.C. 483, 58 S.E. 2d 893; *Moore v. Southern Coatings & Chemical Co.* (1952) (S.C.), 71 S.E. 2d 311.

In the second *Allen case, supra,* it is said that "Manifestly, not only does a voluntary nonsuit terminate the case as a procedural matter; it also wipes the slate clean of all rulings made in the course of the trial resulting in the nonsuit."

And in *Kay v. Meadors, supra, Stukes, J.*, wrote for the Court: "These authorities hold the obvious. Nonsuit was the end of respondent's former action and with it went the attachment. But it was not an adjudication of the rights of either party and the resulting situation was the same as if there had been no former action or attachment, so far as the right to sue again and attach again is concerned. We know of no statute or other rule of law, and none has been cited, whereby voluntary nonsuit in attachment proceedings operates as *res judicata,* which is the substance of appellant's contention. It is fundamental that a voluntary dismissal or nonsuit brings about the same situation or result as if no suit had been brought," citing *Allen v. Ry. Co., supra.* And the Court, referring to *Munn v. Munn,* 146 S.C. 290, 143 S.E. 879, said: "A first warrant of attachment was vacated, and a second was attacked in part upon the ground that vacation of the first made the matter *res judicata.* The contention was rejected, which must be the result here."

Moreover, in the *Moore case, supra,* in a *per curiam* opinion, the South Carolina Court held: "Having concluded that voluntary nonsuit was properly within the discretion of the trial court, and it having been granted, the situation is as if no action had been brought, which is the general rule, and assignments of intermediate errors will ordinarily not be considered on appeal," citing Annotation 11 A.L.R. 2d 1407, the *Allen cases, supra,* and *Kay v. Meador, supra.*

But be that as it may, the order in question, as we interpret it, was not intended to have, nor does it have the force and effect of precluding plaintiff from prosecuting the present action in this State. Hence the judgment from which the appeal is taken is

Reversed.

STATE v. C. S. BRADY.

(Filed 6 May, 1953.)

1. Receiving Stolen Goods § 1a—

The crime of receiving stolen goods, though it presupposes larceny, does not include larceny, and the two offenses are separate and distinct.

2. Same—

The elements of the offense of receiving stolen goods are the receiving or aid in concealing goods which had been stolen by some person other than the accused, with knowledge by the accused that they had been stolen, and retention of possession or concealment by him of such goods with a dishonest purpose.

3. Receiving Stolen Goods § 3—

In a prosecution for receiving stolen goods, the only purpose of requiring the ownership of the goods to be stated in the indictment is to negative ownership in the accused, and it is not necessary that the indictment state the names of those from whom the goods were stolen.

4. Indictment and Warrant § 9—

An indictment is sufficient if it expresses the charge against the defendant in a plain, intelligible, and explicit manner, and it will not be held insufficient for mere informality or minor defects which do not affect the merits of the case. G.S. 15-153.

5. Receiving Stolen Goods § 6—Nonsuit for variance held properly denied.

The bill of indictment charged defendant with feloniously receiving described merchandise, the goods of "Tom Harris and other persons," knowing them to have been feloniously stolen. The proof tended to show that defendant received with guilty knowledge the items of merchandise enumerated in the indictment which had been stolen from certain identified stores, but there was no proof that any of the merchandise had been owned by Tom Harris. *Held:* Defendant's motion to nonsuit for variance was properly overruled, since proof that the articles had been stolen from the named stores supports the allegation of the indictment that the goods had been stolen from "other persons," and the prosecution would be a bar to any subsequent prosecution for receiving these particular goods.

6. Criminal Law §§ 42f, 52a (4)—

The introduction by the State of testimony of an exculpatory statement made by defendant does not preclude the State from showing from other facts or circumstances that the exculpatory statement was false, and when the State introduces other evidence sufficient to raise a reasonable inference to that effect, the exculpatory statement does not justify nonsuit.

7. Receiving Stolen Goods § 7—

In a prosecution for receiving stolen goods, an instruction which fails to charge the jury that it must find that the receiving was with felonious intent must be held for reversible error notwithstanding that the inadvertence was a mere *lapsus linguae*.

STATE *v.* BRADY.

APPEAL by defendant from *Pless, J.,* September Term, 1952, of RICHMOND.

Criminal prosecution upon an indictment charging the defendant with receiving stolen goods, knowing them to have been stolen.

The evidence discloses that D. W. Watkins, age 17, Clarence Berton, age 16, and Bobby Bullard, age 15, stole various and sundry articles of merchandise from different stores in Wadesboro, Rockingham, and Hamlet. These articles included watches, bullets, knives, a radio, fountain pens, a camera, a handkerchief, cigarette lighters, a pencil sharpener, fishing supplies, a rod and reel, etc. These boys testified that they first tried to sell the defendant a part of this merchandise, but were unsuccessful. They then took all the articles to his place of business. The defendant asked them if the articles were "hot." One of the boys said: "It don't feel hot to me." Then one of them said it had been in the back of the car in the sun. The defendant said he didn't want to buy "nothing that was stolen." They tried to sell the articles separately to the defendant. He refused to buy them separately, but offered $15.00 for all of them. The boys wanted $25.00, but finally agreed to take $20.00, and the defendant paid them that amount.

The evidence also discloses that these boys called the defendant's attention to the price tags on the boxes and told him those were the prices he would have paid had he bought the articles himself. The Watkins boy had frequently visited the defendant's pool room which is located on U. S. Highway No. 74, west of Rockingham, where he played pool and bought chances on punchboards. And on one occasion, when his money ran out, he had pawned his pocketknife to the defendant.

The Sheriff of Richmond County testified that when he inquired of the defendant as to whether or not he had purchased the merchandise in question from Watkins and others, he admitted that he had done so. But said he "didn't know the stuff was stolen."

The State offered evidence tending to show that the reasonable market value of the merchandise purchased by the defendant was worth from $125.00 to $150.00.

The defendant offered no evidence in the trial below but moved for judgment as of nonsuit at the close of the State's evidence. The motion was denied.

Verdict: Guilty.

Judgment: Two years imprisonment in the common jail of Richmond County, to be assigned to work on the roads under the supervision of the State Highway and Public Works Commission. The defendant appeals, assigning error.

Pittman & Webb, John T. Page, Jr., and Hugh A. Lee for defendant, appellant.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

DENNY, J. The bill of indictment charged the defendant with feloniously receiving "watches, fishing reel, fountain pens, a camera, and other personal property of the value of more than $100.00, . . . the goods . . . of Tom Harris and other persons," knowing them to have been feloniously stolen.

The defendant contends that since the State did not show that Tom Harris was the owner of any of the stolen property and did not state in the bill of indictment the names of the owners of the various stores in Wadesboro, Rockingham, and Hamlet, from which the goods were stolen, that there is a variance between the indictment and the proof, and his motion to dismiss as of nonsuit should have been allowed.

The appellant is relying on the case of *S. v. Pugh,* 196 N.C. 725, 147 S.E. 7, in which the bill of indictment charged the defendant and others with the larceny of "334 pounds of leaf tobacco, of the value of $58.97, the goods and chattels of L. B. Jenkins Company," and with receiving same knowing it to have been feloniously stolen or taken in violation of C.S. 4250 (now G.S. 14-71). The State offered no evidence tending to show who owned the tobacco. The jury returned a verdict of guilty and upon appeal this Court held that the crime as charged was not supported by the evidence and reversed the court below in its refusal to sustain the motion for judgment as of nonsuit. However, an examination of the original record discloses that Pugh was convicted of larceny. And it is the law with us that where a bill of indictment charges larceny and receiving, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving. *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725. Moreover, the case of *S. v. Haddock,* 3 N.C. 162, cited as authority for the holding in *S. v. Pugh, supra,* was one in which the defendant was only charged with larceny. There the Court held that an "indictment should state in whom the property was, or that it was the property of some person unknown; otherwise, he could not plead in bar to another indictment for the same case."

The crimes of larceny and of receiving stolen goods, knowing them to have been stolen, are separate and distinct offenses. And it seems to be uniformly held that an indictment for larceny must state whose property was stolen, or that it is the property of some person or persons unknown. However, receiving stolen property is a "sort of secondary crime based upon a prior commission of the primary crime of larceny. It presupposes, but does not include, larceny. Therefore the elements of larceny

are not elements of the crime of receiving." *S. v. Martin,* 94 Wash. 313, 162 P. 356. And in Wharton's Criminal Evidence, 10th Edition, Volume 1, section 325b, page 643, the essential elements of the crime of receiving stolen goods which must be proven, are stated as follows: "(a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods, and (c) continued such possession or concealment with a dishonest purpose." See also Burdick, Law of Crime, Volume 2, section 610, page 437.

The only reason for requiring the ownership of stolen property to be stated in an indictment for receiving stolen goods, is to negative ownership in the accused. *S. v. Bading,* 236 Iowa 468, 17 N.W. 2d 804.

In the indictment under consideration the goods are described and are stated to have belonged to Tom Harris and others. It is true there is no evidence that any of the goods were stolen from Tom Harris, but the State did offer evidence to the effect that they were stolen from various stores in Wadesboro, Rockingham, and Hamlet, and were sold to the defendant by Watkins, Berton and Bullard. These boys were witnesses for the State and testified and identified the articles sold to the defendant as being the same articles which they stole from the various stores in the above towns. The defendant could plead this indictment and the testimony of the State in bar of any further prosecution for the receiving of these particular goods.

The Supreme Court of California in considering this question, in the case of *People v. Smith,* 26 Cal. 2d 854, 161 P. 2d 941, had this to say: "The crime of receiving stolen goods consists of either buying or receiving personal property with knowledge that it has been stolen. . . . The gist of the offense is the purchase or receipt of the stolen goods with guilty knowledge but the particular ownership of the goods is not an element of the crime. Neither the legal nor moral character of the act is affected in any way by the fact that the stolen property may have belonged to several persons rather than to a single person. The crimes of larceny and of receiving stolen goods are separate and distinct. . . ."

While it would have been better, perhaps, if the indictment had stated the names of the owners of the stores from which the goods described in the bill of indictment were stolen, if known, and if not, to have so stated. However, in view of our statute, G.S. 15-153, and the decisions of this Court, we think the indictment and proof challenged for variance are sufficient to withstand the motion interposed. G.S. 15-153 provides: "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon

stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." In light of the provisions of this statute, it is the practice with us not to sustain motions to quash bills of indictment for mere informality or minor defects which do not affect the merits of the case. *S. v. Loesch, ante,* 611; *S. v. Stone,* 231 N.C. 324, 56 S.E. 2d 675; *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Hardee,* 192 N.C. 533, 135 S.E. 345; *S. v. Ratliff,* 170 N.C. 707, 86 S.E. 997. The following authorities in other jurisdictions hold that an indictment for receiving stolen goods is not required to state the ownership of the stolen property. *S. v. Cohen* (Mo. Supreme Court, 1936), 100 S.W. 2d 544; *S. v. Park,* 322 Mo. 69, 16 S.W. 2d 30; *People v. Marino,* 271 N.Y. 317, 3 N.E. 2d 439, 105 A.L.R. 1283; *Cohen v. United States,* 277 F. 771; *Woodruff v. State,* 56 Okla. Cr. 409, 41 P. 2d 129; *White v. State,* 23 Okla. Cr. 198, 214 P. 202; *People v. Lima* (Cal. App. 1944), 146 P. 2d 261; *Dixon v. State,* 223 Ind. 521, 62 N.E. 2d 629; *People v. Smith, supra; State v. Martin, supra.* These opinions hold to the contrary: *Stanford v. State,* 137 Tex. Cr. R. 33, 127 S.W. 2d 911; *S. v. Robinson,* 74 Ore. 481, 145 P. 1057; *People v. Nakutin,* 364 Ill. 563, 5 N.E. 2d 78.

The defendant further contends that since the State offered the exculpatory statement made by him to the Sheriff of Richmond County when he made inquiry as to whether the defendant had purchased the goods in question from Watkins and others, it is bound thereby and his motion to nonsuit should have been allowed.

The State by offering exculpatory statements, is not precluded from showing the facts were different. While an exculpatory statement, standing alone, is binding on the State, the State is still free to contradict or show from other facts or circumstances the statement to be false or to raise a reasonable inference to that effect and thereby make out a case for the jury. *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Phillips,* 227 N.C. 277, 41 S.E. 2d 766; *S. v. Hendrick,* 232 N.C. 447, 61 S.E. 2d 349; *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564; *S. v. Bright, ante,* 475, 75 S.E. 2d 407.

We think the evidence adduced in the trial below was sufficient to make out a case for the jury, and we so hold.

The defendant excepts to the following portion of the charge to the jury: "It is admitted by the defendant that he did receive the property, it is not contested that the property was stolen, but that alone is not sufficient to establish the guilt of the defendant. The question submitted to you and the only question that is disputed between the parties is whether or not the defendant knew at the time of receiving the property

that it had been stolen. If, upon consideration of the evidence offered by the State, all of the circumstances and surroundings, if you find, and find beyond a reasonable doubt, that the defendant knew that it was stolen, and that he received it with that knowledge, then, lady and gentlemen, he would be guilty, and it would be your duty to render a verdict of guilty. On the other hand, if, after considering the State's evidence, you have a reasonable doubt of the knowledge of the defendant that the property was stolen, then he would be entitled to the benefit of that reasonable doubt, and it would be your duty to render a verdict of not guilty."

It will be observed that the indictment charges the defendant with "feloniously" receiving stolen goods, knowing them to have been stolen. But the charge fails to instruct the jury that it must find that the receiving was with felonious intent. This was error and entitles the defendant to a new trial. *S. v. Yow,* 227 N.C. 585, 42 S.E. 2d 661; *S. v. Morrison,* 207 N.C. 804, 178 S.E. 562; *S. v. Eunice,* 194 N.C. 409, 139 S.E. 774.

The omission pointed out was certainly an inadvertence or *lapsus linguae* on the part of the able judge presiding in the court below. Or, as stated by the late *Chief Justice Stacy,* in the case of *S. v. Kline,* 190 N.C. 177, 129 S.E. 417, it is "one of those casualties which may befall the most circumspect in the trial of a cause on the circuit." Even so, this does not preclude the possibility of its harmful effect.

For the reason stated, the defendant is awarded a

New trial.

J. P. MARREN AND WIFE, FLORINE W. MARREN, v. C. F. GAMBLE AND WIFE, MARTHA BRITE GAMBLE; THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; AND H. N. SUTTON, CHIEF BUILDING INSPECTOR OF THE CITY OF CHARLOTTE.

(Filed 6 May, 1953.)

1. Municipal Corporations § 37—

Under the proviso of G.S. 160-173, when two or more corners at an intersection of streets in a municipality have been zoned for business, the owner of another corner at the intersection is entitled to have it zoned for business.

2. Same: Constitutional Law § 8c—

The proviso of G.S. 160-173, entitling the owner of a lot at an intersection to have his corner zoned for business upon written application to the legislative body of the municipality when two other corners at the intersection have been so zoned, is not a delegation of legislative power to such owner in violation of Art. II, sec. 1, of the Constitution of North Carolina, since the Act merely prescribes the conditions under which the zoning power of the municipality is to be exercised.

3. Municipal Corporations § 37—

A zoning ordinance does not vest any property right in an owner of property in a municipality to have the zones remain unaltered, nor constitute a contract between the municipality and such owner precluding the municipality from thereafter changing the boundaries of a zone if it deems the change to be desirable, and therefore zoning regulations may be amended or changed when such action is authorized by the enabling statute and does not contravene constitutional limitations on the zoning power.

4. Same: Constitutional Law § 20a—

The proviso of G.S. 160-173 applies with impartiality to all street intersections in all of the municipalities enacting zoning ordinances under the power delegated to them, and is calculated to prevent discrimination and promote uniformity in zoning property having substantially the same character, and therefore the proviso comes within the police power to promote the public welfare, and is not subject to the objection that in its operation it deprives owners of a lot at an intersection of property rights in violation of Art. I, sec. 17, of the Constitution of North Carolina; or Fourteenth Amendment to the Federal Constitution.

5. Municipal Corporations § 37: Constitutional Law § 21—

A public hearing after notice to interested parties upon application of the owner of a lot at an intersection to have his lot zoned for business under the proviso of G.S. 160-173 because two other corners at the intersection had been zoned for business, meets the requirements of G.S. 160-175, an objection by the owner of the fourth corner that under the proviso he was deprived of any real hearing upon the question of whether or not the application should be granted, is without merit, since all the original zoning power of the State reposes in the General Assembly and the municipality perforce can have no authority to pass on the judgment or wisdom of the mandatory provisions of the Act.

APPEAL by plaintiffs from *Sharp, Special Judge,* at March Term, 1953, of MECKLENBURG.

Civil action to enjoin the enforcement of an amendment to the general zoning ordinance of the City of Charlotte.

The complaint alleges these facts:

1. The legislative body of the City of Charlotte, *i.e.,* the Charlotte City Council, has adopted a general zoning ordinance under Article 14 of Chapter 160 of the General Statutes. The ordinance divides the municipality into clearly designated business, industrial, and residential districts, and imposes restrictions on the alteration and erection of buildings and the use of premises in each of such districts.

2. Two public streets, namely, the Plaza, which runs north and south, and East 35th Street, which runs east and west, intersect and cross each other in the corporate limits of the City of Charlotte.

3. The defendants C. F. Gamble and wife, Martha Brite Gamble, own the corner lot at the southwest corner of the intersection. Their lot is vacant.

4. The plaintiffs J. P. Marren and wife, Florine W. Marren, own a lot which abuts the southern boundary of the corner lot of the defendants C. F. Gamble and Martha Brite Gamble, and the western edge of the Plaza. This lot constitutes the site of the dwelling house of the plaintiffs.

5. On 27 October, 1952, the entire block or square in which the lots of the plaintiffs and the defendants C. F. Gamble and Martha Brite Gamble are situated was zoned for residential use.

6. On 27 October, 1952, the corner lots at the southeast, the northeast, and the northwest corners of the intersection of the Plaza and East 35th Street were zoned for business use. Two of them, namely, those at the southeast and northwest corners, were actually being used for business purposes.

7. On 27 October, 1952, the defendants C. F. Gamble and Martha Brite Gamble made a written application to the Charlotte City Council asking that their corner lot at the southwest corner of the intersection of the Plaza and East 35th Street be rezoned from residential to business use.

8. On 31 December, 1952, the plaintiffs and other interested citizens appeared before the Charlotte City Council, and opposed the application of the defendants C. F. Gamble and Martha Brite Gamble. The Charlotte City Council took the position that the defendants C. F. Gamble and Martha Brite Gamble were entitled to have their application allowed as a matter of right under the proviso of G.S. 160-173 because the other three corners at the intersection were already zoned for business use. In consequence, the Charlotte City Council adopted an amendment to the general zoning ordinance whereby it rezoned the lot of the defendants C. F. Gamble and Martha Brite Gamble from residential to business use.

9. The amendment to the general zoning ordinance substantially impairs the market value of the plaintiffs' lot.

The complaint concludes that the amendment to the general zoning ordinance and its underlying statute, *i.e.*, the proviso of G.S. 160-173, contravene both the State Constitution and the Federal Constitution. For this reason, it prays that the defendants be perpetually enjoined from recognizing and enforcing the amendment to the general zoning ordinance.

The defendants demurred to the complaint in writing on the ground that it does not state facts sufficient to constitute a cause of action in favor of the plaintiffs against the defendants. Judge Sharp sustained the demurrer, and the plaintiffs appealed.

Parker Whedon for plaintiffs, appellants.

Cochran, McCleneghan & Miller for defendants C. F. Gamble and wife, Martha Brite Gamble, appellees.

John D. Shaw for defendants, the City of Charlotte and H. N. Sutton, Chief Building Inspector of the City of Charlotte, appellees.

ERVIN, J. The General Assembly has delegated to the legislative body of a municipality the power to promulgate zoning regulations "for the purpose of promoting health, safety, morals, or the general welfare of the community." G.S. 160-172.

G.S. 160-173 is in these words: "For any or all said purposes it may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts: Provided, however, that when at any intersection of streets in the corporate limits of any city or town the said legislative body of the said city or town promulgates any certain regulations and/or restrictions for the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land on two or more of said corners at said intersection, it shall be the duty of such legislative body upon written application from the owner of the other corners of said intersection to redistrict, restrict and regulate the remaining said corners of said intersecting streets in the same manner as is prescribed for the erection, construction, reconstruction, alteration, repair or use of buildings, structure or land of the other said corners for a distance not to exceed one hundred and fifty feet from the property line of said intersecting additional corner."

The Charlotte City Council did not *gang aglee* in taking the position that under the proviso of G.S. 160-173, C. F. Gamble and Martha Brite Gamble possessed the legal right to require the rezoning of their corner from residential to business use because the other three corners of the intersection had already been zoned for business use by the general zoning ordinance. This being so, the plaintiffs have no legal ground for complaint unless the statutory proviso offends the organic law.

The plaintiffs assert initially that the proviso of G.S. 160-173 delegates the power to legislate to a private person in violation of Section 1 of Article II of the Constitution of North Carolina. They offer these arguments to sustain this position: The power to zone or rezone is legislative. The statutory proviso compels the legislative body of the municipality to rezone the corner of an intersection at the demand of its owner whenever the conditions enumerated in the proviso exist. Hence, the proviso, in reality, delegates the legislative power to rezone the corner to its owner rather than the legislative body of the municipality.

These arguments lack substance. When it delegates zoning power to a municipality, the General Assembly may prescribe the conditions under which the power is to be exercised. *Holcombe v. City of Lake Charles,*

175 La. 803, 144 So. 502; *Leahy v. Inspector of Buildings,* 308 Mass. 128, 31 N.E. 2d 436; 62 C.J.S., Municipal Corporations, section 226 (2). In the final analysis, the proviso of G.S. 160-173 does this, and nothing more. When its phraseology is reduced to simple terms, it merely declares that whenever the legislative body of a municipality zones two or more corners at an intersection of streets in the corporate limits of the municipality in a *certain* way, "it shall be the duty of such legislative body upon written application from the owner of the other corners" of the intersection to rezone such other corners in the *same manner.* It does not undertake to authorize or permit the owner of the other corners to exercise any legislative power. To be sure, the proviso of G.S. 160-173 confers upon the owner of the other corners a legal right to require the legislative body of the municipality to rezone his corners in the manner set forth whenever the conditions specified in the proviso exist. But this legal right is created by the General Assembly itself to enforce its own notion as to how corners at street intersections should be zoned.

In enacting a zoning ordinance, a municipality is engaged in legislating and not in contracting. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *Clifton Hills Realty Co. v. City of Cincinnati,* 60 Ohio App. 443, 21 N.E. 2d 993. As a consequence, a zoning ordinance fixing the boundaries of zones does not result in a contract between the municipality and property owners precluding the municipality from afterwards changing the boundaries if it deems a change to be desirable. *Hollearn v. Silverman,* 338 Pa. 346, 12 A. 2d 292. Moreover, a zoning ordinance does not vest in a property owner the right that the restrictions imposed by it upon his property or the property of others shall remain unaltered. *Nusbaum v. City of Norfolk,* 151 Va. 801, 145 S.E. 257; *Eggebeen v. Sonnenburg,* 239 Wis. 213, 1 N.W. 2d 84, 138 A.L.R. 495. For these reasons, zoning regulations may be amended or changed when such action is authorized by the enabling statute and does not contravene constitutional limitations on the zoning power.

The plaintiffs concede that the proviso of G.S. 160-173 is sufficient in phraseology to authorize the amendment to the zoning regulations applicable to the corner owned by C. F. Gamble and Martha Brite Gamble. They insist, however, that the proviso is void even if it does not involve an unconstitutional delegation of legislative power to private persons. They contend that it impinges on the law of the land clause of Section 17 of Article I of the North Carolina Constitution, and the due process of law clause of the Fourteenth Amendment to the United States Constitution in two particulars. The first is that it bears no substantial relation to the health, safety, morals, or general welfare of the community, and the second is that it denies to owners of adjacent or nearby property any

real opportunity to be heard on the question as to whether or not the *other corners* at the intersection ought to be rezoned in the same manner as the *two or more corners* are zoned.

Much of the perplexity arising on this aspect of the case vanishes when the statutory proviso is viewed in proper perspective. The proviso is not restricted in its operation to a single street intersection in a single city. It applies with impartiality to all the street intersections in all the municipalities enacting zoning ordinances under the zoning power delegated to them by the statutes embodied in Article 14 of Chapter 160 of the General Statutes. When proper regard is had to this circumstance, it becomes obvious that the proviso is well designed to promote the public welfare. The proviso is based on the sound concept that ordinarily all the property cornering on a given street intersection is subject to peculiar conditions of a kindred nature. It is calculated to prevent discrimination and promote uniformity in zoning property having substantially the same character. It has, moreover, a strong tendency to permit every owner of land cornering on a street intersection to put his land to the use to which it is best adapted.

The complaint discloses inferentially that before it passed the amendment to the general zoning ordinance, the Charlotte City Council gave the plaintiffs and other interested citizens a public hearing after notice on the only question committed to its determination by the proviso of G.S. 160-173, that is to say, whether or not two or more corners at the intersection of the Plaza and East 35th Street were zoned in the same manner. In so doing, the Charlotte City Council met statutory requirements respecting an adequate notice and a public hearing. G.S. 160-175.

The plaintiffs assert, however, that these statutory requirements do not satisfy the demands of the law of the land clause of the State Constitution and the due process of law clause of the Fourteenth Amendment to the Federal Constitution. They argue that these clauses invalidate the proviso of G.S. 160-173 because it denies to owners of adjacent or nearby property any real opportunity to be heard on the question whether or not the *other corners* at an intersection ought to be rezoned in the same manner as *the two or more corners* are zoned.

An analysis of this argument reveals its paradoxical character. When it is reduced to ultimate terms, the argument comes to this: Whenever the General Assembly delegates zoning power to a municipality and commands the municipality to zone corner lots in a certain way at all street intersections where specified conditions exist, the General Assembly must permit the municipality to pass judgment on the wisdom of the command in relation to each included intersection, and to disobey the command in respect to any included intersection in case it concludes obedience to the command at such intersection would be foolish; otherwise, the General

Assembly violates the law of the land clause of the State Constitution and the due process of law clause of the Fourteenth Amendment to the Federal Constitution.

This argument is insupportable. The constitutional provisions invoked by the plaintiffs do not subordinate the State to the agency of its own creation, and compel the State to permit its creature to disobey its laws simply because its creature deems its laws to be wanting in wisdom. All of the original zoning power of the State reposes in the General Assembly. *Leahy v. Inspector of Buildings, supra; Bradley v. Zoning Adjustment Board of Boston,* 255 Man. 160, 150 N.E. 893. Since the proviso of G.S. 160-173 has a reasonable tendency to promote the public good, it represents a valid exercise of this power, and is entitled to implicit obedience.

The amendment to the general zoning ordinance does not deprive the plaintiffs of any of their legal rights. The resultant diminution in the value of their property is a misfortune which they must suffer as members of organized society.

The judgment sustaining the demurrer is

Affirmed.

F. T. LYERLY v. W. L. GRIFFIN AND HEATH GRIFFIN.

(Filed 6 May, 1953.)

1. Automobiles § 14—

Before attempting to pass another vehicle traveling in the same direction on the highway in front of him, a driver must exercise due care to see that he can pass in safety and must sound his horn in reasonable time to give warning so as to avoid injury which would likely result if the preceding vehicle should make a left turn. G.S. 20-149 (b).

2. Automobiles § 18h (3)—

Plaintiff's own evidence tended to show that he turned to his left on the highway in an attempt to pass a truck traveling in the same direction, but that he did not sound his horn to give warning of his intention to pass the truck, and that the truck without warning or signal turned to its left in front of plaintiff's car in order to enter a private driveway on the left of the highway, and that plaintiff immediately applied his brakes and turned to the right but was unable to avoid a collision. *Held:* Plaintiff's own evidence discloses contributory negligence constituting one of the proximate causes of the injury as a matter of law, and nonsuit was properly entered.

3. Negligence § 19c—

While the burden of proof on the issue of contributory negligence is on defendant, nonsuit on the ground of contributory negligence may properly be rendered when plaintiff's own evidence discloses as the sole inference

logically deducible therefrom that plaintiff was guilty of contributory negligence constituting one of the proximate causes of the injury.

4. Negligence § 19a—

What is the proximate cause of the injury is ordinarily a question for the jury, and it is only when all of the facts are admitted or established and only one inference may be drawn therefrom that the court may declare whether an act was a proximate cause of the injury in suit.

ERVIN and JOHNSON, JJ., dissent.

APPEAL by plaintiff from *Patton, Special Judge,* December Extra Civil Term, 1952, of MECKLENBURG. Affirmed.

Plaintiff instituted action to recover damages for injury to his person and property growing out of a collision between motor vehicles on the highway. Plaintiff alleged this was due to the negligent operation of defendants' truck, and the defendants set up contributory negligence on the part of the plaintiff.

At the conclusion of the plaintiff's evidence defendants' motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Frank W. Orr and J. C. Sedberry for plaintiff, appellant.
Kennedy & Kennedy and Charles E. Knox for defendants, appellees.

DEVIN, C. J. Admittedly there was evidence of negligence on the part of the driver of defendants' truck. Hence the determination of the propriety of the nonsuit must depend on whether from plaintiff's own testimony contributory negligence on his part was affirmatively established, sufficient to bar his recovery.

According to plaintiff's testimony, on the morning of 10 November, 1951, he was driving his automobile south from Monroe on Highway 151. The pavement was 18 feet wide, the road at that point was straight and the day was clear. He was driving at a speed of 55 miles per hour. He observed at a distance of 800 feet in front of him a truck being driven out of a side road into the highway, and proceeding at a speed of 15 miles per hour along the highway in the direction plaintiff was traveling. The truck later proved to be the property of defendant W. L. Griffin and driven at the time by defendant Health Griffin. Overtaking the truck and desiring to pass, plaintiff drove to the left lane of the highway and was 60 or 70 feet from the truck when without warning or signal the truck was driven to the left in front of plaintiff's automobile for the purpose of entering a private driveway to a residence on the left side of the highway. Plaintiff, as soon as he saw the truck begin to turn to the left, applied his brakes and turned to the right, but was unable to avoid a collision and

struck the rear of the truck which was then about the middle of the highway. Plaintiff did not sound his horn before attempting to pass. This was not a business or residence district. Plaintiff estimated the speed at which he was traveling when he attempted to pass was 35 miles per hour; that he was within 25 or 30 feet of the truck when he applied his brakes, and that he was going 20 or 25 miles per hour when the collision occurred.

Plaintiff was injured in his person and property. Defendant's counterclaim for injury to his truck caused by the collision was not pressed consequent upon the allowance of his motion to dismiss the action.

The statutes regulating the operation of motor vehicles on the highway contain this provision:

"The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction." G.S. 20-149 (b).

The driver of defendants' truck failed to give a signal to the driver of the following vehicle of his intention to turn to the left across the highway, as required by G.S. 20-154; and equally the plaintiff failed to give a warning signal of his intention to pass the defendants' truck. Both parties were at fault. If the driver of defendants' truck had given proper signal of his intention to turn left, plaintiff would not have attempted to pass at that moment; and, on the other hand, if plaintiff had sounded his horn in apt time the driver of defendants' truck in the exercise of due care would not have attempted to make a left turn, or if he did, plaintiff would have absolved himself from blame in this respect.

The duty imposed by statute upon the driver of the overtaking vehicle to sound his horn before attempting to pass must be regarded as requiring that warning be given to the driver of the vehicle being overtaken in reasonable time to avoid injury which would likely result from a left turn.

In the absence of such warning from the driver of the overtaking vehicle, knowledge of his intention to pass may not be ascribed to the driver of the forward vehicle (*Dreher v. Divine,* 192 N.C. 325, 135 S.E. 29; *Beaman v. Duncan,* 228 N.C. 600, 46 S.E. 2d 707); and the duty rests upon him who is attempting to pass another vehicle proceeding in same direction on the highway to observe the statute and to exercise due care to see that he can pass in safety. 2 Blashfield, sec. 938, 3-4 Huddy (9th Ed.), secs. 121-122; *Hobbs v. Mann,* 199 N.C. 532, 155 S.E. 163; *Dunkelbeck v. Meyer,* 140 Minn. 283; *Kerlinske v. Etzel,* 215 N.W. (Wis.) 591; *Tackett v. Milburn,* 36 Wash. 2d 349; *Stallard v. Atlantic Greyhound Lines,* 169 Va. 223; *Spence v. Rasmussen,* 190 Ore. 662; *Montgomery v. Whitfield,* 188 F. 2d 757.

In *Sandoz v. Beridon,* 150 Sou. (La.) 25, where the facts were similar to those in the case at bar, the Court said: "It seems to us that even

though Dr. Beridon failed to look behind carefully and at a proper time and to extend his hand and arm, the plaintiff Dejean, as driver of the overtaking vehicle, was equally neglectful and at fault in not timely giving the suitable and audible signal, which the law required him to give to the party about to be passed. There was a mutual failure of duty, each contributing to bring about the collision. We therefore conclude that as against Dejean the defense of contributory negligence is good and that he has no right to recover on that account."

It is apparent from plaintiff's testimony that his negligence in failing to sound his horn before attempting to pass, as required by the statute, must be regarded as one of the causes which proximately contributed to his injury.

"The plaintiff's negligence need not have been the sole proximate cause of the injury. If his negligence was one of the proximate causes, the plaintiff would not be entitled to recover." *Wright v. Grocery Co.,* 210 N.C. 462, 187 S.E. 564. It is sufficient to sustain a nonsuit on this ground if the plaintiff's testimony makes out a case of contributory negligence on his part concurring with that of the defendant in proximately producing the injury. *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887.

While the burden of proof on the issue of contributory negligence was on the defendants, nonsuit on this ground may properly be rendered when but a single inference leading to that conclusion can be drawn from the plaintiff's evidence. *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598; *Hayes v. Tel. Co.,* 211 N.C. 192, 189 S.E. 499; *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Morrisette v. Boone Co.,* 235 N.C. 162, 69 S.E. 2d 239; *Morris v. Transport Co.,* 235 N.C. 568 (576), 70 S.E. 2d 845; *Ward v. Cruse,* 236 N.C. 400, 72 S.E. 2d 835.

What is the proximate cause of an injury is ordinarily a question for the jury. "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not." *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740. Here the facts were not in dispute. The affirmative defense of contributory negligence was based on the plaintiff's own testimony. *Wright v. R. R.,* 155 N.C. 325, 71 S.E. 306; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137.

The judgment of nonsuit rendered by the able judge who heard this case will be upheld.

Affirmed.

ERVIN and JOHNSON, JJ., dissent.

L. E. MIKEAL v. CLARENCE W. PENDLETON AND YELLOW CAB COMPANY OF CHARLOTTE, N. C., INC.

(Filed 6 May, 1953.)

1. Negligence § 19c—

A motion for nonsuit on the ground of contributory negligence shown by plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom.

2. Automobiles §§ 18h (2), 18h (3)—

Plaintiff's evidence tending to show that he stopped before entering a through street intersection, saw a vehicle approaching along the through street some 225 feet away, attempted to cross the intersection before the other vehicle, but was struck by the other vehicle just as his front wheels had cleared the intersection, and that such other vehicle was traveling at excessive speed, *is held* sufficient to be submitted to the jury upon the issue of negligence and not to disclose contributory negligence on the part of plaintiff as a matter of law.

3. Negligence § 20—

An instruction that negligence is the failure to perform some duty imposed by law or a want of due care, without any instruction in regard to the rule of the reasonably prudent man, must be held for prejudicial error.

4. Negligence § 1—

Negligence is a want of due care, which must be determined with reference to the facts and circumstances surrounding the parties at the time, judged by the conduct of an ordinarily prudent person similarly situated.

APPEAL by defendants from *Hatch, Special Judge,* and a jury, at 29 September, 1952, Extra Civil Term, of MECKLENBURG. New trial.

Civil action to recover for personal injuries and property damage resulting from a collision of two automobiles in a street intersection due to the alleged negligence of the defendants.

The collision occurred about one o'clock in the early morning of 29 July, 1951, at the intersection of South Church and West Stonewall Streets in the City of Charlotte. South Church Street is a one-way arterial or "through" street; whereas West Stonewall Street is a servient street, on which motorists are required to stop before entering its intersection with South Church Street. In accordance with a city ordinance there was a blinker-type traffic signal in operation at this intersection flashing an intermittent red stop light for traffic on West Stonewall Street, and an intermittent yellow caution light for traffic on South Church Street. South Church Street is approximately 30 feet wide at the intersection. West Stonewall Street east of South Church Street is about 24 feet wide, and west of Church Street about 22 feet wide.

The plaintiff was driving his Cadillac automobile westwardly on West Stonewall Street; the defendant Pendleton was driving a Plymouth taxi-

cab belonging to the corporate defendant southwardly on South Church Street.

The plaintiff testified that upon reaching the intersection he brought his automobile to a complete stop with the front of his car approximately even with the extension of the east curb of Church Street, from which point he had an unobstructed view of more than a block northward to his right along South Church Street. He said he looked to the left and then to his right along South Church Street and saw the defendants' taxi approaching from his right about two-thirds of a block, or 225 feet north of the intersection. As he put it: ". . . I figured I had ample time to get across and I started on across" at a speed of 6 or 8 miles per hour. When his Cadillac, approximately 22 feet in length, had reached a point where the front wheels had just cleared the western margin of South Church Street, it was hit by the defendants' approaching taxicab. The plaintiff said ". . . he came right on there like a flash; hit me here, and knocked me sideways right into this building and up against that telephone pole there." The front of the defendants' cab made contact with the right front door and right front fender of the plaintiff's Cadillac. After the collision, the plaintiff's car, facing in a westerly direction, was lodged between a building and a telephone pole off the southwest corner of the intersection. The pole is 18 feet west of the South Church Street curb; the sidewalk next to the "building up to the Stonewall (Street) curb is 58 inches wide; . . ." The defendants' cab was standing in the intersection, about three feet from the point of impact, and facing in a southwesterly direction.

C. D. Thomas, who was in the front seat of the plaintiff's car, testified he saw the cab when it was about 55 feet away and said in his opinion it was traveling from 35 to 40 miles per hour. He further said: "The taxicab was on its right-hand side of South Church Street when I saw it, and I would say probably within 4 feet of the curb. It did not swerve, it come right straight into us. It did not slow down at all."

The defendants' evidence, sharply in conflict with that of the plaintiff, tends to show that the cab approached the intersection at a speed of only 20 or 25 miles per hour and that the plaintiff's car, traveling some 30 or 35 miles per hour, drove into the intersection without stopping, ahead of the cab just as it was entering or about to enter the intersection. The defendant Pendleton, who was driving the cab, said: "When I first saw Mr. Mikeal's car, I had just entered the intersection at a speed of between 20 and 25 miles an hour. At that time, Mr. Mikeal's car was slightly to my left. It just flashed by the stucco building there (on the corner of the intersection left of the cab driver)."

Issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict awarding the plaintiff damages of $2,033.00, the defendants appeal, assigning errors.

Helms & Mullis and Wm. H. Bobbitt, Jr., for defendants, appellants.
Jones & Small and Robinson & Jones for plaintiff, appellee.

JOHNSON, J. It is established by the decisions of this Court that a motion for nonsuit on the ground of contributory negligence shown by the plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom. *Donlop v. Snyder,* 234 N.C. 627, 68 S.E. 2d 316; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Fowler v. Atlantic Co.,* 234 N.C. 542, 67 S.E. 2d 496.

An examination of the evidence adduced below when considered in its light most favorable to the plaintiff, as is the rule on motion for nonsuit, was sufficient to make out a *prima facie* case of actionable negligence against the defendants, free of facts and circumstances shown by the plaintiff's own evidence amounting to contributory negligence as a matter of law. The motion for judgment as of nonsuit was properly overruled.

However, we are constrained to the view that the defendants are entitled to a new trial for errors appearing in the charge.

The court in charging the jury said: "Negligence is not difficult to define. Negligence, Ladies and Gentlemen of the Jury, is a failure to perform some duty imposed by law, a want of due care."

The defendants, under exception duly brought forward, contend that this instruction is not an adequate definition of negligence. They assert that while the trial judge used the phrase "some duty imposed by law," he failed to state the nature and requirements of this "duty"; that while the judge used the term "due care," at no place in the charge was the jury told what does or does not constitute "due care," or by what standard "due care" is to be measured. Thus the defendants urge that it was left open for the jury to speculate as to the meaning of these technical terms and to give them such legal effect as the jury chose. In short, the defendants contend that this portion of the charge left it entirely for the jury to determine what duty the defendant driver owed the plaintiff and what acts or omissions constituted a breach of that duty.

The defendants' exception seems to be well taken. The court inadvertently failed to explain to the jury the rule of the reasonably prudent man. An examination of the entire charge leaves the impression that this oversight may not be treated as harmless error under application of the doctrine of contextual construction. The exception is sustained.

Negligence is a failure to perform some duty imposed by law. It is doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, negligence

is a want of due care; and, in determining whether due care has been exercised in any given situation by the party alleged to have been negligent, reference must be had to the facts and circumstances of the case, and to the surroundings of the party at the time, and he must be judged by the influence which those facts, and his surroundings, would have had upon a man of ordinary prudence in shaping his conduct, if he had been similarly situated. *Drum v. Miller,* 135 N.C. 204, 47 S.E. 421; *Ramsbottom v. Railroad,* 138 N.C. 38, 50 S.E. 448; *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871.

Since the case goes back for retrial, we refrain from discussing the rest of defendants' exceptions.

New trial.

RICHARD B. PUGH, ADMINISTRATOR OF THE ESTATE OF RICHARD B. PUGH, JR., DECEASED, v. TIDEWATER POWER COMPANY, AND CAROLINA POWER & LIGHT COMPANY.

(Filed 6 May, 1953.)

1. Electricity § 7—

Plaintiff's evidence tended to show that his intestate, a boy twelve years old, was flying a kite with a line composed in large part of metal wire, and that the metal wire came in contact with defendants' high voltage wire maintained not less than 25 feet above the ground. Remnants of another kite had been hanging from the transmission wire nearby for a couple of months preceding the tragedy. *Held:* Even conceding that the power company had constructive notice that children were in the habit of flying kites in the neighborhood, the power company was not under duty to foresee that conductive material would be used as a kite string, and therefore the injury was not within reasonable anticipation, and motion to nonsuit was properly sustained.

2. Evidence § 5—

It is a matter of common knowledge that kite strings are ordinarily made of material which is a nonconductor of electricity.

APPEAL by plaintiff from *Carr, J.,* at December Term, 1952, of NEW HANOVER.

Civil action to recover damages for the death of a boy who suffered electrocution when a metal wire, which he was using to fly a kite, came in contact with a bare overhead wire carrying a powerful current of electricity.

The plaintiff's evidence made out this case:

1. The plaintiff's intestate Richard B. Pugh, Jr., a bright boy of the age of twelve years, was a member of the household of his parents, who resided in a thickly populated section of New Hanover County.

2. The Tidewater Power Company, which was engaged in furnishing electricity to the public, distributed electricity through this section by a transmission line, which passed over a vacant field 50 feet from the intestate's home. Currents of electricity suitably reduced by step-down transformers were taken off the transmission line at various points, and conveyed by black insulated wires to the homes of customers. The intestate's home was thus supplied with electricity.

3. The transmission line consisted of five bare and black wires which were attached to cross-arms and suspended on wooden poles at a height of not less than 25 feet above the ground. Each of these wires carried a powerful current of electricity.

4. The Tidewater Power Company did not post any warnings of the dangerous character of the high voltage electric currents carried on these bare wires.

5. Observable remnants of a kite were hanging on three of these bare wires about 75 feet from the intestate's home for "a couple of months" next preceding the tragedy. Despite this, the Tidewater Power Company did not warn the children of the neighborhood against flying kites near the transmission line. But the intestate's father did tell "him not to fly a kite around a wire."

6. The intestate undertook to fly a kite in the vacant field near the transmission line on the afternoon of 10 February, 1952, while the ground was wet. In so doing, he used a kite line composed in large part of a metal wire. The metal wire came in contact with one of the high voltage wires, and the intestate was instantly electrocuted.

7. Subsequent to the tragedy, the Tidewater Power Company "was . . . merged with . . . the Carolina Power & Light Company."

When the plaintiff had introduced his evidence and rested his case, the defendants moved to dismiss the action upon a compulsory nonsuit. Judge Carr allowed the motion, and entered judgment accordingly. The plaintiff excepted and appealed.

Robert E. Calder for plaintiff, appellant.

Poisson, Campbell & Marshall, A. Y. Arledge, and Ernest S. Delaney, Jr., for defendants, appellees.

ERVIN, J. We take it for granted without so adjudging for the purpose of this particular appeal that the Tidewater Power Company was charged with notice that children were in the habit of flying kites in the vicinity of the high voltage wires by the mere circumstance that the observable remnants of a kite were hanging on the wires during several weeks next preceding the tragedy. We are nevertheless constrained to affirm the compulsory nonsuit. It is a matter of common knowledge that

children ordinarily use strings, which are nonconductors of electricity, in flying kites. *Watral's Adm'r v. Appalachian Power Co.,* 273 Ky. 25, 115 S.W. 2d 372; *Kedziora v. Washington Water Power Co.,* 193 Wash. 51, 74 P. 2d 898. The evidence at the trial did not disclose any facts sufficient to charge the Tidewater Power Company with notice that a metal wire might be put to such a use. In consequence, the tragedy was not within the reasonable anticipation of the Tidewater Power Company. *Stanley v. Smithfield,* 211 N.C. 386, 190 S.E. 207; *Parker v. R. R.,* 169 N.C. 68, 85 S.E. 33; *Caraglio v. Frontier Power Co.,* 192 F. 2d 175; *Croxton v. Duke Power Co.,* 181 F. 2d 306; *Garrett v. Arkansas Power & Light Co.,* 218 Ark. 575, 237 S.W. 2d 895; *Callaway v. Central Georgia Power Co.,* 43 Ga. App. 820, 160 S.E. 703; *Dilley v. Iowa Public Service Co.,* 210 Iowa 1332, 227 N.W. 173; *Fredericks' Admr. v. Kentucky Utilities Co.,* 276 Ky. 13, 122 S.W. 2d 1000; *Watral's Adm'r v. Appalachian Power Co., supra; Kelley v. Texas Utilities Co.* (Tex. Civ. App.), 115 S.W. 2d 1233; *Kedziora v. Washington Water Power Co., supra;* 18 Am. Jur., Electricity, section 53; 29 C.J.S., Electricity, section 42.

The cases invoked by the plaintiff, to wit, *Benton v. Public-Service Corporation,* 165 N.C. 354, 81 S.E. 448, and *Ferrell v. Cotton Mills,* 157 N.C. 528, 73 S.E. 142, 37 L.R.A. (N.S.) 64, are distinguishable.

Affirmed.

CHARLIE J. HOOKS v. FRANK HUDSON.

(Filed 6 May, 1953.)

Automobiles §§ 8d, 18a, 18b—

Allegations to the effect that defendant's car was parked in the daytime on the hardsurface of the highway and left unattended in violation of statute, that plaintiff was forced to stop his car behind the parked car because of on-coming traffic, and that another car then rammed into the back of plaintiff's car, resulting in the injury in suit, *is held* insufficient to state a cause of action against defendant, and defendant's demurrer was properly sustained.

APPEAL by plaintiff from *Carr, J.,* at September Term, 1952, of COLUMBUS.

Civil action to recover for personal injuries and property damage alleged to have resulted from actionable negligence of defendant in parking his family-purpose automobile operated by his son, and leaving it parked on paved portion of highway, heard in Superior Court upon demurrer of defendant chiefly upon the ground that the allegations set forth in the complaint fail to state a cause of action against defendant in that

it appears upon the face of the complaint that there is no causal connection between the parking of defendant's automobile on the highway and the collision of which plaintiff complains.

The matters and things of which plaintiff complains, as set out in his complaint, occurred about 11 o'clock on Saturday morning, 22 December, 1951. The scene was at a point on Highway No. 301 about two and a half miles south of Weldon, North Carolina. Plaintiff, accompanied by his wife, and driving his 1951 4-door Cadillac sedan, was traveling north on this highway. Another automobile, being driven by E. E. Holding, was preceding plaintiff. The family-purpose automobile of defendant, being operated by his son, "had parked and was parked" unoccupied and entirely on the paved portion in the right lane of the highway,—the left wheels being five and a half inches from the center line. Numerous motor vehicles were coming from the opposite direction, so that the forward progress of the Holding automobile, and that of plaintiff was "completely impeded and obstructed." "Due to these causes and circumstances" the automobile driven by Holding "had been forced to stop immediately behind the said automobile of defendant," and "plaintiff's automobile was forced to stop immediately behind the automobile being driven by E. E. Holding and plaintiff's automobile had been stopped at said point approximately thirty seconds when he was struck on the rear by an automobile being driven, as he is informed and believes, by one Lester M. Council, Jr., and as a result of being struck from the rear in said manner plaintiff's automobile was hurled and forced forward into the automobile (Holding's) immediately in front . . .," causing damages at least to the extent of $2,300.00 to his, plaintiff's, automobile, and personal injury to him.

The acts of negligence as set out in the complaint and charged by plaintiff against defendant, in summary, are that defendant unlawfully and negligently parked his automobile upon the paved portion of the highway so as to obstruct vehicular traffic, etc. And it is alleged in the complaint that the negligence alleged against defendant was "the sole and proximate cause of said collision and the resulting damages to plaintiff's automobile and . . . personal injuries sustained by the plaintiff."

Upon hearing on the demurrer of defendant, the court, being of opinion that the complaint does not state a cause of action against defendant, entered judgment sustaining the demurrer.

Plaintiff excepts thereto, and appeals to Supreme Court, assigning error.

Powell & Powell and D. Jack Hooks for plaintiff, appellant.

Varser, McIntyre & Henry for defendant, appellee.

WINBORNE, J. Did the judge of Superior Court err in sustaining defendant's demurrer to the complaint? This is the only question presented on this appeal.

In this connection, the controlling principles have been restated and applied in the recent cases of *McLaney v. Motor Freight, Inc.*, 236 N.C. 714, 74 S.E. 2d 36, and *Hollifield v. Everhart, ante,* 313, 74 S.E. 2d 706. In each of these cases, similar in factual situation to the case in hand, the sufficiency of the allegations of the complaint to state a cause of action, was challenged by demurrer upon grounds similar to those on which defendant here relies. And what is said there is applicable here. Further restatement would be merely repetitious. Hence on authority of these cases, the judgment below is

Affirmed.

QUEEN CITY COACH COMPANY, A CORPORATION, v. CAROLINA COACH COMPANY, A CORPORATION; VIRGINIA SURETY COMPANY, A CORPORATION; LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION; AND LLOYDS OF LONDON, AN UNINCORPORATED ASSOCIATION.

(Filed 20 May, 1953.)

1. Judgments § 17b—

A judgment must be interpreted in the light of the pleadings, the issues, findings of fact, and conclusions of law.

2. Appeal and Error § 3—

The party who, under the terms of the judgment construed in the light of the record, is required to suffer the loss in suit, is the party aggrieved, and has the right to appeal. G.S. 1-271.

3. Appeal and Error § 40d—

The findings of fact of the trial court are conclusive on appeal when supported by competent evidence.

4. Insurance § 43b—Under terms of contracts in suit, lessor's liability insurance covered lessor's buses while being operated on lessee's route, and not any vehicle of lessee.

Two common carriers by bus executed an agreement under which each would operate three buses daily over their combined franchise routes, with provision that while operating over the franchise route of the one, the buses of the other were to be under lease and under the direction and control of the lessee, and that while lessee should be solely responsible to third persons for all liabilities "growing out" of operations of lessor's buses over lessee's franchise route, lessor would furnish liability insurance covering its buses while so operated, with lessee named therein as an additional insured. The respective insurers executed endorsements to their contracts in accordance with this agreement. The bus of one carrier became disabled while being operated on the franchise route of the other, and lessee sent

its bus to take over the passengers from the disabled bus. While lessee's bus was en route to the disabled bus it was involved in a collision for which lessee was forced to respond in damages. *Held:* Neither lessor nor its insurers may be held liable to lessee for the loss, since under the contract between the carriers and the insurance endorsements pursuant thereto, the insurance covered lessor's buses while being operated over lessee's franchise route, and the fact that lessee dispatched its bus as a result of the operation of lessor's bus over lessee's franchise route, cannot enlarge the liability of lessor or its insurers as denominated in the contracts.

APPEAL by defendant, Virginia Surety Company, from *Sharp, Special Judge,* at October Term, 1952, of MECKLENBURG.

Civil action to enforce supposed contract to provide indemnity.

For ease of narration, the Queen City Coach Company is called Queen, the Carolina Coach Company is characterized as Carolina, the Virginia Surety Company is designated as Virginia, the Liberty Mutual Insurance Company is identified as Liberty, and Lloyds of London is referred to as Lloyds.

The salient facts are stated in the numbered paragraphs set forth below.

1. At the times herein mentioned Queen and Carolina were common carriers of passengers by motor vehicle, and as such were 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.

2. The certificates issued to Queen specified that one of its franchise routes as a common carrier of passengers by motor vehicle covered the public highway between Salisbury and Asheville.

3. The certificates issued to Carolina specified that one of its franchise routes as a common carrier of passengers by motor vehicle covered the public highway between Raleigh and Salisbury.

4. Queen maintained a policy of liability and property damage insurance in Virginia as required by G.S. 62-108, "insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by . . . (Queen) . . . upon the public highways of the State."

5. Carolina maintained policies of liability and property damage insurance in Liberty and Lloyds as required by G.S. 62-108, "insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by . . . (Carolina) . . . upon the public highways of the State."

6. On 29 May, 1947, Queen and Carolina contracted in writing "to cooperate in furnishing . . . to the traveling public a through service between Raleigh . . . and Asheville." The contract stipulated that

Queen and Carolina were "to provide . . . six daily round trips between Raleigh . . . and Asheville"; that three of the round trips were to be made by the buses and drivers of Queen, and that three of the round trips were to be made by the buses and drivers of Carolina; that the buses of Queen were "leased" to Carolina while they were being operated on Carolina's franchise route, and the buses of Carolina were "leased" to Queen while they were being operated on Queen's franchise route; and that the lessee was to have "control and direction" of the buses and drivers of the lessor while such buses and drivers were on the franchise route of the lessee. Certain provisions of paragraphs 11, 12, and 14 of the contract are particularly germane to this litigation. Queen and Carolina expressed these provisions in the following language:

"(11). The lessee shall be solely responsible to third parties for any and all operations and any and all liabilities growing out of such operations as may arise or occur as a result of the operation of lessor's buses over the . . . franchise route . . . of lessee . . ."

"(12). The lessor shall at its own expense carry bodily injury and property damage insurance on buses of lessor operating over the franchise route . . . of lessee under the terms hereof . . . to protect and indemnify the lessor from liability of lessee that may arise under the terms of paragraph 11 hereof, and to that end the lessor shall have its . . . bodily injury and property damage insurance policies endorsed so as to make the lessee an additional insured while the lessor's buses are operated over the franchise route . . . of the lessee . . ."

"(14). . . . The parties . . . further agree to exchange with each other copies of their respective public liability and property damage insurance contracts and any endorsements issued thereto, or satisfactory proof of the same, and such copies of exchanged insurance contracts and endorsements shall be furnished each of the insurance carriers of the parties to this agreement."

The contract was immediately approved by the North Carolina Utilities Commission.

7. Subsequent to the execution of the contract of 29 May, 1947, Queen and Carolina operated six round trips daily between Raleigh and Asheville in the manner specified in the contract. They did this for the express purpose of effectuating the contract.

8. Subsequent to the execution of the contract of 29 May, 1947, Queen caused its insurer, Virginia, to attach an endorsement to its policy of liability and property damage insurance, and to issue a certificate to Carolina concerning its action in that respect. Carolina accepted the endorsement and certificate of Virginia as a performance by Queen of Queen's obligations to Carolina as lessor under paragraphs 12 and 14 of the contract of 29 May, 1947.

9. The endorsement of Virginia made these stipulations: (1) "It is understood and agreed between the named insured (Queen City Coach Company) and the company (Virginia Surety Company) that the Carolina Coach Company is included under this policy as an additional insured to the extent of protection against liability for bodily injury and property damage while Queen City Coach Company . . . (is) . . . operating its equipment under permit or franchise granted to or held by said Carolina Coach Company pursuant to an agreement entered into on 29 May, 1947, and subsequent amendments thereto"; (2) "It is further agreed that this policy shall cover accidents involving equipment owned by Queen City Coach Company . . . regardless of whether or not such equipment is operating under rights of franchise granted to or held by (Queen City Coach Company) . . ."; and (3) "It is also agreed that coverage is not provided to the Carolina Coach Company while its equipment is operating under rights or franchises granted to or held by Queen City Coach Company . . . regardless of all other provisions of this policy to the contrary." The certificate of Virginia was couched in the identical language employed in the first and second stipulations of its endorsement.

10. Subsequent to the execution of the contract of 29 May, 1947, Carolina caused its insurers, Liberty and Lloyds, to attach endorsements to their policies of liability and property damage insurance, and to issue certificates to Queen concerning their actions in that respect. Queen accepted the endorsements and certificates of Liberty and Lloyds as a performance by Carolina of Carolina's obligations to Queen as lessor under paragraphs 12 and 14 of the contract of 29 May, 1947.

11. The endorsement of Liberty made this stipulation: "It is understood and agreed between the named insured (Carolina Coach Company) and the company (Liberty Mutual Insurance Company) that Queen City Coach Company . . . (is) . . . included under this policy as additional insured . . . while equipment owned by the named insured (Carolina Coach Company) is being operated under permits or franchises granted to or held by said Queen City Coach Company . . ." The certificate of Liberty stated, in substance, that the endorsement on its policy contained special provisions for the benefit of Queen in respect to "buses operated under contract dated 5/29/47." Carolina had two policies of insurance in Lloyds. The endorsements and certificates of Lloyds made this stipulation and this recital in respect to each of its policies: "It is understood and agreed between Carolina Coach Company and Underwriters (Lloyds of London) that Queen City Coach Company . . . (is) . . . included under this policy as additional assured . . ., but only in respect of equipment owned by Carolina Coach Company while such equipment is being

operated under permits or franchises granted to or held by Queen City Coach Company . . ."

12. The contract of 29 May, 1947, and the several policies and endorsements hereinbefore mentioned were in effect on 25 December, 1947.

13. On the morning of 25 December, 1947, a Carolina bus operated by Glenn Winecoff, a Carolina driver, left Asheville for Raleigh on a regularly scheduled trip in conformance to the contract of 29 May, 1947. The Carolina bus became disabled near Swannanoa, a point on Queen's franchise route.

14. Pursuant to a request from Winecoff, Queen ordered a Queen bus operated by James B. Robinson, a Queen driver, to proceed over its franchise route from Asheville to the disabled Carolina bus for the purpose of relieving the Carolina bus of its passengers. While proceeding along Queen's franchise route on the way from Asheville to the disabled Carolina bus, the Queen bus driven by Robinson collided with an automobile operated by George O. Perkins and occupied by Kenneth T. Perkins, killing George O. Perkins and injuring Kenneth T. Perkins.

15. Claims were made against Queen for the death of George O. Perkins and the bodily injury of Kenneth T. Perkins. Queen forthwith notified Carolina, Liberty, Lloyds, and Virginia of the claims, and demanded that they assume liability for them. Carolina, Liberty, Lloyds, and Virginia disclaimed liability, and refused to adjust the claims. Maud T. Perkins, Administratrix of George O. Perkins, and Kenneth T. Perkins then sued Queen and Robinson in separate actions in the Superior Court of Buncombe County for damages for the death of George O. Perkins and the bodily injury of Kenneth T. Perkins. Queen made demand on Carolina, Liberty, Lloyds, and Virginia to defend the actions. Each of them refused to do so. Queen thereupon retained competent defense counsel, who filed answers in behalf of Queen and Robinson denying liability to the administratrix of George O. Perkins and Kenneth T. Perkins.

16. Queen procured orders making Carolina a party in each Buncombe County action. Queen filed third-party complaints against Carolina in these cases, alleging that Robinson was driving the Queen bus for Carolina's benefit under Carolina's direction at the time of the collision and demanding recovery over against Carolina by way of indemnity or contribution for any judgments the Administratrix of George O. Perkins and Kenneth T. Perkins might obtain against Queen. Carolina answered the third-party complaints, denying the factual averments made by Queen and pleading the contract of 29 May, 1947, in bar of the relief over sought by Queen. Queen replied, admitting the existence of the contract of 29 May, 1947, and asserting that Carolina put an incorrect interpretation upon it.

17. The Buncombe County actions were heard before Judge John H. Clement at the November Term, 1948, of the Superior Court of Buncombe County. Judge Clement sustained demurrers *ore tenus* interposed by Carolina to Queen's third-party complaints and replies, and dismissed both cases as to Carolina. He submitted to a jury, however, the issues of fact joined between the Administratrix of George O. Perkins and Kenneth T. Perkins, on the one hand, and Queen and Robinson, on the other. Although it gave notices of appeals to the Supreme Court from the dismissals of its claims against Carolina, Queen did not perfect such appeals, and the same were docketed and dismissed in the Supreme Court under Rule 17 at the Spring Term, 1949.

18. Maud T. Perkins, Administratrix of George T. Perkins, recovered a verdict and judgment against Queen and Robinson for $26,560.00 on account of the death of her intestate; and Kenneth T. Perkins recovered a verdict and judgment against Queen and Robinson for $6,500.00 on account of his bodily injury.

19. On 20 December, 1948, Queen advised Carolina, Liberty, Lloyds, and Virginia that it proposed to settle the "Maud T. Perkins and Kenneth T. Perkins judgments totaling $33,060.00 plus interest for $30,000.00"; that Queen intended to demand reimbursement from Carolina and its insurers, Liberty and Lloyds; and that they should protest without delay to Queen if they deemed the proposed settlement unreasonable. Counsel for Carolina forthwith informed Queen that Carolina denied all liability to Queen in connection with the Perkins cases.

20. On 27 December, 1948, Queen paid $30,369.35 into the office of the Clerk of the Superior Court of Buncombe County in full settlement of the judgments ($30,000.00) and the costs ($369.35) in the cases brought by the Administratrix of George O. Perkins and Kenneth T. Perkins against Queen and Robinson.

21. Virginia has recognized at all times that the policy of liability and property damage insurance issued by it to Queen covered the Queen bus involved in the accident in which George O. Perkins was killed and Kenneth T. Perkins was injured. Virginia has nevertheless refused to accept responsibility for the accident and the resultant claims against Queen on the ground that its liability in the premises is secondary to a similar liability resting on Carolina and its insurers, Liberty and Lloyds. The rationale of Virginia is this: Virginia's policy specifies, in essence, that the insurance protection which it affords Queen is effective only in case no other insurance is available. Carolina bound itself by the contract of 29 May, 1947, to furnish Queen other insurance protection against the loss occasioned by the collision of the Queen bus and the Perkins car. If the policies and endorsements of Liberty and Lloyds cover this loss, they afford Queen other available insurance, and render

Liberty and Lloyds primarily liable to Queen; and if the policies and endorsements of Liberty and Lloyds do not cover this loss, Carolina has breached its contractual obligation to furnish Queen other insurance protection, and for that reason is primarily liable to Queen.

22. Queen consulted Virginia before paying the judgments and costs in the Buncombe County actions. During the consultation, Queen and Virginia entered into a contract whereby Virginia agreed to loan Queen a sum of money equal in amount to the sums to be expended by Queen in paying the judgments and costs, and whereby Queen agreed to repay the loan to Virginia in case, and only in case, it should be judicially determined that the primary obligation for the accident and the resultant Buncombe County suits rested on Carolina or its insurers, Liberty and Lloyds. Virginia advanced $30,369.35 to Queen pursuant to this contract. At the same time Virginia made direct payment of counsel fees to the attorneys who defended the Buncombe County actions.

23. Subsequent to all the events depicted above, Queen brought the present action against Carolina, Liberty, Lloyds, and Virginia in the Superior Court of Mecklenburg County. Queen sought primarily to recover the expenditures made in connection with the Buncombe County suits from Liberty and Lloyds on the theory that they were liable for the outlays under the terms of their policies and endorsements. Queen sought secondarily to recover the expenditures from Carolina alone on the theory that Carolina obligated itself by the contract of 29 May, 1947, to provide liability insurance to protect Queen against loss arising out of accidents similar to that resulting in the Buncombe County cases, and that Carolina breached its obligation to furnish such insurance if the policies and endorsements of Liberty and Lloyds did not cover the accident and the resultant suits. Queen prayed finally for an adjudication that Virginia was liable for the expenditures in case it should be adjudged that legal accountability for them did not rest on Carolina or its insurers. Virginia made common cause with Queen against Carolina and its insurers. Carolina, Liberty, and Lloyds filed answers, denying the validity of the positions taken by Queen and Virginia. Each of them asserted that sole responsibility for the expenditures in suit rested on Virginia as insurer of Queen. Carolina pleaded, moreover, that the dismissals of the third-party complaints in the Buncombe County actions rendered the claims of Queen against Carolina *res judicata*.

24. When this action was called for trial at the October Term, 1952, of the Superior Court of Mecklenburg County, the parties waived trial by jury and submitted the issues of fact to Judge Susie Sharp, who heard the evidence and made findings of fact harmonizing with the matters recited in this statement. Each finding was supported by testimony. Judge Sharp concluded as matters of law on her findings of fact that the

policies and endorsements of Liberty and Lloyds did "not cover the liability of the Queen City Coach Company for the result of the accident of 25 December, 1947, involving the collision with the Perkins car"; that the contract of 29 May, 1947, obligated Carolina "to furnish to Queen City Coach Company insurance protection only with respect to accidents in which there might be involved buses owned by Carolina Coach Company and operating in the franchise territory of Queen City Coach Company"; and that Carolina "was not guilty of any breach of any contractual obligation in failing to furnish . . . to Queen City Coach Company . . . insurance . . . which would cover the liability of the Queen City Coach Company for damages because of the collision with the Perkins car on December 25, 1947." Judge Sharp adjudged on her findings and conclusions that Queen was not entitled to recover anything from Carolina, Liberty, Lloyds, or Virginia. Virginia excepted and appealed, asserting by its assignments of error that Judge Sharp erred in her findings of fact, conclusions of law, and adjudication.

Arch T. Allen and Joyner & Howison for defendant Carolina Coach Company, appellee.

McDougle, Ervin, Horack & Snepp for defendant Virginia Surety Company, appellant.

Jones & Small for defendants Liberty Mutual Insurance Company and Lloyds of London, appellees.

ERVIN, J. Carolina, Liberty and Lloyds move at the outset to dismiss the appeal on the ground that judgment was rendered in favor of Virginia at the trial and that in consequence Virginia has no right to appeal. The movers find color of support for their position in the recital of the judgment that Queen is not entitled to recover anything from Virginia. The judgment is to be interpreted, however, in the light of the pleadings, the issues, the findings of fact, and the conclusions of law. *Berrier v. Commissioners,* 186 N.C. 564, 120 S.E. 328; *Weeks v. McPhail,* 129 N.C. 73, 39 S.E. 732; *Taunton v. Dobbs,* 240 Ala. 287, 199 So. 9; *Aloe v. Lowe,* 298 Ill. 404, 131 N.E. 612; *Hays v. Madison County,* 274 Ky. 116, 118 S.W. 2d 197; *Attorney General v. New York, N. H. & H. R. Co.,* 201 Mass. 370, 87 N.E. 621; *Western Paving Co. v. Board of Com'rs of Lincoln County,* 183 Okl. 281, 81 P. 2d 252; 49 C.J.S., Judgments, sections 438, 439. When this is done, it is manifest that the judgment adjudicates that Carolina, Liberty and Lloyds did not contract to make good to Queen the loss resulting from the collision between the Queen bus and the automobile driven by George O. Perkins; that in consequence Queen was not obligated to repay Virginia the moneys advanced to Queen by Virginia; and that the advancement of the moneys to Queen by Vir-

ginia was tantamount to a performance by Virginia of its obligation as Queen's insurer. This being true, the judgment put liability for the loss occasioned by the accident on Virginia alone, and made Virginia a "party aggrieved" within the purview of the statute prescribing who may appeal. G.S. 1-271.

Virginia makes these assertions by its assignments of error:

1. That the trial judge erred in making certain findings of fact.

2. That the trial judge erred in adjudging that the policies and endorsements did not bind Liberty and Lloyds to indemnify Queen for the loss arising out of the collision of the Queen bus and the Perkins car.

3. That the trial judge erred in holding that the contract of 29 May, 1947, did not obligate Carolina to furnish Queen liability insurance protection against the loss occasioned by the collision of the Queen bus and the Perkins car, and that in consequence Carolina did not breach an obligation to Queen in failing to provide Queen with such insurance protection.

The assignments of error based on exceptions to findings of fact are unavailing. The parties waived trial of the issues of fact by a jury in conformity with G.S. 1-184. The findings of fact of the trial judge are supported by competent evidence, and for that reason are binding on the parties. *Mitchell v. Barfield,* 232 N.C. 325, 59 S.E. 2d 810; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Griggs v. Stoker Service Co.,* 229 N.C. 572, 50 S.E. 2d 914; *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464.

We turn to the courtroom scene in the *Merchant of Venice* for the conclusive answer to the argument of Virginia that the policies and endorsements imposed on Liberty and Lloyds contractual duties to make good to Queen the loss arising out of the collision of the Queen bus and the Perkins car. It was not "so nominated in the bond."

When the policies of Liberty and Lloyds were originally issued, they insured Carolina against legal liability for loss caused by the operation of Carolina's motor vehicles. The endorsements of Liberty and Lloyds did not extend the coverage of their policies to Queen's motor vehicles. The endorsements merely made Queen an additional insured under the policies of Liberty and Lloyds, and granted to Queen as such additional insured liability insurance protection against loss arising out of the operation of Carolina's motor vehicles on Queen's franchise route.

Virginia lays hold on paragraph 11 and a portion of paragraph 12 of the contract of 29 May, 1947, to sustain its contention that Carolina obligated itself by the contract to furnish Queen liability insurance protection against the loss occasioned by the collision of the Queen bus with the Perkins car, and that Carolina breached this contractual obligation to Queen if the policies and endorsements furnished by Carolina did not,

in fact, require Liberty and Lloyds to indemnify Queen for this particular loss.

Virginia advances these arguments on this phase of the case: Carolina bound itself to carry liability insurance to protect Queen from liability arising "as a result of the operation" of Carolina's buses over Queen's franchise route pursuant to the contract. The Carolina bus was on a trip over Queen's franchise route for which Carolina was responsible under the contract at the time of its disablement. Since the Queen bus was going to the relief of the disabled Carolina bus at the time of the collision with the Perkins car, the resultant liability of Queen for the injuries to the occupants of the Perkins car arose "as a result of the operation" of Carolina's bus over Queen's franchise route pursuant to the contract. Hence, Carolina obligated itself by the contract to furnish Queen liability insurance protection against the loss occasioned by the collision of the Queen bus with the Perkins car.

The arguments of Virginia on this aspect of the controversy resemble "the play-bill which is said to have announced the tragedy of Hamlet, the character of the Prince of Denmark being left out." They ignore the crucial stipulation of paragraph 12 of the contract of 29 May, 1947, that the liability insurance to be carried by the *lessor* was to be on *buses of lessor.*

When all is said, the contract of 29 May, 1947, imposed these obligations, and these obligations only, on Carolina and Queen in respect to insurance: (1) It obligated Carolina to insure both itself and Queen against legal liability for losses caused by the operation of Carolina's buses on Queen's franchise route; and (2) it obligated Queen to insure both itself and Carolina against legal liability for losses caused by the operation of Queen's buses on Carolina's franchise route. This being so, the trial judge rightly ruled that Carolina did not contract to provide Queen with liability insurance protection against the loss arising out of the collision of the Queen bus and the Perkins car.

Our interpretation of the contract of 29 May, 1947, is identical with that which the parties put upon it in issuing and accepting the endorsements and certificates. *Smith v. Thompson,* 210 N.C. 672, 188 S.E. 395; Williston on Contracts (Rev. Ed.), section 623. Virginia emphasized the validity of the interpretation by inserting in the endorsement to its policy the third stipulation declaring in express terms "that coverage is not provided to the Carolina Coach Company while its equipment is operating under rights or franchises granted to or held by Queen City Bus Company."

For the reasons given, the judgment is

Affirmed.

FLOYD D. BECK AND WIFE, CALLIE BECK, v. CARL E. VONCANNON AND WIFE, MARGIE VONCANNON, AND RALPH J. RAINEY AND WIFE, FRANCES F. RAINEY.

(Filed 20 May, 1953.)

1. Clerks of Court § 2—

A deputy clerk appointed by the clerk under authority of G.S. 2-13 is not an independent officer of the court but has only derivative authority, and must do all things in the clerk's name except where statute expressly provides otherwise.

2. Same: Process § 1—

While summons must be signed by the clerk, it may be issued by a deputy clerk as a ministerial act, but in such instance the deputy should sign the name of the clerk by her as deputy.

3. Process § 14—

If the summons shows upon its face that it emanated from the office of the clerk as an official paper and was intended to bring the defendant into court to answer the complaint of plaintiff, it is sufficient to confer jurisdiction on the court, and formal defects appearing thereon will be treated as nonjurisdictional irregularities and subject to amendment.

4. Same: Judgments § 18—

The regular printed form of summons was issued signed by the deputy clerk of the court. *Held:* Although the summons should have been issued in the name of the clerk, the defect was a nonjurisdictional irregularity, and proper service of the summons was sufficient to give the court jurisdiction so that its judgment rendered in the action is not void, and will not be disturbed for such irregularity in the absence of a showing of prejudice.

5. Taxation § 40g—

The sale of land for taxes pursuant to judgment of foreclosure will not be disturbed on the ground that the judgment directed the commissioner to sell two tracts of land belonging to the judgment debtors while sale and confirmation was had only as to one tract because of the payment of the taxes on the other tract pending the proceedings, since such irregularity could not have prejudiced tax debtors.

6. Same—

Where it is admitted that the tax sale was conducted fairly and openly without suppression of bidding or any element of fraud, the record supports the court's finding that the sale price was adequate, and tax debtors may not successfully attack the sale for inadequacy of the sale price.

7. Same—

Where judgment of tax foreclosure directs that the land be sold free and clear of all encumbrances, the fact that the sale is made subject to all outstanding city and county taxes is insufficient to set the sale aside in the absence of a showing of prejudice.

8. Appeal and Error § 29—

Exceptions not brought forward and discussed in the brief are deemed abandoned.

9. Judgments § 25—

The proper remedy to attack a judgment for nonjurisdictional irregularities is by motion in the cause and not by independent action, but the summons and complaint in such independent action may be treated as a petition and motion in the cause when instituted in the same county.

APPEAL by plaintiffs from *Moore, J.*, at November Term, 1952, of ROWAN.

Civil action to set aside and remove as a cloud on the title to land, judgments and all other proceedings in a previous tax foreclosure action.

The land in controversy consists of nine vacant lots located just inside the town of Rockwell in Rowan County. It is admitted that the plaintiffs herein owned the lots up to the time of the tax foreclosure action. The defendants herein claim title under the foreclosure action.

The plaintiffs allege in their complaint that the summons in the foreclosure action was fatally defective and wholly ineffectual to bring them into court, and that therefore all proceedings in the action were and are utterly void. The complaint also sets out a number of alleged procedural defects in the foreclosure proceeding. These are sufficiently discussed in the opinion.

The parties by written stipulation waived jury trial and agreed that the presiding judge should hear the case, find the facts, and render judgment.

The controlling facts found may be summarized as follows:

1. The tax foreclosure action, entitled "Rowan County *v.* Floyd D. Beck and wife, Callie Beck, *et al.*," was entered on the summons docket of the Clerk of the Superior Court of Rowan County on 13 June, 1949, and regular form printed summons was issued from the Clerk's office that day commanding the Sheriff of Rowan County to summon the defendants therein named.

2. Near the bottom of the summons was printed the words "Clerk Superior Court of Rowan County." A duly qualified and acting Deputy Clerk of the Superior Court of Rowan County, Vera Maie Uzzell, wrote the word "Deputy" in longhand before the printed words "Clerk Superior Court of Rowan County" at the bottom of the summons. She also wrote her name in longhand above the printed words. The following is a copy of the subscription clause wherein the alleged defect appears at the bottom of the summons, with the words written in longhand by Miss Uzzell being shown in italics:

Vera Maie Uzzell
Deputy Clerk Superior Court
of Rowan County.

3. On 13 June, 1949, J. H. Krider, Sheriff of Rowan County, served the summons on Floyd D. and Callie Beck by reading the summons to them and delivering to each a copy thereof and also a copy of the verified complaint filed in the action, as appears on the Sheriff's return.

4. At the time the foreclosure action was filed, the vacant lots in controversy were listed for taxes in the name of Floyd D. Beck, and there was due and owing to Rowan County taxes duly levied and assessed against the lots for the years 1931 and 1932 in the principal sums of $20.73 and $16.51, respectively. (These taxes appear to have been duly declared on in the verified complaint filed in the foreclosure action. And in the complaint filed by the plaintiffs in the instant action it is admitted that they neither answered nor appeared in the foreclosure action.)

5. On 14 December, 1950, the Clerk of the Superior Court entered judgment by default, adjudging that the taxes for 1931 and 1932, with interest, in the aggregate sum of $79.20 were a specific lien on the lots described in the complaint. It was further decreed that the land be sold at public auction for the satisfaction of the lien by a commissioner who was appointed for that purpose.

6. The land was bid off at the commissioner's sale on 20 January, 1951, by Nelson Woodson and W. C. Coughenour, Jr., at the high bid of $110, and report was filed by the commissioner with the Clerk the day of sale. On 5 February, 1951, the sale was confirmed by order of the Clerk. And on payment of the purchase money the nine vacant lots were conveyed to the purchasers by the commissioner by deed recorded in the Public Registry of Rowan County in Book 344, p. 226. Following this, the purchasers Woodson and Coughenour on 20 October, 1951, by deed recorded in Book 349, p. 616, sold and conveyed the lot to Ralph J. Rainey for the sum of $600. And on 9 November, 1951, by deed recorded in Book 353, p. 305, Rainey and wife conveyed the lots to the defendants Carl E. Voncannon and wife, Margie Voncannon, for a consideration of $780.

Upon the facts found, the court concluded in substance that the summons was properly issued and served; that any irregularities appearing in the proceeding were immaterial and not prejudicial; that Beck and wife are bound by all the proceedings had in the foreclosure action, and that the lots were duly sold and conveyed by commissioner's deed. And accordingly judgment was entered denying the plaintiffs relief of any kind.

From the judgment so entered the plaintiffs appealed, assigning errors.

D. A. Rendleman for plaintiffs, appellants.
Nelson Woodson for defendants, appellees.

JOHNSON, J. The challenged summons was issued by Vera Maie Uzzell, Deputy Clerk, in her own name, instead of in the name of her

principal. The crucial question thus presented is: Does this want of proper signature amount to a failure to comply with the requirements of due process so as to make the summons ineffectual to confer jurisdiction and render the whole proceeding void and of no effect, or is the omission a mere nonjurisdictional irregularity, subject to amendment?

Clerks of the Superior Court are authorized by statute to appoint deputies. Chap. 115, Sec. 86, Laws of 1777, now codified in amended form as G.S. 2-13. See also G.S. 2-14 and G.S. 2-15.

These statutes, as interpreted and applied by the decisions of this Court, fix the status of a deputy as the agent or servant of the principal Clerk, rather than as an independent officer of the court. The decisions give emphasis to the idea that the legal power and authority incident to the office of Clerk of the Superior Court is vested in the principal Clerk as the responsible officer of the law, to be exercised by him, either in person or, within the orbit of ministerial powers, by deputy. Therefore, since a deputy's authority is derivative, the general rule is that he is required to do all things in his principal's name (except where statute expressly provides otherwise. G.S. 47-1). *Miller v. Miller,* 89 N.C. 402; *Shepherd v. Lane,* 13 N.C. 148. See also *Piland v. Taylor,* 113 N.C. 1, 18 S.E. 70.

The statute, G.S. 1-89, directs that in connection with the commencement of a civil action the summons must be signed by the Clerk. However, our decisions hold that the issuance of summons is not a judicial act which must be performed by the Clerk in person, but rather that it is a ministerial act which may be done in his name by a deputy. *Shepherd v. Lane, supra; Jackson v. Buchanan,* 89 N.C. 74.

In our Reports numerous decisions may be found dealing with the jurisdictional effect of the absence from summons of the Clerk's signature or name. However, decision here is controlled by the principles explained in these cases: *Henderson v. Graham,* 84 N.C. 496; *Redmond v. Mullenax,* 113 N.C. 505, 18 S.E. 708; *Hooker v. Forbes,* 202 N.C. 364, 162 S.E. 903; *Land Bank v. Aycock,* 223 N.C. 837, 28 S.E. 2d 494; *Williams v. Trammell,* 230 N.C. 575, 55 S.E. 2d 81; *Boone v. Sparrow,* 235 N.C. 396, 70 S.E. 2d 204.

The rule deducible from these decisions, as applicable to the instant case, may be summarized as follows: To confer jurisdiction, the process relied on must in fact issue from the court and show upon its face that it emanated therefrom and was intended to bring the defendant into court to answer the complaint of the plaintiff. And when this is clearly shown by evidence appearing on the face of the summons, ordinarily the writ will be deemed sufficient to meet the requirements of due process and bring the party served into court, and formal defects appearing on the face of the record will be treated as nonjurisdictional irregularities, sub-

ject to amendment. "If, however, there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all . . ." *Boone v. Sparrow, supra.*

In *Henderson v. Graham, supra,* the summons was issued without the signature of the Clerk in the blank placed at the end of the instrument. However, the summons bore the seal of the court. After it had been served, the defendant's attorney entered a special appearance and moved to dismiss the action, and the plaintiff's attorney asked leave to amend by allowing the Clerk to affix his signature *nunc pro tunc.* The court below declined to allow the amendment for want of power and granted the motion to dismiss. On appeal, *Chief Justice Smith,* in discussing the question whether the want of signature rendered the summons fatally defective and ineffectual to confer jurisdiction, or merely irregular and subject to amendment, announced the principle that any defect or omission of a formal character which would be waived or remedied by a general appearance or an answer upon the merits, may be treated as a matter which can be remedied by amendment. And it was held that the failure of the Clerk to sign the summons was an omission of this description. There the summons, though unsigned, bore the seal of the court. This was the crucial factor on which decision was made to turn. The imprint of the seal furnished internal evidence of the official origin of the summons.

In *Hooker v. Forbes, supra,* the Clerk by oversight failed to sign the summons. However, the jurat of the Clerk and his signature below the cost bond furnished internal proof of the official character and origin of the summons. It was there held that the defect was nonjurisdictional and amendable.

In *Land Bank v. Aycock, supra,* summons was transmitted by the Assistant Clerk of the Superior Court of Durham County to the Sheriff of Johnston County and was complete in every respect, including seal of the court, "except it did not contain the signature of the clerk or of the assistant clerk or anyone in the clerk's office on the blank line at the bottom prepared for such signature . . ." The Assistant Clerk signed the summons on the appropriate line after service by the Sheriff. The defendant entered a special appearance and moved to dismiss for alleged want of jurisdiction because of the defect indicated. The lower court denied the defendant's motion to dismiss and allowed the plaintiff's counter motion by entering an order directing that the act of the Assistant Clerk in affixing his signature after service by the Sheriff be approved and ratified. These rulings were affirmed on appeal.

In the instant case it was stipulated by the parties, and so found by the court, that the summons did in fact emanate from the Clerk's office and

that it was duly served on the defendants as indicated by the Sheriff's return. It was also stipulated that Vera Maie Uzzell, who signed the summons, was a Deputy Clerk of the Superior Court of Rowan County at the time the summons was issued.

Therefore, under application of the controlling principles of law it is manifest that the summons was not void. Rather, it clearly appears that the summons was sufficient to confer jurisdiction and bring the defendants into court.

Accordingly, we hold that the failure of the Deputy to sign the name of her principal was a nonjurisdictional irregularity. And it is noted that the plaintiffs failed to show prejudice entitling them to relief on the ground of such irregularity. They neither alleged nor sought relief based on prejudice arising out of nonjurisdictional irregularity of the summons. The single theory of the plaintiffs' attack on the summons is that it was and is fatally defective and utterly void.

The procedural irregularities alleged by the plaintiffs relate to other phases of the foreclosure proceeding. These we now treat.

1. The plaintiffs point to the fact that the judgment of foreclosure directed the commissioner to sell, not only the vacant lots in controversy, but also the plaintiffs' house and lot; and that the commissioner exposed to sale and the purchasers bid off for the composite bid of $110 both the house and lot and the vacant lots. Here the irregularity complained of is that the judgment of confirmation and the commissioner's deed omitted the house and lot. Thus the plaintiffs contend there is a fatal variance between the sale as made and as confirmed. The contention is untenable. The house and lot were omitted after petition filed in the cause by the county showing taxes thereon paid prior to judgment. Besides, it is manifest that the elimination of plaintiffs' house and lot from the judgment of confirmation was beneficial to them. Therefore, they may not be heard to predicate error on any such nonprejudicial irregularity, especially so since the purchasers' bid of $110 for all the property remained unchanged and the full amount of the bid was paid for the vacant lots.

And in respect to the allegation that the bid and sale price of the lots was inadequate, it is enough to say that the record supports the court's finding to the contrary. There is no suggestion that the sale was not properly advertised, and the following stipulation appearing in the record would seem to be conclusive against the plaintiffs on this point: "That the sale had on January 20, 1951, was conducted fairly and openly without suppression of bidding or any element of fraud and that Nelson Woodson and W. C. Coughenour, Jr. bid for themselves and not for anyone else directly or indirectly."

2. The plaintiffs complain that the commissioner advertised and sold the land, not "free and clear of all encumbrances" as directed by the

judgment, but "subject to all outstanding City and County taxes and all local improvement assessments against the . . . property not included in the judgment . . ." As to this, it is noted that the plaintiffs failed to show prejudice by reason of the variance. The commissioner's report shows that the entire purchase price of $110 was consumed in payment of the tax-judgment and court costs.

3. Exceptions relating to alleged irregularities not brought forward or discussed in brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. pp. 562 and 563. The other exceptions brought forward by appellants, but not discussed herein, have been examined. They are overruled as being untenable.

It all comes to this: The summons, while irregular in form, was adequate to confer jurisdiction and bring the plaintiffs into court; and they have failed to show prejudice resulting from the defect in the form of the summons. As to the procedural irregularities alleged by the plaintiffs, they have shown no prejudice in law resulting therefrom. Therefore, while there is technical error in the findings and conclusion that the summons was strictly in accord with the applicable principles of law, nevertheless, upon the record as presented the errors are harmless and insufficient to affect the result.

It is here noted that ordinarily the remedy for attacking a judgment or proceeding for nonjurisdictional irregularity is by motion in the cause, rather than by independent action. *Rosser v. Matthews,* 217 N.C. 132, 6 S.E. 2d 849; *Bass v. Moore,* 229 N.C. 211, 49 S.E. 2d 391; McIntosh, N. C. Practice and Procedure, pp. 1121 and 1122. However, this question of procedure was not raised in the court below and is not presented here. Nevertheless, the summons and complaint in this action may be treated as a petition and motion in the tax foreclosure proceeding. *Simmons v. Simmons,* 228 N.C. 233, 45 S.E. 2d 124; *Craddock v. Brinkley,* 177 N.C. 125, 98 S.E. 280; *Jarman v. Saunders,* 64 N.C. 367.

We conclude that the court below reached the correct conclusion in holding that the defendants (plaintiffs herein) were served with summons and in adjudging that they be denied the relief sought.

In conclusion, it is observed that the court below found that in addition to the notice afforded by the summons, the plaintiff Floyd Beck was kept advised of proceedings at all crucial stages of the foreclosure action. First, the tax collector gave him notice that suit was about to be filed. Then the county attorney, by registered mail, advised Beck suit papers were being prepared and urged settlement of the taxes. Also, the court found as a fact that after entry of the judgment directing sale, the commissioner mailed both plaintiffs a copy of the notice of sale; and the plaintiffs, by stipulation filed in the lower court, admitted receiving from the commissioner a copy of his report of sale. Nevertheless, no response

was made to any of these notices respecting the foreclosure proceeding, and this proceeding extended over a period of nearly two years.

Let the judgment below be modified as herein indicated, and as so modified it will be affirmed.

Modified and affirmed.

RAY R. AMOS v. SOUTHERN RAILWAY COMPANY, ATLANTIC AND YADKIN RAILWAY COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY.

(Filed 20 May, 1953.)

Master and Servant § 29½: Injunctions § 4f: Courts § 13—

A resident of this State, injured in an accident occurring here in the course of his employment by a railroad company, instituted action under the Federal Employers' Liability Act in a circuit court in the State of Missouri. Thereafter the employee instituted an action in the county of his residence in this State to recover for the same injury. *Held:* Upon its petition, the railroad company is entitled to an order restraining plaintiff from prosecuting his action in Missouri so long as plaintiff invokes the jurisdiction of the courts of this State for the adjudication of his claim. 45 U.S.C.A., sec. 56; 28 U.S.C.A., sec. 1404 (a).

APPEAL by plaintiff from *Patton, Special Judge,* October Term, 1952, of FORSYTH.

This is an action to recover for personal injuries under the Federal Employers' Liability Act. The plaintiff alleges in his complaint that he was injured on 16 April, 1949, while working for the defendants in Stokes County, North Carolina. He was, at the time of his injury and when he instituted this action, a citizen and resident of Forsyth County, North Carolina.

On 8 November, 1949, the plaintiff, in consideration of the payment of certain expenses for or incidental to treatment received by him in connection with the injuries complained of, and certain sums paid to the Railroad Retirement Board and to him personally, in the total sum of $3,271.90, executed a release for himself, his heirs, personal representatives and assigns, which reads in pertinent part as follows: "I, R. R. Amos, . . . hereby RELEASE AND FOREVER DISCHARGE Atlantic and Yadkin Railway Company and its successors and assigns and Norfolk & Western Railway Company and its successors and assigns of all and from all claims, demands, actions, causes of action and suits, which I now have or could hereafter have, because of or in connection with or arising out of the whole or any part of the following:" (There follows a statement in detail with respect to the injuries sustained by him on 16 April, 1949, and the circumstances under which he sustained them.)

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 personal injuries under the Federal Employers' Liability Act. In the complaint filed in that action, it is alleged that the plaintiff's injuries were sustained on 16 April, 1949, while employed by the Southern Railway Company. The Southern Railway Company answered, denying plaintiff was its employee on 16 April, 1949, or prior thereto, and alleged that on said date he was the joint employee of the Atlantic and Yadkin Railway Company and the Norfolk & Western Railway Company, and set up the release referred to herein in support of its allegations. The action is still pending in the Missouri court.

Thereafter, the plaintiff instituted the present action in the Superior Court of Forsyth County, North Carolina, on 15 April, 1952, which was three years, lacking one day, from the date of his alleged injury.

The Southern Railway Company filed a petition in this 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 facts, and entered an order permanently enjoining the plaintiff from any further prosecution of the Missouri suit. The plaintiff appealed from this order and assigned error.

Elledge & Johnson for plaintiff, appellant.

Womble, Carlyle, Martin & Sandridge for defendant Southern Railway Company, appellee.

DENNY, J. This appeal was heard at the Fall Term, 1952, of this Court, but its disposition was delayed awaiting the decision of the Supreme Court of the United States in the case of *Pope v. Atlantic Coast Line Railroad Co.*, 344 U.S. 863, ... L. Ed. ....., in which *certiorari* had been granted.

In view of the conclusion we have reached with respect to the disposition of this appeal, we think it is appropriate to review briefly some of the decisions of the Supreme Court of the United States on the question of venue in actions to recover for personal injuries under the provisions of the Federal Employers' Liability Act, and the power of state courts to enjoin the prosecution of such actions when brought in a federal or state court in another jurisdiction.

The statutory provisions in the Federal Employers' Liability Act with respect to venue is in section 6, codified as 45 U.S.C.A., section 56, and which in pertinent part reads as follows: "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing

such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

In the case of *Baltimore & O. R. Co. v. Kepner,* 314 U.S. 44, 86 L. Ed. 28 (1941), 136 A.L.R. 1222, Kepner, an employee of the Baltimore & Ohio Railroad Company, was injured in the course of his employment in Butler County, Ohio. He was a citizen and resident of that State. He brought an action in the United States District Court for the Eastern District of New York under the Federal Employers' Liability Act, to recover for his injuries. The defendant Railroad instituted an independent action in Hamilton County, Ohio, in the Court of Common Pleas, to restrain Kepner from prosecuting his action in New York. The Supreme Court of Ohio held that under the provisions contained in section 6 of the Federal Employers' Liability Act, Kepner had the right to bring his action in a federal court in any other state in which the railroad operated, and upon appeal to the Supreme Court of the United States the holding was affirmed.

In *Miles v. Illinois C. R. Co.,* 315 U.S. 698, 86 L. Ed. 1129 (1942), 146 A.L.R. 1104, the railroad employee was killed in Memphis, Tennessee, and his administrator brought an action in a state court in Missouri to recover for the death of the employee under the Federal Employers' Liability Act. The defendant Railroad brought an original bill in the Chancery Court of Shelby County, Tennessee, seeking to enjoin the further prosecution of the pending action in the Missouri state court. The restraining order was granted, and upon appeal to the Supreme Court of the United States the judgment was reversed. The Court said: "The permission granted by Congress to sue in state courts may be exercised only where the carrier is found doing business. If suits in federal district courts at those points do not unduly burden interstate commerce, suits in similarly located state courts cannot be burdensome. As Congress has permitted both the state and federal suits, its determination that the carriers must bear the incidental burden is a determination that the state courts may not treat the normal expense and inconvenience of trial in permitted places, such as the one selected here, as inequitable and unconscionable."

The decisions in the *Kepner* and *Miles cases* not only held that the venue provisions of the Federal Employers' Liability Act deprived courts of equity of the power to enjoin vexatious litigation as to actions in a distant jurisdiction, but also deprived courts of equity from applying the doctrine of *forum non conveniens.* In the meantime, it became a widespread practice, almost to the point of being characterized as a racket, for actions under the Federal Employers' Liability Act to be brought in states far distant from the residence of the injured employee as well as

from the jurisdiction in which the accident occurred. Apparently, Congress took cognizance of this situation and amended the Federal Judicial Code in 1948 by the enactment of a new section, codified as 28 U.S.C.A., section 1404 (a). The amendment is couched in the following language: "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

After the adoption of the above statute, the Supreme Court of the United States, in *Ex parte Collett* (1949), 337 U.S. 55, 93 L. Ed. 1207, considered the effect of the statute with respect to removal for the convenience of parties, witnesses, and in the interest of justice. Joseph Collett had instituted an action under the Federal Employers' Liability Act against the Louisville and Nashville Railroad in the United States District Court for the Eastern District of Illinois. Thereafter, the Railroad filed a motion to transfer the case to the United States District Court for the Eastern District of Kentucky. The court below found that all thirty-five witnesses and Collett himself lived in Irvine, Kentucky, which was also the scene of the accident; that Irvine, Kentucky, is 420 miles, approximately twenty-four hours by public transportation from East St. Louis where the action was instituted. The court held that the transfer would serve the convenience of the parties and witnesses and would be in the interest of justice, and granted the Railroad's motion. Collett filed a motion in the Supreme Court of the United States for leave to file a petition for a *writ of mandamus* against the United States District Court for the Eastern District of Illinois, requiring the vacation of its order of removal. The motion was denied.

In the case of *Pope v. Atlantic Coast Line Railroad Company, supra* (decided 27 April, 1953), Pope, an employee of the defendant Railroad, was injured in Ben Hill County, Georgia, which was the place of his employment as well as the place of his residence. But he went to Alabama and instituted an action under the Federal Employers' Liability Act in the Circuit Court of Jefferson County. The Railroad Company instituted a suit in equity in the Superior Court of Ben Hill County and petitioned the court to restrain Pope from prosecuting his action in Alabama.

The trial court sustained a general demurrer to the petition. The Georgia Supreme Court reversed the ruling and held that the courts of Georgia were clothed with power to enjoin Georgia residents from bringing vexatious suits in foreign jurisdictions. The Supreme Court of the United States granted *certiorari,* 344 U.S. 863, ... L. Ed. ....., because the decision involved the interpretation of an important federal statute and was asserted to be in conflict with decisions of that Court in *Miles v. Illinois Central R. Co., supra,* and *Baltimore & O. R. Co. v. Kepner, supra.* The Supreme Court of the United States, in reversing the decision

of the Georgia Supreme Court, said: "Congress has deliberately chosen to give petitioner a transitory cause of action; and we have held before, in a case indistinguishable from this one, that section 6 displaces the traditional 'power of a state court to enjoin its citizens, on the ground of oppressiveness, from suing . . . in the courts of another state . . .' *Miles v. Illinois Central R. Co., supra,* 315 U.S. at 699."

Also in this same case, with respect to the doctrine of *forum non conveniens,* granted in section 1404 (a), the Court said: "We have heretofore held that section 1404 (a) makes the doctrine of *forum non conveniens* applicable to Federal Employers' Liability Act cases brought in federal courts and provides for the transfer of such actions to a more convenient forum. *Ex parte Collett,* 337 U.S. 55 (1949). Respondent would have us extend that decision, to hold that section 1404 (a) also provides for the power asserted by the Georgia court in this case. We do not agree; we do not think the language of the statute suggests any such implied grant of broad power to the state courts. Section 1404 (a), by its very terms, speaks to federal courts; it addresses itself only to that federal forum in which a lawsuit has been initiated; its function is to vest such a federal forum with the power to transfer a transitory cause of action to a more convenient federal court. It does not speak to state courts, and it says nothing concerning the power of some court other than the forum where a lawsuit is initiated to enjoin the litigant from further prosecuting a transitory cause of action in some other jurisdiction. Nor does section 1404 (a) contemplate the collateral attack on venue now urged by respondent; it contains no suggestion that the venue question may be raised and settled by the initiation of a second lawsuit in a court in a foreign jurisdiction; its limited purpose is to authorize, under certain circumstances, the transfer of a civil action from one federal forum to another federal forum in which the action 'might have been brought.'"

In the light of the above decisions we must concede that, notwithstanding the fact that the court below found that all the witnesses and the plaintiff in the present action live in North Carolina, where the cause of action arose; that it is approximately 970 miles from Winston-Salem, the county seat of Forsyth County, North Carolina, to St. Louis, Missouri, and requires approximately twenty-seven hours by fastest train to travel from Winston-Salem to St. Louis, the Southern Railway Company would not be entitled to the relief it seeks no matter how inconvenient or expensive it may be to defend the suit in Missouri, if it had instituted an action in this State for the purpose of restraining the plaintiff from prosecuting his action in Missouri.

However, we think a different situation exists where a citizen and resident of a state, after instituting an action in another state to recover for injuries under the Federal Employers' Liability Act, institutes a

second action in the state of his residence, where the cause of action arose, under the same Act and on the same cause of action. And we do not think the reasoning of the Supreme Court of the United States in *Pope v. Atlantic Coast Line Railroad Company, supra,* where the defendant Railroad instituted a new and separate suit against the injured employee, to enjoin him from prosecuting his Alabama action, is controlling in this Court on the facts presented on the present record. Neither do we think the ruling of the North Carolina court in a suit instituted by the injured employee in this State, may properly be held to constitute a collateral attack on venue in another state. Furthermore, when a resident or non-resident invokes the jurisdiction of our courts by instituting an action therein, the court may prescribe the terms upon which he may be allowed to prosecute such an action. *Carpenter v. Hanes,* 162 N.C. 46, 77 S.E. 1101, Ann. Cas. 1915A 832; *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558; 28 Am. Jur., Injunctions, section 204, page 389.

We know of no provision in the Federal Employers' Liability Act which authorizes an injured employee to institute a multiplicity of actions for a single injury. Certainly there is nothing in section 6 of the Act to indicate any right to institute more than one action. If he is so authorized, then the plaintiff in this action, prior to the expiration of the three years from the date of his injury, could have instituted an action against the Southern Railway Company in each and every state in which it was doing business at the time of the commencement of such actions. A ruling supporting such view would not only be inequitable and unconscionable, but indefensible. Therefore, we hold that the restraining order entered in the court below is valid, and the Southern Railway Company is entitled to have it remain in full force and effect so long as the plaintiff invokes the jurisdiction of the courts of this State for the adjudication of his claim against the Southern Railway Company for injuries sustained by him on 16 April, 1949, pursuant to the provisions of the Federal Employers' Liability Act.

The permanent injunction issued below will be modified in accord with this opinion.

Modified and affirmed.

FRANK SESSOMS AND CARRIE SESSOMS COLE v. ALEC McDONALD AND WIFE, AMIE McDONALD; TILDON WALKER AND WIFE, LOTTIE M. WALKER; AND J. WARREN PATE AND WIFE, ELIZABETH G. PATE.

(Filed 20 May, 1953.)

1. Adverse Possession § 2—

Where the State is not a party to the action, title is conclusively presumed to be out of the State. G.S. 1-36.

2. Adverse Possession § 6—

In order to ripen title by adverse possession, the possession must be continuous, and isolated acts of possession, no matter how adverse, are insufficient for this purpose.

3. Adverse Possession § 9b—

While the grantee in an unregistered deed may acquire title to the premises by adverse possession for twenty years, such possession is confined to the land actually occupied, since in such instance there is no claim under color of title.

4. Trial § 22a—

On motion to nonsuit, the court does not pass upon the credibility of the witnesses or the weight of the testimony, but determines only whether the evidence tending to sustain plaintiff's claim is sufficient to raise an issue for the jury, admitting for the purpose all facts in evidence favorable to plaintiff and giving plaintiff the benefit of every reasonable inference therefrom.

5. Trial § 22c—

Contradictions in plaintiff's evidence do not justify nonsuit.

6. Adverse Possession § 19—Evidence of continuous possession by using land for purposes for which it was ordinarily susceptible held sufficient.

Plaintiffs' evidence tended to show that they were grantees in a deed to a lot contiguous to their homeplace, that they immediately went into possession upon delivery of their deed and exercised dominion over the premises by listing and paying taxes, erecting a fence encompassing the entire lot, having dirt hauled in to fill up the low part, and personally or through tenants maintaining a garden thereon encompassing the entire lot for a number of years and that part of the lot susceptible to this use after the piling of dirt thereon rendered a part of the lot not susceptible to this use. *Held:* The evidence was sufficient to be submitted to the jury upon the issue of acquisition of title by twenty years adverse possession.

APPEAL by the defendants Alec McDonald and wife, Amie McDonald, from *Nimocks, J.*, and a jury, October Term, 1952. CUMBERLAND.

This is a civil action in which the plaintiffs seek to be adjudged the owners in fee simple and entitled to the immediate possession of a lot of land in the City of Fayetteville, North Carolina.

The defendants Tildon Walker and wife, and J. Warren Pate and wife filed no answer, and made no appearance. The defendant appellants' brief states "this appeal involves the single question: Did the trial judge commit error in refusing to grant the defendants' motion for nonsuit made at the close of the plaintiffs' evidence, and renewed at the close of all the evidence?"

It is stated in the plaintiff appellees' brief "the plaintiffs rested their claim of title and right of possession upon 20 years or more of adverse possession."

A summary of the plaintiffs' evidence follows. On 21 September, 1929, W. A. Vanstory and wife in consideration of $300 paid to them by the plaintiffs executed and delivered to the plaintiffs, as husband and wife, a deed with full covenants of warranty conveying Lot 51 in plat of a part of the subdivision of the Bevill and Vanstory properties in Fayetteville, North Carolina—the Lot was also described in the deed by metes and bounds. The plat referred to in the deed was recorded in Plat Book S-7, p. 111, in the Register of Deeds' Office of Cumberland County. Frank Sessoms began paying for this Lot in 1928, and when he had finished paying for it, the deed was executed and delivered to him. He carried it home and showed the deed to his wife, who put it in a drawer. Frank Sessoms and his wife separated in 1935, and are now divorced. Her name is now Carrie Sessoms Cole. Frank Sessoms recorded this deed in the Register of Deeds' Office of Cumberland County on 11 December, 1951.

Frank Sessoms has lived on the Wilmington Road 25 or more years. He owns Lot 32 on this road, which has a house on it, and lives in it. He also owns Lot 49 with a house on it, which he leases to James Simpson, who has been his tenant there since December, 1943. Lot 49 is immediately south of Lot 32, and Lot 51—the subject of this litigation—is immediately south of and adjacent to Lot 49. Lot 51 is 40.1 feet on the front and 140 feet deep.

Immediately after receiving the Vanstory deed for Lot 51 on 21 September, 1929, Frank Sessoms plowed the lot, and began using it as a garden. He had used it as a garden the year before, because he was paying Vanstory for it. In 1930 he used all of this lot as a garden. In 1931 he put a fence around his Lots 32, 49 and 51—he fenced the whole of Lot 51. This fence stayed around these lots 8 or 9 years. Some part of the old wire is now there, but no posts. At that time the lots south of Lot 51 were grown up in small trees, but Lot 51 never grew up in small trees. Frank Sessoms and his wife used the whole of Lot 51 as a garden, raising collards, beans, peas, etc., until she separated from him in 1935. She worked it as a garden. Frank Sessoms testified he had a garden on Lot 51 until 1940 or 1941. He set out fruit trees in 1931 on this lot and they stayed there 10 or 12 years. Some died, and when his

wife separated from him, she dug up some, and carried them away. He, his wife and children and children in the neighborhood gathered fruit from these trees. In 1938 or 1939 or 1944 he had cottonseed•moult put on the lot to improve the soil. The back part of this lot was low. In 1944 the Wilmington Road was being hard-surfaced, and the road contractor hauled dirt from the road to get rid of it. Frank Sessoms had the contractor to dump some of this dirt in piles on the lot. The dirt remained in piles until leveled by a bulldozer employed by Alec McDonald in 1952.

James Simpson has been a tenant of Frank Sessoms on Lot 49 since December, 1943. With Frank Sessoms' consent he tended this lot as a garden in 1943 and in 1944, and since 1943 parked his car on Lot 51 with Frank Sessoms' permission. James Simpson dug a ditch on Lot 51, and kept it open to keep the water off of the back of the lot he leased from Frank Sessoms after the dirt was piled on Lot 51, and kept the ditch open until Alec McDonald moved on the lot. The back of James Simpson's smokehouse is still inside Lot 51 about 2 feet. Every fall he kept his cow on Lot 51 to keep the weeds down.

Hardy Rhone has lived in the rear of Frank Sessoms' house since 1931. He testified "there was a garden on Lot 51 every year—it was cultivated somewhat every year, just about like city folks do." Hardy Rhone had a garden on Lot 51 with Frank Sessoms' permission in 1945 and in 1946.

Frank Sessoms listed Lot 51 for taxes every year. He had tax receipts on this lot to cover the years 1937 to 1951, both inclusive, except the years 1943, 1945, 1947 and 1950. He had tax receipts prior to 1937, but his wife lost them. On cross-examination Frank Sessoms testified "I can't explain why I had the property for 8 years before it was listed."

Frank Sessoms has not paid any paving assessment on Lot 51. He was never sent a bill, and did not know he owed any until the dispute arose over this lot.

Before Alec McDonald and his wife moved their house on this lot, Frank Sessoms showed them his deed, and told them the lot was his.

The evidence of the defendant appellants may be summarized as follows. Five witnesses, who lived in the neighborhood, testified they had known Lot 51 from 12 to 50 years. None remembered seeing any garden on the lot, and all remembered seeing weeds, bushes, etc. W. C. Holland, a real estate broker, acting for W. A. Vanstory, Jr., finding that the public records did not show that W. A. Vanstory, Sr., had sold Lot 51, sold Lot 51 in February, 1950, to J. Warren Pate and Tildon Walker. F. S. Cullom, an official of the Branch Banking and Trust Company, was handling the Vanstory property as trust property, and in November, 1951, sold and conveyed Lot 51 to E. B. Hope. He did not know that W. C. Holland was handling the lot for W. A. Vanstory, Jr. Cullom,

Pate and Hope did not see any use that was made of this property; it was grown up with weeds. E. B. Hope sold and conveyed Lot 51 to Alec McDonald and wife, and Alec McDonald moved his house on this lot and is now living on it. The deed from E. B. Hope and wife to Alec McDonald and his wife is dated 19 December, 1951, and was recorded 12 February, 1952, in the public registry in Cumberland County. The evidence does not show when the McDonalds moved on Lot 51. However, their answer alleges they took possession after their deed from Hope was recorded.

The evidence does not show whether W. A. Vanstory is dead or not. The case on appeal shows this. "The defendants showed through the witnesses record title to the property from Vanstory, Sr., to Vanstory, Jr., to Walker and Pate, and to the defendants McDonald. Also, another title from the Bank as Trustee under the Will of Vanstory, Sr., to Edward Hope, to the defendants McDonald."

Thomas H. Williams and Taylor & Mitchell for plaintiffs, appellees.

Charles G. Rose, Jr., for defendants, appellants.

PARKER, J. The sole question presented for decision is whether there was sufficient evidence to carry the case to the jury that the plaintiffs have ripened title to Lot 51 by twenty years adverse possession under known and visible lines and boundaries. G.S. 1-40; *Johnson v. Fry,* 195 N.C. 832, 143 S.E. 857. There is no evidence that anyone was under any disability.

The State not being a party to the action, the title is conclusively presumed to be out of the State. G.S. 1-36.

One issue was submitted to the jury: "Are the plaintiffs the owners and entitled to possession of the property described in the complaint?", to which they responded Yes.

A very clear and concise definition of adverse possession is given in *Perry v. Alford,* 225 N.C. 146, 33 S.E. 2d 665, as follows: "To constitute adverse possession the possession must have been actual, open, continuous, and denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible," citing authorities.

This Court has also said in *Vance v. Guy,* 223 N.C. 409, at p. 413, 27 S.E. 2d 117 "the possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible." (Citing *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347; *Davis v. Land Bank,* 219 N.C. 248, 13 S.E. 2d 417). However, occasional acts of ownership, no matter how

adverse, do not constitute a possession that will mature title. *Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851.

The plaintiffs' unregistered deed does not prevent their setting up adverse possession for twenty years to Lot 51. *Johnson v. Fry, supra; Glass v. Shoe Co.,* 212 N.C. 70, 192 S.E. 899.

The plaintiffs rely upon adverse possession alone without color of title. Title acquired under such circumstances is confined to the lands actually occupied. "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." *Carswell v. Morganton,* 236 N.C. 375, 72 S.E. 2d 748. Citing many authorities.

In ruling on a motion for nonsuit the court does not pass on the credibility of the witnesses or the weight of the testimony—that is for the jury. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Contradictions in the plaintiff's evidence do not justify a nonsuit. *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791. "When the defendant moves for a compulsory nonsuit, he admits, for the purpose of the motion, the truth of all facts in evidence tending to sustain the plaintiff's claim; and the plaintiff is entitled to have the court, in ruling on the motion, to give him the benefit of every favorable inference which the testimony fairly supports." *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757.

The deed from W. A. Vanstory and wife to the plaintiffs is good as between the parties to the deed. *Patterson v. Bryant,* 216 N.C. 550, 5 S.E. 2d 849. The inference seems to be irresistible that whatever use the plaintiffs made of Lot 51, they did it with intent to hold this lot solely for themselves to the exclusion of all others, and that such use was made in the character of owners, in opposition to the right or claim of any other person, and not merely as occasional trespassers.

Frank Sessoms listed Lot 51 for taxes every year. He had tax receipts on this lot to cover the years 1937 to 1951, both inclusive, except the years 1943, 1945, 1947 and 1950. He had tax receipts prior to 1937, but his wife lost them. The listing and payment of taxes on Lot 51 by Frank Sessoms, while not sufficient by themselves to show adverse possession, are relevant facts in connection with the other circumstances as tending to show a claim of title. *Perry v. Alford, supra.*

Upon receipt of their unregistered deed on 21 September, 1929, Frank Sessoms ploughed Lot 51, and he and his wife tended all of it as a garden until 1935, when he and his wife separated; Frank Sessoms used it as a garden until 1940 or 1941; Simpson and Rhone, with Frank Sessoms' permission, used it as a garden in 1943, 1944, 1945 and 1946. Hardy Rhone testified there was a garden on Lot 51 every year—it was cultivated somewhat every year, just about like city folks do. In 1931 Frank Sessoms planted fruit trees on this lot, which stayed there 10 or 12 years.

In 1931 Frank Sessoms put a fence around all of Lot 51 and his other two adjacent lots, which stayed there 8 or 9 years. In 1938 or 1939 or 1944 he had cotton seed moult put on the lot. In 1944 he put piles of dirt on the lot to build up the rear where it was low. These piles remained until Alec McDonald leveled them with a bulldozer in 1952 to move his house on the lot. Frank Sessoms' tenant cut a ditch on Lot 51 after the dirt was piled on this lot to keep the water off of Lot 49 where the tenant lived. This ditch remained open until Alec McDonald moved on the lot. The tenant, Simpson, kept his car on Lot 51; grazed his cow on it each fall; and part of his smokehouse is still on it. Lot 51 never grew up in small trees. There has been no break in continuous possession.

When the dirt in 1944 was piled on Lot 51 to the extent that a bulldozer leveled it, it is obvious all of the lot could not be planted as a garden.

Considering the size of this lot—40.1 feet wide and 140 feet deep—it seems to us that giving to the plaintiffs every favorable inference which the testimony fairly supports that from 21 September, 1929, until the defendant appellants moved on this lot in 1952, the plaintiffs actually occupied all of Lot 51 with intent to hold it solely as possessors to the exclusion of all others; that they exercised acts of dominion over this lot in making the ordinary use and taking the ordinary profits of which this small city lot was susceptible in its condition, and that such acts were so repeated as to show that they were done in the character of owners, in opposition to the right or claim of any other person and not merely as occasional trespassers.

The facts in this case are far different from the cases relied upon by the defendant appellants, which are cases of "occasional acts of ownership" or a break in the continuity of possession.

The court below was correct in overruling the motions for judgment of nonsuit.

The only other assignment of error by the defendant appellants is to the signing of the judgment, which is overruled.

Under a charge that is not brought forward, and is deemed to be correct, the jury, the sole judges of the credibility of the witnesses and the weight of the testimony, have answered the issue in favor of the plaintiffs, by which verdict the defendant appellants must abide.

In the trial we find

No error.

IRVIN S. BLACKWOOD AND JESSE A. BLACKWOOD, EXECUTORS OF THE ESTATE OF L. J. BLACKWOOD, DECEASED; IRVIN S. BLACKWOOD AND WIFE, JOSEPHINE R. BLACKWOOD, JESSE A. BLACKWOOD AND WIFE, FANNIE K. BLACKWOOD, INDIVIDUALLY, AND ROGER B. BLACKWOOD AND WIFE, MAXINE B. BLACKWOOD, GEORGE N. BLACKWOOD AND WIFE, BARBARA P. BLACKWOOD, JAMES I. BLACKWOOD AND WIFE, MARY W. BLACKWOOD, AND CLARA J. BLACKWOOD, WIDOW, v. STEPHEN A. BLACKWOOD, LUTHER J. BLACKWOOD II, DAVID K. BLACKWOOD, JOSEPH D. BLACKWOOD, JEANNIE L. BLACKWOOD, LARRY B. BLACKWOOD, DANA A. BLACKWOOD, MICHAEL G. BLACKWOOD, KATHY A. BLACKWOOD, MARY D. BLACKWOOD AND JAMES R. BLACKWOOD, ALL MINORS, AND ALL UNBORN AND UNKNOW HEIRS OF IRVIN S. BLACKWOOD, JESSE A. BLACKWOOD, ROGER B. BLACKWOOD, GEORGE N. BLACKWOOD AND JAMES I. BLACKWOOD.

(Filed 20 May, 1953.)

1. Wills §§ 33k, 40—

Where the widow takes a life estate, her dissent will accelerate the vesting of the remainder even though the remainder be contingent, but if she takes a defeasible fee so that there is an executory devise upon the happening of the event, her dissent cannot have the effect of defeating the executory devise and the will will be construed in the same way as if there had been no renunciation.

2. Wills §§ 33c, 33g—

A devise to testator's widow "in fee simple so long as she remains my widow" creates at most a life estate in the widow, and upon the widow's dissent the remainder vests by acceleration in the ulterior takers.

APPEAL by defendants from *Rudisill, J.*, March Term, 1953, of GUILFORD (Greensboro Division).

This action was instituted by the plaintiffs for the purpose of obtaining an interpretation of certain provisions of the last will and testament of L. J. Blackwood, deceased, and a ruling as to whether the dissent of his widow from the will permits the application of the doctrine of acceleration under its provisions.

The plaintiffs are all the children and the widow of the testator, all of whom are over twenty-one years of age. The defendants are all of the testator's grandchildren, all of whom are minors and for whom a guardian *ad litem* was duly appointed.

L. J. Blackwood, a citizen and resident of Guilford County, North Carolina, died 8 April, 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, 21 April, 1952.

On 26 August, 1952, Clara J. Blackwood, dissented from the will of her deceased husband, L. J. Blackwood, and subsequently executed a deed

of release of her dower interest in the real property of which L. J. Blackwood died seized, to the children of L. J. Blackwood, to wit: Irvin S. Blackwood, Jesse A. Blackwood, Roger B. Blackwood, George N. Blackwood, and James I. Blackwood.

Items I and II of the testator's will contain the provisions in controversy, and read as follows:

"ITEM I: I give and devise to my beloved wife, Clara J. Blackwood, all the real estate that I may be seized of at my death to her in fee simple so long as she remains my widow, and in the event of her marriage it is my will and desire that all of said property be equally divided between all of my children then living and in the event that any of them are dead leaving children or heirs at law, that their said heirs shall inherit and take the same interest that their parent would have taken had he been living.

"ITEM II: I give and bequeath to my wife, Clara J. Blackwood, all of my personal property including stocks, bonds, notes, mortgages, and all other property of whatsoever kind and wheresoever located, to her so long as she remains my widow and in the event of her marriage, all of said property shall be equally divided among all of my children then living and in the event that any of them are dead leaving children or heirs at law, that their said heirs shall inherit and take the same interest that their parent would have taken, had he been living."

The trial judge heard the matter below by consent, without a jury, and held that the intent of the testator in both Items I and II of his will was to provide for his widow, Clara J. Blackwood, during her widowhood; that when she dissented from the will, she and the children of the testator, above named, became entitled to the distribution in equal parts of the personal property of his estate, less any amount thereof that might be required for the payment of the obligations of the estate; that since the widow has released her dower interest in the real property belonging to the estate to the children of the testator, they are now the owners of said real estate in fee simple, subject to the proper obligations of the estate; and that the defendants jointly and severally have no right, title, claim, or interest, present, contingent, or otherwise, to the personal or real property belonging to the estate of the testator. Judgment was accordingly entered to which the defendants excepted and appealed to this Court, assigning error.

James B. Wolfe, Jr., guardian ad litem, for defendant appellants.
Roy M. Booth for plaintiff appellees.

DENNY, J. The determinative question on this appeal is whether Clara J. Blackwood, the widow of the testator, took a defeasible fee simple estate under the testator's will or a life estate.

It is well settled that if she took a fee simple estate, defeasible only upon her remarriage, the limitation over would be an executory devise. In such case her renunciation would not accelerate the limitation over, but the will would be construed in the same way as if there had been no renunciation. Simes, Law of Future Interests, Volume 3, section 760, page 244; 31 C.J.S., Estates, section 121 (1) (a), page 134. "While a contingent remainder may be destroyed at common law by fine or recovery, by merger of the particular estate, or by any displacement thereof, an executory devise cannot be defeated by destruction of the precedent estate by disseizin, forfeiture, surrender or merger." 19 Am. Jur., Estates, section 129, page 585. However, if the widow took a life estate only under the will of her husband, L. J. Blackwood, then the remainder was vested in the children of the testator, and when she dissented from the will, they became vested absolutely and unconditionally with title to the real and personal property of the testator's estate, subject only to the statutory rights of the widow.

Under our decisions, a devise by a husband to his wife, so long as she remains his widow, is at most only a life estate. *Alexander v. Alexander,* 210 N.C. 281, 186 S.E. 319; *Sink v. Sink,* 150 N.C. 444, 64 S.E. 193; *In re Brooks' Will,* 125 N.C. 136, 34 S.E. 265.

In the matter of *In re Brooks' Will, supra,* the testator disposed of his property in the following words: "I will and bequeath all my real and personal property to my beloved wife, Martha B. Brooks, to have and possess as long as she remains my widow. Should she remarry, then the law is my will." *Montgomery, J.,* speaking for the Court, said: "The language of the will clearly shows that the intention of the testator was to limit the estate of the widow to a life estate. A time was fixed beyond which that interest could not extend. She was 'to have and possess the property as long as she remains my widow.' Her death terminated of course her widowhood, and with the ending of that condition, ended also the estate of the widow. . . . He knew that at her death the property would revert to his heirs at law, and he felt that it would be unnecessary to say so, for he had already limited her estate to one *durante viduitate.* By the further expression 'should she remarry, then the law is my will,' he meant simply that she should enjoy, after her remarriage, only such part of his estate as the law would invest her with, whether with or without his sanction or consent and that the children would come in possession at once of the whole, less that part fixed upon her by law. Section 2180 of the Code (now G.S. 31-38) cannot be invoked for the purpose of extending the estate to a fee, for, as we have seen, the intention of the testator was clear to limit it at most to an estate for her life."

In the case of *Sink v. Sink, supra,* the will contained the following language: "I give and bequeath to my wife the remainder of my land,

. . . to have and to hold to her own proper use and behoof . . . during the term of her widowhood, and after her remarriage to be equally divided between my brothers and sisters." The Court said: "We are of opinion that the estate in the land devised to the widow could not endure beyond her life"; and cited with approval *Fuller v. Wilbur,* 170 Mass. 506, 49 N.E. 916, where the devise was as follows: "I give and bequeath to my beloved wife all my real and personal estate, of whatever name, for her sole use and benefit so long as she remains my widow, . . ." The Massachusetts Court, in construing the will, said: "The words, 'so long as she remains my widow,' imply a continuance of the estate during widowhood, and no longer; and, at most, it could not extend beyond her life." Our Court also cited in the *Sink case, Kratz v. Kratz,* 189 Ill. 276, 59 N.E. 519, where the devise was to the wife during her widowhood, of the real and personal estate, "absolutely and unconditionally," and in which the Illinois Court held that her interest was limited to the period of her widowhood—that is, during her life or until she remarried.

In *Alexander v. Alexander, supra,* the testator, in substance, said: "I lend to my wife the balance of my estate . . . for and during her widowhood" with full power of disposition, "and at the termination of her preceding particular estate the balance of my estate to be equally divided between my two children." The Court, speaking through *Devin, J.* (now *Chief Justice*), held the word "lend" used in the will was equivalent to "give" or "devise." Even so, that the widow took only a life estate. It was pointed out that "while the gift of an estate to a person generally or indefinitely with power of disposition ordinarily carries a fee, this rule will not be allowed to prevail when the testator gives to the first taker by express terms, an estate for life only, though coupled with power of disposition."

In Blackstone's Commentaries, Book 2, section 121, it is said: "If an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine, do not sooner happen."

In the instant case, the testator said, "I give and devise to my beloved wife, Clara J. Blackwood, all the real estate that I may be seized of at my death to her in fee simple so long as she remains my widow, and in the event of her marriage it is my will and desire that all of said property be equally divided between all my children then living . . ." The words, "so long as she remains my widow" limited the estate to one for

life or until she remarries. The use of the words, "in fee simple," in light of the limitation placed on the devise, cannot mean any more than an intention that during her widowhood she was to have the absolute and unconditional control and use of the property, free from any interference from others. But the language of the will, when considered in its entirety, is inconsistent with an intention to devise a fee simple estate. *Alexander v. Alexander, supra.* Hence, in light of our decisions and the other authorities cited herein, we hold that the devise gave Clara J. Blackwood, at most, a life estate.

In view of the conclusion we have reached, we concur in the ruling of the court below in applying the doctrine of acceleration, and the judgment will be upheld. *Bank v. Easterby,* 236 N.C. 599, 73 S.E. 2d 541; *Trust Co. v. Johnson,* 236 N.C. 594, 73 S.E. 2d 468; *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. *Cf. Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385.

Affirmed.

L. F. BLAKE v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, A CORPORATION.

(Filed 20 May, 1953.)

1. Negligence § 4f—

An employee of a wholesaler while delivering merchandise to a retailer's warehouse is an invitee of the retailer.

2. Same—Contributory negligence of invitee held to bar recovery as matter of law.

An employee of a wholesaler in delivering merchandise to the warehouse of a retailer, backed his truck to the warehouse platform, loaded the bags of merchandise on a hand truck, and then pulled the heavily loaded hand truck over the doorsill, and while backing into the warehouse, slipped and fell to his injury on a watery or wet place on the warehouse floor. *Held:* In backing into the warehouse without looking where he was going or giving any attention whatsoever to the condition of the floor, the employee failed to exercise ordinary care for his own safety and his contributory negligence in so doing bars his recovery against the retailer as a matter of law.

JOHNSON, J., dissenting.

ERVIN and PARKER, JJ., concur in dissent.

APPEAL by plaintiff from *Morris, J.,* December Term 1952, ROBESON. Affirmed.

Civil action to recover compensation for personal injuries.

Plaintiff was an employee of Statesville Flour Mills and hauled feed and flour to retail merchants. On the afternoon of 9 May 1950, he carried a truck of feed in bags to the defendant's warehouse at Southern Pines. He backed his truck up to a narrow platform at the warehouse and loaded the bags of feed on a hand truck. He then undertook to pull this truck into the warehouse, backing through the warehouse door. As he pulled the heavily loaded (over 400 pounds) truck over the doorsill, he slipped and fell. There was a wet place just inside the door. He testified this watery or wet place caused him to slip and fall. When he fell, the handle of the truck struck him in the groin, inflicting certain personal injuries.

He testified: "I did not have the door open before I attempted to go in. The door was partly open. I had to push it open to get in . . . I opened the door with my back. I could have pushed it open with my hand . . . My helper could have opened the door . . . I couldn't look before I fell . . . I couldn't see the floor . . . I did not look at the floor before I slipped. I failed to look down . . . I carried stuff to that store for over ten years . . . I was familiar with the platform, door and floor of the warehouse . . . I had complete control of how to load that truck . . . I didn't see the water or wet floor . . . I saw a toilet near the place where the water was. I had gone where the water was before. The difference was they had either sawdust or sand on the floor. There was no sand or sawdust on the floor on the 9th of May 1950 . . . I did not see the wet place until I slid. I did not pay any attention to it."

There was evidence tending to show that the assistant manager of the defendant knew that the watery or wet place was on the floor prior to the time plaintiff entered and had instructed employees of the defendant to "clean that water up."

At the conclusion of the evidence for the plaintiff, the court, on motion of defendant, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Frank McNeill and McLean & Stacy for plaintiff appellant.
Varser, McIntyre & Henry for defendant appellee.

BARNHILL, J. That the plaintiff was an invitee of the defendant at the time he suffered his injuries is not debatable. *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408.

So far, however, this Court has not held that water alone, unmixed with oil or grease or other slippery substance, on a floor over which an invitee may be expected to pass, creates a hazard against which the proprietor must guard. Counsel do not call our attention to any decision from any other jurisdiction to that effect. See, however, *Kresge Co. v.*

Fader, 158 N.E. 174, 58 A.L.R. 132; *Jutras v. Amoskeag Mfg. Co.,* 147 A. 753; *Shumaker v. Charada Inv. Co.,* 49 P. 2d 44; *Kraus v. Wolf,* 171 N.E. 63; and *Bridgford v. Stewart Dry Goods Co.,* 231 S.W. 22.

Be that as it may, we are of the opinion plaintiff's own account of the mishap which caused the injuries for which he seeks recovery clearly discloses a failure on his part to exercise ordinary care for his own safety which, in any event, bars his right of recovery.

He testified that the loaded truck was too heavy to push. He had to pull it. Necessarily this placed considerable pressure on his feet. Yet he undertook to back into the warehouse and pull the truck over the doorsill without looking where he was going or giving any attention whatsoever to the condition of the floor where he would be compelled to place his feet in order to apply the additional pressure required to propel the truck across the obstruction created by the doorsill. On his own testimony he might as well have blindfolded himself before entering the building. In practical effect that is what he did. These facts, to which plaintiff himself testified, will not permit any reasonable inference other than that he failed to exercise ordinary care for his own safety. *Porter v. Niven,* 221 N.C. 220, 19 S.E. 2d 864; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740; *Lee v. Upholstery Co.,* 227 N.C. 88, 40 S.E. 2d 688; *Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904. A plaintiff will not be permitted to recover for injuries resulting from a hazard he helped to create. *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337.

In *Porter v. Niven, supra,* where judgment of nonsuit was affirmed, the facts are sufficiently similar to render the decision therein pertinent here. In that case, *Denny, J.,* speaking for the Court, says:

"In the instant case, apparently, the plaintiff pushed the screen door open with one of the milk cans which he was carrying, and simply took it for granted that there was no obstruction in the passageway, and failed to make any observation as to whether or not there was an obstruction in the passageway, when by his own testimony he could have seen the churn if he had looked."

The judgment entered in the court below is

Affirmed.

JOHNSON, J., dissenting: It seems to me the majority opinion weighs this plaintiff's conduct too heavily against him.

The plaintiff was experienced in the business of trucking and delivering freight. For some twelve years he had been hauling foodstuffs for the Statesville Flour Mills. The A & P store in Southern Pines was one of its customers of long standing. He was thoroughly familiar with the

platform and the back door of the store and with the floor inside the door where the injury occurred. He had been making deliveries at this store for some ten years. Always before the floor had been in a safe condition. Customarily there had been sawdust or sand on the floor. On the day of the injury, the plaintiff backed up to the loading platform behind the store and let down the "tail gate" about even with the platform and proceeded to unload in the usual manner by taking the two-wheel upright hand truck off the platform and pushing it onto the body of the motor truck and loading it. The natural movement then was to back the hand truck off the motor truck body onto and across the platform and through the door. The platform was only five feet wide. Thus, to have tried to turn around on such narrow space would have been an awkward movement. Besides, the loaded truck had to be taken over the door-stop. As to this, the plaintiff testified: "I had to back in the door, couldn't push the truck in; I backed in the door, pushed it open with my back and backed in. . . . The door was partly open. I had to push it open to go in."

This was but a shorthand explanation of the method usually followed by experienced truckers in getting a loaded hand truck over an obstruction like a door-stop. The procedure is to pull the truck, rather than push it, over the obstruction. It is a criss-cross movement—first one wheel is pulled up and over, and then the other.

It is readily inferable from the whole of the plaintiff's testimony that this was the usual method which he had followed through the years in unloading at the defendant's store.

The rule is firmly established with us that nonsuit on the ground of contributory negligence may be allowed only when plaintiff's own evidence establishes contributory negligence so clearly that no other reasonable inference is deducible therefrom. *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431; *Grimm v. Watson*, 233 N.C. 65, 62 S.E. 2d 538; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Hobbs v. Drewer*, 226 N.C. 146, 37 S.E. 2d 121. If more than one inference may reasonably be drawn from the evidence, the question of contributory negligence must be submitted to the jury. *Bundy v. Powell, supra; Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637. The plaintiff is entitled to the benefit of the rule that the evidence must be considered in the light most favorable to him. *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25. And he is entitled to every reasonable inference and intendment which may logically and reasonably be drawn from the evidence in support of his claim. *James v. Railroad*, 236 N.C. 290, 72 S.E. 2d 682; *Maddox v. Brown*, 232 N.C. 244, 59 S.E. 2d 791; *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757.

Judging the plaintiff's conduct by the rule of the reasonably prudent man, I do not see how it can be said that the only reasonable inference

to be drawn therefrom is that he negligently contributed to his injury. It seems to me that the other inference is clearly deducible, and this makes it a case for the jury.

Clearly the testimony made out a *prima facie* case of actionable negligence against the defendant. As to this, the plaintiff testified: "The water on the floor caused me to slip down; it was slick. Two men helped me up. The (defendant's) Assistant Manager said . . .: 'Boys, I told you to clean that water up.'" See *Bowden v. Kress,* 198 N.C. 559, 152 S.E. 625; *Parker v. Tea Co.,* 201 N.C. 691, 161 S.E. 209; *Brown v. Montgomery Ward & Co.,* 217 N.C. 368, 8 S.E. 2d 199; *Harris v. Montgomery Ward & Co.,* 230 N.C. 485, 53 S.E. 2d 536; *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33.

My vote is to reverse.

ERVIN and PARKER, JJ., concur in dissent.

JOHN R. FREEMAN v. W. J. PREDDY AND JAMES R. PREDDY.

(Filed 20 May, 1953.)

1. Appeal and Error § 38—

A new trial will not be granted for mere technical error, but the burden is upon appellant not only to show error but also that he was prejudiced to the extent that the verdict of the jury was thereby improperly influenced against him.

2. Appeal and Error § 39c—

Where appellant is not entitled to relief on any aspect of the record, as when the court would have been fully justified in giving a peremptory instruction or directing a verdict against him on the determinative issue or issues, any error committed during the trial will be deemed harmless.

3. Automobiles §§ 8i, 18h (2)—Evidence held sufficient to sustain directed verdict that defendants were guilty of negligence in entering intersection in path of car approaching from right.

Taking the facts to be as disclosed by defendants' own testimony, it appeared that their car approached an intersection of city streets at about the same time as plaintiff's car, which approached the intersection from defendants' right, that neither vehicle was traveling at excessive speed, and that when defendants were 14 or 18 feet from the intersection they saw plaintiff's car to their right about 55 or 60 feet away, that defendant driver did not apply his brakes or slacken speed, and that plaintiff's car struck the right door of defendants' car when defendants' car was only three-fourths of the way across the intersection. *Held:* Defendants' own evidence refutes any suggestion that defendant driver entered the intersection

at a time when a man of ordinary prudence would reasonably believe that plaintiff's vehicle was a sufficient distance away to permit defendants to proceed in safety across the intersection without creating an unnecessary traffic hazard, and defendants' statement to the effect that they thought they had time to clear the intersection is without substance.

4. Automobiles § 8i—

The fact that a motorist reaches an intersection a fraction ahead of a vehicle approaching the intersection from his right does not entitle him to proceed into the intersection, but it is required that he yield the right of way to the vehicle on his right unless it is a sufficient distance away to permit him to proceed in safety without creating an unnecessary traffic hazard.

APPEAL by defendants from *Rousseau, J.*, September Term, 1952, GUILFORD. No error.

Civil action to recover compensation for personal injuries resulting from an intersection automobile collision in which defendants plead cross actions or counterclaims for personal injuries and property damage.

On 22 December 1951, plaintiff was operating a Chevrolet sedan in a westerly direction on 14th Street, approaching Vine Street, in Greensboro. At the same time, defendant James R. Preddy was operating the Ford V-8 coupe of his father, defendant W. J. Preddy, on Vine Street, traveling in a northerly direction and approaching 14th Street. This placed the plaintiff's automobile to the right of the Preddy vehicle.

As the Preddy car got in the lane of traffic of the Freeman automobile, the Freeman automobile struck the Preddy vehicle at the door. The Chevrolet proceeded on, bent over an iron post, and "wrapped" its front end around a tree. The Ford turned completely around and stopped about 35 feet north of the intersection, facing east. There was evidence defendants were traveling at 45 or 50 miles per hour.

The Ford was occupied by the two defendants and one Floyd. W. J. Preddy was thrown out of the automobile and all three received injuries.

In the trial below the court submitted issues of negligence, contributory negligence, and damages on plaintiff's cause of action and like issues of negligence and damages on the cross actions of defendants. The jury answered the issues of negligence and contributory negligence in the affirmative. The court entered judgment on the verdict that (1) plaintiff have and recover nothing of defendants, and (2) defendants have and recover nothing of plaintiff. Defendants excepted and appealed.

Jordan & Wright for plaintiff appellee.

H. L. Koontz and Shuping & Shuping for defendant appellants.

BARNHILL, J. The exceptive assignments of error relied on by defendants are directed to alleged error (1) in the instructions of the court, and

(2) in the failure of the court to charge the jury in respect to certain material and substantive features of the law arising on the evidence offered in the cause. Counsel for appellants presented an earnest, exhaustive, and persuasive argument which inclines us to the view that there may be error in the failure of the court to charge, particularly in reference to the rights and duties of the two motorists as they each approached the intersection where the collision occurred.

But this we need not now decide for technical error alone is not sufficient. New trials are not granted for error and no more. The burden is on the appellant not only to show error but also to show that he was prejudiced to the extent that the verdict of the jury was thereby probably influenced against him. *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; *Tolley v. Creamery, Inc.,* 217 N.C. 255, 7 S.E. 2d 502; *Smith v. Steen,* 225 N.C. 644, 35 S.E. 2d 888; *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194.

The error must be "material and prejudicial, amounting to a denial of some substantial right," *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797, and an error cannot be regarded as prejudicial to a substantial right of a litigant unless there is a reasonable probability that the result of the trial might have been materially more favorable to him if the error had not occurred. *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486.

In applying this rule, we have consistently held that when, upon a consideration of the whole record, it clearly appears that the appellant, under no aspect of the testimony, is entitled to recover and that the evidence considered in the light most favorable to him is such that the trial judge would have been fully justified in giving a peremptory instruction, or directing a verdict, against him on the determinative issue or issues, any error committed during the trial will be deemed harmless. *Gray v. Power Co.,* 231 N.C. 423, 57 S.E. 2d 316; *McArthur v. Byrd,* 213 N.C. 321, 195 S.E. 777; *Foxman v. Hanes,* 218 N.C. 722, 12 S.E. 2d 258; *Clark v. Henrietta Mills,* 219 N.C. 1, 12 S.E. 2d 682; *Ramsey v. Ramsey,* 229 N.C. 270, 49 S.E. 2d 476.

Such is the case here. There is no evidence in the record that would warrant or sustain an answer to the first issue favorable to defendants. On their testimony and the testimony of their eyewitness to the collision, defendant James Preddy failed to observe the positive mandate of a material traffic rule designed and enacted for the protection of the lives and property of those who use or have a right to use our public highways and streets.

Plaintiff's automobile was to the right of the defendants' as the two vehicles approached the intersection. They approached at approximately the same time so that for both to proceed would create a dangerous

situation likely to result in a collision. Under these circumstances it was the duty of the operator of defendants' vehicle to stop and yield the right of way. G.S. 20-155; *Bennett v. Stephenson, ante,* 377; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532, and cases cited; *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361. The conclusion that his failure so to do was one of the proximate causes of the collision is inescapable.

That this is true is demonstrated by the testimony of the two defendants themselves. There is strong indication that James Preddy did not see the plaintiff's automobile until he was in the intersection. But this testimony may be disregarded. We need only turn to the most favorable account of the occurrence as detailed by defendants. Their descriptions of the occurrence for which they vouch are strikingly similar. There is only some slight variation in their estimates of distances. Defendant James Preddy was the operator of the automobile occupied by defendants. As such, it was his duty to observe the rules of the road. So then, we accept his testimony as a true description of the mishap.

As he was traveling only about 20 m.p.h. as he approached the intersection, he did not slow down. When he was 14 or 18 feet from the intersection, he saw the Freeman vehicle to his right about 55 to 60 feet up 14th Street. "After I looked to the right and saw him up there, I looked to the left and I didn't see anything coming that way, so I went on across. After I got into the intersection, I glanced back to the right and saw him about 14 or 18 feet away, so I swerved to the left." "I'd say I was about three-quarters of the way across" when the impact came. He (Preddy) never applied his brakes or attempted to stop.

He testified further as to the Freeman vehicle: "I didn't know exactly how fast Mr. Freeman was going. I thought he was going so I could get across the intersection. He was going at a moderate rate of speed, I'd say not too fast. I don't think he was going too fast."

W. J. Preddy testified he observed the Freeman vehicle 54 feet from the intersection when they were within 14 or 16 feet of it. "I didn't say anything to him about stopping . . . The car was so close to us it was no need to put on brakes. It would have hit anyhow—was not any need to try to stop. The only thing to do is try to change your direction. He didn't have much time to change direction. He just cut the wheels and by the time he got the wheels cut the car hit him."

So then, the evidence considered in the light most favorable to defendants presents this situation: Both vehicles were traveling at approximately the same rate of speed. The Preddy car was 17 feet long. The shoulder on 14th Street is eight feet and the pavement, 20 feet wide. Therefore it was necessary for defendants to travel a minimum of 42 feet plus 17 feet—the length of their automobile—while plaintiff was traveling a maximum of 60 feet, in order to clear the intersection before plain-

tiff reached and entered it. In fact they got only three-fourths of the way across, which put them directly in the plaintiff's lane of travel.

These facts, offered in evidence by defendants, effectively refute any suggestion that defendants reached and entered the intersection at a time when a man of ordinary prudence would reasonably believe that plaintiff's vehicle was a sufficient distance away to permit him to proceed in safety without creating an unnecessary traffic hazard. Therefore, their opinion evidence to the effect they thought they had ample time so to do is without substance. Clearly it was their duty to stop and yield the right of way. This they failed to do.

It may be that defendants entered the intersection a fraction ahead of plaintiff. But this did not suffice to shift the burden on plaintiff to stop and yield the right of way. *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554; *S. v. Hill, supra; Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Crone v. Fisher,* 223 N.C. 635, 27 S.E. 2d 642.

This is just one of those cases in which it is apparent both parties were temporarily inattentive to the duties imposed upon them as motorists. On this record, neither is entitled to recover of the other.

In the trial below we find

No error.

GARFIELD F. BROWN v. THE TEXAS COMPANY, A CORPORATION, AND ROBERT A. YANDELL, TRADING AS YANDELL MOTOR SALES COMPANY.

(Filed 20 May, 1953.)

1. Master and Servant § 4a—

A firm contracting to erect a sign in accordance with specifications on a lump-sum basis, with exclusive right to direct the manner and method of doing the work and having the obligation of furnishing material and labor, is an independent contractor.

2. Master and Servant § 12—

It is the duty of the independent contractor and not the contractee to furnish the contractor's employees a safe place in which to work and proper safeguards against such dangers as may be incident to the work.

3. Same—

Ordinarily the contractee is not liable for injuries sustained by employees of an independent contractor unless the work is inherently dangerous.

4. Same—Contributory negligence of employee of independent contractor held to bar recovery against contractee.

In performing work under an independent contract, plaintiff, a member of the contracting firm, elected to stand on a three-inch pipe some sixteen

or seventeen feet above the pavement with nothing to which he could hold or balance himself except a two-inch upright pipe which was screwed into the welded joint, and fell to his injury while attempting to apply considerable pressure with a heavy wrench to a horizontal pipe he was screwing into a joint at the top of the upright pipe. Plaintiff had employed contractee's employee to weld the joint, and the welder had assured plaintiff that welding would make a sound, strong joint. *Held:* Even if plaintiff fell because the welded joint broke loose, his contributory negligence in voluntarily adopting a manner and method of doing the work which was attendant with danger apparent to any man of ordinary prudence, bars recovery from the contractee as a matter of law, since it is apparent that the hazard plaintiff himself thus created was one of the proximate causes of his fall and resultant injuries.

APPEAL by plaintiff from *Sharp, Special Judge,* January Extra Civil Term, 1953, MECKLENBURG. Affirmed.

Civil action to recover compensation for personal injuries.

Plaintiff, prior to 1950, was the head of a corporation which was engaged in the business of painting, repairing, erecting signs, and performing other similar small jobs on a contract basis. His company was frequently engaged by defendant Texas Company. After leaving the State for a short while, he returned and formed a partnership with one J. T. Lovern for the purpose of engaging in the same type of business, under the firm name of J. T. Lovern & Company. While one Lefear, employed by the firm, usually supervised the erection of signs, plaintiff actively assisted in doing the necessary work on this and on one or two other occasions.

In the spring or early summer of 1951, defendant Texas Company leased a retail service station at Pineville to defendant Yandell and employed plaintiff's firm to erect on the premises a banjo-type sign to advertise the fact that it was a Texas Company station. It was later changed to a bracket-type sign.

Plaintiff's firm accepted the contract to erect the sign on a lump-sum basis, and it was to furnish the pipes, joints, and other necessary material other than the sign itself. The Texas Company furnished, at plaintiff's request, a rough drawing or sketch of the work to be done, with specifications.

One Hanna, manager of the Texas Company in that area, offered to allow plaintiff to use second-hand pipe it had on hand and went with him to a pile of scrap pipe, pointed out two pieces of two-inch pipe about the right length, and told plaintiff he could use them if he so desired. "He told me I could use any of the pipe I needed." Plaintiff or Mr. Lovern took the two pieces pointed out by Hanna.

At the service station where the sign was to be erected, there was a three-inch upright pipe set at the pump island and another attached to the

roof of the service station building. A three-inch horizontal cross bar extended from one upright to the other. Plaintiff's firm was to attach a two-inch pipe extension to the upright pipe at the pump island. To the top of this upright pipe, another pipe about seven feet long was to be attached, extending out horizontally, arm fashion, upon which the sign was to be hung.

Having installed a T reducer joint at the top of the upright pipe at the pump station, plaintiff undertook to install the two-inch upright extension pipe by screwing it into the reducer joint. He discovered that the threads on the pipe were so rusty and worn that this could not be done without cutting new threads. Yandell undertook to help him find a man in Pineville who could cut the threads, but he was out of town. Rather than take the time to return to Charlotte to have this work done, plaintiff employed Yandell's welder to weld the two-inch pipe to the reducer joint, and the welder assured him the welding would make a sound, strong joint.

After installing the two-inch upright pipe, plaintiff stood on the three-inch horizontal bar, put his left arm around the two-inch upright and his left hand on top to hold and balance himself and undertook to screw the two-inch horizontal bar or arm into the joint at the top. As the threads on this pipe had been painted over and were rusty, he could screw it in by hand only a distance of three or four threads. He then took his wrench and undertook to screw it in by applying considerable pressure. He lost his balance, fell to the pavement below and was seriously injured.

In describing the accident, he testified:

"I made three or four pulls on that and all at once over I went on my face. That's as far as I remember . . . the pipe was rusty and the threads, they had been painted over with a coat of black paint. I saw that before I got up there . . . When I was standing on that three inch horizontal pipe . . . I knew at that time that the only thing that was holding that upright pipe there was the weld of the reducer."

The plaintiff alleges that the defendant was negligent in that it (1) did not give adequate instructions and specifications, (2) furnished defective parts and materials, (3) failed to warn of the dangers inherent in the work, (4) let the contract at a price that did not permit plaintiff to provide a proper platform upon which to work while installing the pipe, and (5) failed to provide necessary safeguards or give necessary instructions to avoid injury.

Plaintiff took a voluntary nonsuit as to the defendant Yandell, and, at the conclusion of the evidence for plaintiff, the court, on motion of defendant, entered judgment of nonsuit as to the defendant Texas Company. Plaintiff excepted and appealed.

E. A. Hilker and Robinson & Jones for plaintiff appellant.

Tillett, Campbell, Craighill & Rendleman for defendant Texas Company, appellee.

BARNHILL, J. We are inclined to the view that the evidence, considered in the light most favorable to the plaintiff, fails to disclose any negligent breach of duty on the part of defendant which could have in any wise contributed to his injury.

The plaintiff admits he was not an employee of defendant, and on this record it appears that the contracting firm of which he was a member was an independent contractor. It agreed to perform a specified contract on a lump-sum basis. It was to furnish the material and labor and had the exclusive right to direct the manner and method of doing the work. And it was its duty, and not the duty of the defendant, to furnish its employees a safe place in which to work and proper safeguards against such dangers as might be incident to the work to be done. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; *Bass v. Wholesale Corp.,* 212 N.C. 252, 193 S.E. 1; *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515; *McCraw v. Mills, Inc.,* 233 N.C. 524, 64 S.E. 2d 658; *Wood v. Miller,* 226 N.C. 567, 39 S.E. 2d 608.

None of those conditions which impose liability upon the owner-contractee for injuries sustained by employees of an independent contractor are made to appear. While the manner and method of doing the work adopted by plaintiff may have been attended with great risk, there was nothing inherently dangerous in the work to be done when and if performed in a careful and prudent manner and with due regard to the safety of those who were employed to do it. *Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561.

But we may concede, *arguendo,* that there is evidence of negligence on the part of the defendant. Even so, it clearly appears that plaintiff failed to exercise ordinary care for his own safety, and that such want of due care on his part was at least one of the proximate causes of his fall and resulting injuries.

While there are many detailed facts appearing in the testimony, as is evidenced by the accompanying summary of the testimony, the determinative facts on this question are few and to the point. Plaintiff was a member of the contracting partnership, and it was his duty to furnish adequate facilities for himself and all other employees of his company. Yet he undertook to stand on a three-inch pipe sixteen or seventeen feet above the pavement, with nothing to which he could hold or balance himself except a two-inch upright pipe weighed down at the top by a horizontal pipe seven feet long. While undertaking to balance himself by holding to this slim pipe with his left hand, he reached up and attempted

to apply considerable pressure to the horizontal pipe with a heavy wrench. Whether he fell because the welded joint broke loose or whether his fall caused the welding to give way is not made to appear. In either event the danger attendant upon the manner and method he voluntarily adopted in doing the work should have been apparent to any man of ordinary prudence. The conclusion that the hazard he thus created was at least one of the proximate causes of his fall and resulting injuries is inescapable. *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209; *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337; *Caulder v. Gresham*, 224 N.C. 402, 30 S.E. 2d 312; *Samuels v. Bowers*, 232 N.C. 149, 59 S.E. 2d 787; *Levy v. Aluminum Co.*, 232 N.C. 158, 59 S.E. 2d 632.

We can appreciate the desire of plaintiff to "turn a dollar" on a small contract and the attendant temptation to "cut corners" and assume risks that otherwise would have been avoided, but this forms no basis for holding defendant liable for the unfortunate occurrence which followed.

The judgment entered in the court below is

Affirmed.

GEORGE COMPTON DRAUGHON v. R. E. MADDOX; JAMES DEWEY FOUST, ADMINISTRATOR OF THE ESTATE OF D. F. FOUST, AND ANNIE M. FOUST, ADMINISTRATRIX OF THE ESTATE OF D. F. FOUST, D.B.A. D. F. FOUST LIVESTOCK AUCTION MARKET; STOP AND SHOP STORE, INC.

(Filed 20 May, 1953.)

1. Animals § 1½—

Agreed facts that a cow, unaccompanied by a health certificate, was sold on a public livestock market regulated by staute, and that the purchaser signed a certificate that the animal was for immediate slaughter at a named abattoir in accordance with law, *are held* sufficient to support a finding that the cow was sold for immediate slaughter and for human consumption.

2. Same: Food § 16—

Where a cow is sold for immediate slaughter for human consumption there is an implied warranty that the animal is fit for this purpose, and when it is condemned by the health authorities immediately after slaughter because of a latent disease, the purchaser may recover on the implied warranty in the seller's action for the purchase price.

APPEAL by plaintiff from *Morris, J.*, at November Term, 1952, of CUMBERLAND.

Civil action to recover purchase price of a certain cow sold by plaintiff on the D. F. Foust Livestock Auction Market.

The parties stipulated the facts, and waived a trial by jury, and consented that the judge presiding decide the issues.

The stipulated facts are as follows:

"On March 24, 1952, the plaintiff, George Compton Draughon, purchased a certain 5 or 6 year old holstein cow from Bailey Evans' farm in Cumberland County, took it to his own farm and thereafter, on March 25, 1952, offered it for sale at public auction at the D. F. Foust Livestock Market near Greensboro. On March 26, 1952 the cow in question was slaughtered at the Curtis Brothers, Inc. Abattoir near Greensboro, examined and condemned as unfit for human consumption on the same date by the Guilford County Veterinarian, Dr. D. L. Cooley, upon discovery that the cow had advanced traumatic pericarditis. The high bidder at the sale was the Stop and Shop Store, Inc., at a price of $286.15. Upon condemnation of the cow, the defendant, D. F. Foust Livestock Market stopped payment on check issued in payment of the same, and both the defendant Livestock Market and defendant Stop and Shop Store, Inc. have refused payment for said cow.

"The D. F. Foust Livestock Market is a public livestock market regulated by the statutes of North Carolina. No written or verbal representations were made by the plaintiff either to the Stop and Shop Store, Inc. or the other defendants concerning the condition or health of the cow in question. To all visual appearances the cow in question was healthy. The plaintiff did not know of any defects. He had fed and watered the cow. The bidders at the Livestock Market auctions have opportunity to examine the cows auctioned off before auction sale. In practice, when a sickly looking or 'slow cow' is being auctioned off, the auctioneer states in effect 'Look this cow over carefully for you buy at your own risk' but no such statement was made on the sale of the cow in question. Both the plaintiff and the defendant R. E. Maddox for Stop and Shop Store, Inc. have traded on the Foust Market for several years and are both experienced livestock men. Before the cow in question was moved from the Livestock Market to the Abattoir the Stop and Shop Store, Inc. signed the following certificate: 'This is to certify that I have this date purchased and removed the cattle described by this bill of sale for immediate slaughter at Curtis Brothers Abattoir and will handle said animals in accordance with the law.' "

"No statement was made by either plaintiff or the defendants to the other, nor was there any discussion of the purposes for which the cow was sold or purchased.

"The disease for which this cow was condemned is a disease which would not ordinarily be detected without expert examination by a veterinarian."

The court stated, and answered the issues as follows:

"1. Was there an implied warranty in the sale of the cow that it was fit for human consumption? Answer: Yes.

"2. Was the warranty breached? Answer: Yes.

"3. In what amount, if any, is plaintiff entitled to recover of the defendants? Answer: ....."

And in accordance therewith the presiding judge entered judgment that plaintiff take nothing by this action, and that defendants go hence without day and recover their costs in this action to be taxed by the clerk.

To the signing and entry of the judgment plaintiff excepts, and appeals to Supreme Court, and assigns error.

Thomas H. Williams for plaintiff, appellant.

Smith, Sapp, Moore & Smith and Henry L. Anderson for defendants, appellees.

WINBORNE, J. Defendants base their defense to this action of plaintiff upon the theory that the cow in question, having been sold at a public livestock market, regulated by statute, under the circumstances detailed by the stipulated facts, was sold for immediate slaughter, and for human consumption, G.S. 106-409, and, that, hence, a sale so conducted under such circumstances created an implied warranty by plaintiff, the seller, that the cow was fit for the purpose. There is no suggestion of intentional wrongdoing on the part of any of the parties to the action. Apparently, the condition of the cow was a latent defect,—not subject to detection by observation or superficial examination.

In this connection this Court held in the case of *McConnell v. Jones,* 228 N.C. 218, 44 S.E. 2d 876, in opinion by *Devin, J.,* now *Chief Justice,* that "Although, under the maxim of the common law *caveat emptor,* there is no implied warranty as to quality in the sale of personal property, the seller is nevertheless held to the duty of furnishing property in compliance with the contract, and such as shall be capable of being used for the purpose intended." Supporting decisions of this Court are cited.

And in *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822, 24 A.L.R. 2d 906, *Devin, J.,* again writing, it is said that "A person who sells an article for use in connection with food for human consumption is held in law to have impliedly warranted that it is wholesome, and fit for that purpose."

This is therefore the basic question: Are the facts stipulated sufficient to support finding that the cow was sold for immediate slaughter? When read in connection with the provisions of the statute pertaining to public livestock markets, Article 35 of Chapter 106 of the General Statutes, particularly G.S. 106-409, the facts appear to be sufficient.

It is agreed that in North Carolina a public livestock market, such as that on which the cow in question was sold, is regulated by the public livestock statute. And in Section 106-409, as amended by 1949 Session Laws, Chapter 997, Sec. 2, it is provided that: "No cattle except those for immediate slaughter shall be removed from any public livestock market unless they are accompanied by a health certificate issued by a qualified veterinarian, said veterinarian to be approved by the commissioner of agriculture, showing that such animals are apparently healthy and come directly from a herd all of which animals in the herd have passed a negative test for Bang's disease within twelve months prior to the date of sale, or that said animal or animals have passed a satisfactory test for Bang's disease made within thirty days prior to sale and such other tests and vaccinations as the commissioner of agriculture may require. Every such animal shall be identified by an approved numbered ear tag and description."

Moreover, this section of the statute also provides that: "All cattle removed from any public livestock market for immediate slaughter shall be identified in an approved manner and the person removing same shall sign a form in duplicate showing number of cattle, their description, where same are to be slaughtered or resold for slaughter. Said cattle shall be resold only to a recognized slaughter plant or the agent of same, or to a person, firm or corporation that handles cattle for immediate slaughter only, and said cattle shall be used for immediate slaughter only. No market operator shall allow the removal of any cattle from a market in violation of this section."

It may be inferred that the requirements of the statute were observed, and complied with. Too, the plaintiff and the purchaser had traded on this particular livestock market for several years, and were experienced livestock men. And it may also be inferred that when the cow was offered for sale, unaccompanied by a health certificate, required by the statute, she was offered for sale for immediate slaughter. Furthermore, this inference is supported by the form signed by the purchaser, as required by the statute, and by the fact that the cow was actually slaughtered the next day. Indeed, in *S. v. Lovelace,* 228 N.C. 186, 45 S.E. 2d 48, *Seawell, J.,* referring to Bang's disease among cattle in interstate commerce, pertinently stated: "Where there is no health certificate the regulation recognizes but one stage in the traffic,—from the importer to the slaughter pen."

Due consideration has been given to all authorities cited by appellant, and they are found to be distinguishable from case in hand.

The judgment below is

Affirmed.

STATE v. REID WILSON.

(Filed 20 May, 1953.)

1. Indictment and Warrant § 15—

The Superior Court on appeal from an inferior court has no authority to permit an amendment of the original warrant so as to charge a different offense.

2. Indictment and Warrant § 9: Intoxicating Liquor § 9a—

A warrant which, deleted of surplus words, charges that defendant did unlawfully and willfully possess alcoholic liquors on his licensed premises, the possession of which liquors was not authorized under his license which authorized the sale at retail of beverages as defined in G.S. 18-64 (a) (b), *is held* sufficient to charge the unlawful possession of liquor, and permits the inference that the liquor was nontax-paid.

3. Same: Indictment and Warrant § 15—

Where the warrant upon which defendant was tried in the inferior court is sufficient to charge defendant with the unlawful possession of nontax-paid liquor, the warrant, though inartfully drawn, is sufficiently definite, and may be amended in the Superior Court to charge the offense in proper language.

4. Criminal Law § 78b—

An assignment of error to the refusal of the court to quash the warrant on a ground not advanced during the trial and not ruled on by the trial court, does not present the matter for decision on appeal.

APPEAL by defendant from *Rudisill, J.*, at January Term, 1953, of DAVIDSON.

Criminal prosecution upon warrant signed by "A. L. Parker, Sgt. P. D." on affidavit of "E. R. Secrest, S. H. P." sworn and subscribed before "A. L. Parker, Sgt. P. D." charging that defendant on 29 November, 1952, "did unlawfully and willfully sale, offer for sale, possess, permit consumption, sell, offer for sale, possess, permit the consumption of alcoholic liquors on the licensed premises of his own while acting as a servant, agent or employee of the licensee, the sale and possession of which alcoholic liquors was not authorized under the license which the licensee held authorizing the sale at retail of beverages as defined in Section 18-64 (A) and (B) for consumption on the premises where sold, contrary to the form of the statute" etc., directed "to the chief of police of Lexington, sheriff, constable or other lawful officer of Davidson County" returnable before Davidson County Court—and heard in Superior Court of Davidson County upon appeal thereto by defendant from judgment of the County Court. (Note: The designations A and B of subsections of Section G.S. 18-64 are in fact small letters (a) and (b), and will be so referred to in this opinion.)

Upon the call of the case, the solicitor for the State made motion to amend the affidavit to the warrant so as to charge "that defendant on the 29th day of November, 1952 unlawfully and willfully did have in his possession intoxicating liquors upon which the taxes due the United States and the State of North Carolina had not been paid," and on the second count, further, "on the above date the said Reid Wilson did unlawfully and willfully have intoxicating liquors in his possession for the purpose of sale and did sell illicit liquors," contrary to the form of statute, etc. The amendment was allowed by the court, and defendant objected and excepted, and made special appearance and moved "to quash the warrant." Motion was denied. Defendant then pleaded former jeopardy, —"the case having been formerly tried in a court of competent jurisdiction and this case coming up from a court of competent jurisdiction." Overruled and exception.

Defendant pleaded not guilty.

Upon the trial in Superior Court the State offered evidence tending to show facts from which it may be reasonably inferred that defendant possessed, and directed sale of nontax-paid white whiskey.

Among witnesses put on stand by the State was "E. R. Secrest" who testified that he is a member of the State Highway Patrol. Defendant offered no evidence.

And motions of defendant for judgment as of nonsuit aptly made when the State rested its case, and renewed when he rested, were overruled and defendant excepted.

Verdict: "Guilty of unlawful possession of intoxicating liquor, as charged in the first count of the warrant, and not guilty of unlawful possession for the purpose of sale, as charged in the second count of the warrant."

Judgment: Confinement in common jail of Davidson County for a period of 12 months, assigned to work under the supervision of State Highway and Public Works Commission, as provided by law.

Defendant excepts thereto, and appeals to Supreme Court and assigns error.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

T. S. Wall, Jr., for defendant, appellant.

WINBORNE, J. The first two assignments of error on this appeal may be considered together. Appellant contends that the original warrant is fatally defective in that it fails to charge any criminal offense, and hence may not be amended.

In this connection it is a well established rule of practice in criminal prosecutions in this State that the Superior Court, on appeal thereto from an inferior court, has the discretionary authority to permit an amendment of the warrant on which the prosecution rests. *S. v. Wilson,* 221 N.C. 365, 20 S.E. 2d 273. But a warrant cannot be amended so as to charge a different offense. *S. v. Goff,* 205 N.C. 545, 172 S.E. 407; *S. v. Clegg,* 214 N.C. 675, 200 S.E. 371; *S. v. Brown,* 225 N.C. 22, 33 S.E. 2d 121; *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609, and numerous other cases.

On the other hand, the Attorney-General for the State, while admitting that the warrant is "inartfully drawn," contends that the original warrant charges at least three separate offenses: (1) The unlawful possession of nontax-paid liquor, (2) the unlawful possession for purpose of sale of nontax-paid liquor, and (3) the unlawful sale of alcoholic liquors; and that the amendments simply state the three charges "in more workmanlike language."

Be that as it may, since the jury only found defendant guilty of the offense of unlawful possession of intoxicating liquors, as charged in the first count, that is, of nontax-paid liquor, consideration of these assignments may be confined to that count.

Now, turning to the original affidavit on which the warrant was issued, it seems clear that the phraseology of it, deleted of surplus words, *S. v. Levy,* 220 N.C. 812, 18 S.E. 2d 355, may be divided into two parts. The first part charges that defendant "did unlawfully and willfully . . . possess . . . alcoholic liquors on the licensed premises of his own . . ." And the second part, reading "the . . . possession of which alcoholic liquors was not authorized under the license which the licensee held authorizing the sale at retail of beverages as defined in Section 18-64 (a) and (b) for consumption on the premises where sold," distinguishes the liquors unlawfully possessed from those alcoholic beverages lawfully possessed under license,—thereby making certain the character of liquor of which defendant is charged with unlawful possession. And from this distinguishing character, it may be inferred that the alcoholic liquors unlawfully possessed were nontax-paid,—as the evidence offered upon trial tends to show.

Accordingly this Court holds that the charge is sufficiently definite to withstand the attack made upon it by defendant, and to admit of amendment as allowed,—designated the first count.

Therefore motions of defendant to quash the warrant founded on the original affidavit, and the affidavit as amended, were properly overruled. And in the assignments based upon exceptions thereto error is not made to appear.

The next assignment of error is that "the motion to quash the warrant for the reason that the warrant was issued by A. L. Parker, a Sergeant of the Police Department, which is unconstitutional in North Carolina." However, reference to the record fails to disclose that the motion to quash was based on this ground. And there is nothing in the record to indicate that the court made any ruling in this respect. Defendant in his brief points to the general statute, G.S. 15-18, as authority in support of his position that the Sergeant of the Police Department is not authorized to issue a warrant. However, the Attorney-General calls attention to the fact that the General Assembly has authorized and empowered "The Chief of Police, the Captains and the Sergeants of the Police Department of the Town of Lexington, Davidson County," "to issue warrants and all other criminal process, take affidavits and receive bail in any criminal action coming before the inferior court known as 'The Davidson County Court.'" Section 1 of Chapter 1258 of 1949 Session Laws of North Carolina. Defendant does not refer to this act nor discuss its provisions. Hence the question of the legality, or the constitutionality of the act of the Sergeant of the Police Department in issuing the warrant is not presented, and is not considered.

The motions of defendant aptly made for judgment as of nonsuit were properly overruled. The evidence appears to be sufficient to take the case to the jury, and to support the verdict rendered. And there is nothing in the record to show that defendant was taken unawares.

Other assignments of error are considered, and fail to reveal prejudicial error.

Therefore, in the judgment below, we find

No error.

STATE v. M. D. BENNETT.

(Filed 20 May, 1953.)

1. Conspiracy § 6—

Evidence tending to show an agreement under which an employee of a woodworking plant was to steal doors from his employer and deliver them to defendant's premises at an agreed price per door is sufficient to overrule nonsuit in a prosecution for conspiracy to commit larceny.

2. Criminal Law § 9—

All persons who participate in treason or the commission of misdemeanors, or petit larceny, even though it be a felony, are guilty as principals, the distinction between principals and accessories being made only in respect to felonies generally.

3. Same: Larceny § 3—

In North Carolina all simple larceny, whether felonious or nonfelonious, is made petit larceny by statute, G.S. 14-70, and therefore evidence that defendant procured another to steal doors of a value greatly in excess of one hundred dollars and deliver them to defendant's premises, is sufficient to overrule nonsuit in a prosecution of defendant for larceny, since his participation in petit larceny, even though a felony, constitutes defendant a principal.

4. Criminal Law § 44—

A motion for a continuance is addressed to the discretion of the trial court, and when it appears that the motion was based on the absence of defendant's counsel, but that defendant was nevertheless represented by other counsel who was thoroughly familiar with the case, and who ably represented defendant throughout the trial, the record fails to show abuse of discretion in denying the motion.

5. Criminal Law § 48c—

Where at the time of their admission in evidence and again in the charge, the court instructs the jury that the confessions of codefendants should not be considered against defendant, the admission of the confessions cannot be held for error as to the defendant.

6. Conspiracy § 5—

The testimony of an accomplice relating to matters in furtherance of the common design is competent against a defendant in a prosecution for conspiracy.

7. Criminal Law § 81c (3)—

The admission of evidence which could not have affected the verdict will not be held for reversible error.

8. Criminal Law § 53d—

Where the State's direct evidence is sufficient to warrant conviction, the failure of the court to give specific instructions on the circumstantial evidence is not error.

APPEAL by defendant from *Bone, J.,* and a jury, at June Term, 1952, of CUMBERLAND.

Criminal prosecution upon an indictment charging both a conspiracy to commit larceny and larceny.

For convenience of narration, M. D. Bennett is called the defendant.

The defendant and four others, to wit, Buster Reaves, Mack Rogers, L. W. Smiley, and Hubert Smith were indicted by the grand jury upon two counts at the March Term, 1952, of the Superior Court of Cumberland County. The first count charged them with a conspiracy to steal doors belonging to the Thomasson Plywood Corporation of the value of more than $100.00; and the second count charged them with the actual larceny of doors owned by the Thomasson Plywood Corporation of the value of more than $100.00.

When the case was called for trial at the June Term, 1952, of the Superior Court of Cumberland County, Rogers and Smiley pleaded guilty and testified in behalf of the State against the defendant, Reaves and Smith, who entered pleas of not guilty to both counts.

The only evidence at the trial was that offered by the State. The record as certified to us omits all reference to the fate of Reaves and Smith. It reveals, however, that the petit jury convicted the defendant on both counts; that Judge Bone sentenced the defendant to imprisonment in the county jail on both counts; and that the defendant appealed, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Love for the State.

Malcolm McQueen and James MacRae for defendant, appellant.

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

1. That the trial judge erred in denying the motion of the defendant for a compulsory nonsuit.

2. That the trial judge erred in refusing to grant the defendant a continuance.

3. That the trial judge erred in admitting certain testimony.

4. That the trial judge erred in failing to give the petit jury an instruction on circumstantial evidence.

When the testimony at the trial is interpreted in the light most favorable to the State, it makes out this case:

The Thomasson Plywood Corporation manufactured doors at its plant in the City of Fayetteville. Rogers was foreman of its night shift. On 1 August, 1951, the defendant and Rogers entered into an arrangement whereby Rogers agreed to steal doors from the Thomasson Plywood Corporation and place them upon the premises of the defendant on the Lumberton Road, and whereby the defendant agreed to pay Rogers $3.00 for each stolen door left by him at such place. Between 1 August, 1951, and 29 January, 1952, Rogers stole some 700 doors worth from "$7.00 to $11.00" apiece from the Thomasson Plywood Corporation, and caused Reaves, Smiley and Smith, who were his subordinates, to remove them by motor truck under the cover of darkness from the plant of the Thomasson Plywood Corporation in the City of Fayetteville to the premises of the defendant on the Lumberton Road. The defendant accepted these stolen doors, and paid Rogers the stipulated price for them in cash. On 29 January, 1952, peace officers of Cumberland County found 182 of the stolen doors on the defendant's premises.

Since the State's evidence suffices to show an agreement between the defendant and Rogers to take by larceny doors belonging to the Thomasson Plywood Corporation, it is ample to withstand an involuntary nonsuit on the first count of the indictment. *S. v. Dean,* 35 N.C. 63; *People v. Bond,* 291 Ill. 74, 125 N.E. 740; *Davis v. State,* 197 Ind. 448, 151 N.E. 329.

Under G.S. 14-72 as amended, the larceny of property of the value of more than one hundred dollars is a felony. *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920, 156 A.L.R. 625. The State's testimony makes it crystal clear that the stolen doors were worth several thousands of dollars, and that the defendant was not actually or constructively present at the time and place of their theft. Despite these considerations, the State's evidence is sufficient to support the conviction of the defendant as a principal in the larceny charged in the second count of the indictment. This is true because of the peculiar rule which prevails in North Carolina in respect to persons concerned in the commission of a felonious larceny.

The distinction between principals and accessories is made only in felonies. All persons who participate in treason or in misdemeanors, whether present or absent, are indictable and punishable as principals. 22 C.J.S., Criminal Law, section 81. The rule governing treason and misdemeanors was also applied to petit larceny at common law, although it was a felony. Blackstone: Commentaries on the Laws of England, Book 4, 36; Brill: Cyclopedia of Criminal Law, section 219. In North Carolina all simple larceny, whether felonious or nonfelonious, has been made petit larceny by the ancient statute now codified as G.S. 14-70. As a consequence of this enactment, there can be no accessories to larceny in North Carolina, and the common law rule that all persons who participate in a petit larceny, whether present or absent, are indictable and punishable as principals is established law in North Carolina. *S. v. Whitehurst,* 202 N.C. 631, 163 S.E. 683; *S. v. Overcash,* 182 N.C. 889, 109 S.E. 626; *S. v. Stroud,* 95 N.C. 626; *S. v. Fox,* 94 N.C. 928; *S. v. Tyler,* 85 N.C. 569; *S. v. Gaston,* 73 N.C. 93, 21 Am. R. 459; *S. v. Shaw,* 49 N.C. 440; *S. v. Barden,* 12 N.C. 518. It necessarily follows that the evidence indicating that the defendant procured Rogers to steal the doors is sufficient to overcome the motion for a compulsory nonsuit on the second count. *S. v. Whitehurst, supra; S. v. Overcash, supra.*

The motion of the defendant for a continuance because of the absence of one of his attorneys was addressed to the sound discretion of the trial judge. There is no basis for any contention that the trial judge abused his discretion or jeopardized any right of the defendant in denying the motion. *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5. The defendant was ably represented at the trial by another attorney who was thoroughly familiar with the case and who made a gallant fight in his behalf. *S. v.*

Davis, 203 N.C. 13, 164 S.E. 737; *Shelton v. Commonwealth,* 255 Ky. 745, 75 S.W. 2d 494; *State v. Davis,* 191 Iowa 720, 183 N.W. 314.

The defendant, Reaves and Smith were jointly tried. The trial judge allowed the State to present in evidence as against Reeves and Smith extrajudicial confessions made by them. The receipt of these confessions cannot be held for error as to the defendant. This is true because the trial judge instructed the jury with particularity both at the time of their admission and during the course of the charge that the confessions were not evidence against the defendant, and that they were not to be considered by the jury in any way in determining the charges against him. *S. v. Flynn,* 230 N.C. 293, 52 S.E. 2d 791; *S. v. Murray,* 216 N.C. 681, 6 S.E. 2d 513; *S. v. Walton,* 172 N.C. 931, 90 S.E. 518; *S. v. Cobb,* 164 N.C. 418, 79 S.E. 419; *S. v. Collins,* 121 N.C. 667, 28 S.E. 520; *S. v. Rinehart,* 106 N.C. 787, 11 S.E. 512. The testimony of Rogers, who was a witness for the State, that he paid Reaves, Smiley and Smith for hauling the stolen doors from the plant of the Thomasson Plywood Corporation to the premises of the defendant was relevant to the issue. Rogers made the payments during the existence of the conspiracy and in furtherance of its object. He was not rendered incompetent to testify in behalf of the prosecution by the fact that he was an accomplice of the defendant. *S. v. Jones,* 176 N.C. 702, 97 S.E. 32; *S. v. Shaft,* 166 N.C. 407, 81 S.E. 932, Ann. Cas. 1916C, 627; *S. v. Weir,* 12 N.C. 363. The admission of the evidence of Sheriff Guy that certain building materials on the defendant's premises bore no labels must be deemed harmless to the defense. The exclusion of this evidence could not have resulted in a different verdict. *S. v. Glover,* 208 N.C. 68, 179 S.E. 6.

Since the State's case was based for the most part on direct evidence sufficient in itself to warrant conviction, the trial judge did not err in failing to give the jury specific instructions on circumstantial evidence. *S. v. Hicks,* 229 N.C. 345, 49 S.E. 2d 639; *S. v. Neville,* 157 N.C. 591, 72 S.E. 798. The defendant did not request any such instructions at the trial.

For the reasons given, the trial and judgment will be upheld.

No error.

GERALDINE C. FLYNT, BY HER NEXT FRIEND, J. C. BAREFOOT, JR., PLAINTIFF, v. WILBURN HAROLD FLYNT, DEFENDANT.

(Filed 20 May, 1953.)

1. Judgments § 17b—

An adjudication of the merits of the cause cannot be had until issues of law or of fact have been joined on the pleadings of the parties and the issues thus joined tried in the manner appointed by law, G.S. 1-171, G.S. 1-172, and an adjudication of the merits in favor of a defendant who has raised no issue is a nullity.

2. Pleadings § 25—

Defendant may raise an issue relating to the merits of the cause only by demurrer or answer. G.S. 1-124.

3. Divorce and Alimony § 11—

The ruling of the court upon hearing of a motion for alimony *pendente lite* can have no bearing on the merits, and cannot constitute *res judicata* of the cause of action for divorce.

4. Judgments § 32—

A judgment operates as an estoppel only as to the facts in issue as they existed at the time of its rendition, and does not prevent a re-examination of the same questions between the same parties upon a subsequent date when the facts have changed or new facts have occurred which alter the legal rights or relations of the parties.

5. Divorce and Alimony § 11—

Order denying alimony *pendente lite* on the ground that defendant was then providing plaintiff with adequate support and for that plaintiff had no legal capacity to sue because she had been adjudged mentally incompetent, does not preclude a motion for alimony *pendente lite* in a subsequent action instituted by plaintiff by a next friend, G.S. 1-64, if the fact of support has been altered in the meantime.

6. Abatement and Revival § 6—

When the pendency of a prior action between the parties on the same cause of action does not appear on the face of the complaint, the objection may not be taken by demurrer, and if defendant fails to raise the matter by answer it will be deemed waived. G.S. 1-127, G.S. 1-133, G.S. 1-134.

APPEAL by plaintiff from *Sink, J.*, in Chambers at Greensboro, North Carolina, 14 August, 1952.

These are the facts:

1. The plaintiff Geraldine C. Flynt is the wife of the defendant Wilburn Harold Flynt.

2. On 29 November, 1951, the plaintiff, suing without a guardian or next friend, brought a former action against the defendant in the Superior Court of Guilford County for permanent alimony without divorce under G.S. 50-16. The complaint set forth in detail several grounds for

the relief sought by the plaintiff. The defendant answered, denying the material averments of the complaint and pleading that the plaintiff was insane and consequently had not the legal capacity to sue.

3. The former action was heard by Judge George B. Patton at the April Term, 1952, of the Superior Court of Guilford County on the motion of the plaintiff for alimony pending the action and attorney fees. Judge Patton found as facts that the plaintiff was adjudged to be insane in a proceeding before the Clerk of the Superior Court of Guilford County on 1 March, 1949; that the plaintiff was detained in the State Hospital at Morganton as an insane patient from that time until 11 August, 1949, when she was released on probation and became a member of the household of her mother in San Antonio, Texas; that there has been no adjudication by the hospital authorities or the Clerk of the Superior Court of Guilford County at any time since 1 March, 1949, that the plaintiff has been restored to her sanity; and that "the defendant has been sending various sums of money from time to time to . . . (the) . . . mother of the plaintiff . . . for the support . . . of his said wife . . ." Judge Patton made these conclusions of law on his findings of fact: "The Court is of the opinion that the plaintiff is not entitled to maintain this action in her own name, and . . . even if she were, she is not entitled to alimony *pendente lite* and counsel fees under . . . Section 50-16 of the General Statutes." Judge Patton thereupon made this adjudication: "The motion of the plaintiff for alimony *pendente lite* and counsel fees . . . is hereby denied." The plaintiff did not perfect an appeal from Judge Patton's ruling. No other order has been entered in the former action.

4. Subsequent to these events, to wit, on 16 July, 1952, the plaintiff, suing by a next friend, J. C. Barefoot, Jr., brought this action against the defendant in the Superior Court of Guilford County for permanent alimony without divorce under G.S. 50-16. Barefoot was appointed next friend of the plaintiff, who has no general or testamentary guardian within the State, on the theory that the plaintiff "is . . . under a legal disability to maintain litigation in her own name" because she "was committed to the State Hospital at Morganton . . . by proceeding before the Clerk of the Superior Court of Guilford County on March 1, 1949," and "has not been restored to the rights of which she may have been deprived by said commitment."

5. The complaint in this case is virtually identical with the complaint in the former action. It contains 14 paragraphs, and does not refer in any way to the former action or to Judge Patton's ruling in it.

6. The defendant has not demurred to the complaint in this case or filed any answer to it.

7. The plaintiff applied to Judge Sink by a separate motion in the cause after notice to the defendant for an order awarding her alimony pending this action. The motion does not refer in any way to the former action or to Judge Patton's ruling in it.

8. The defendant responded to this motion with a paper writing entitled "defendant's motion and defendant's answer to plaintiff's motion." This writing contains three paragraphs, sets forth the facts respecting the former action and Judge Patton's ruling in it, concludes that the plaintiff cannot maintain this action because of the pendency of the former action and because Judge Patton's ruling in it constitutes "*res judicata* as between the parties to this action," and prays "that this action be dismissed for . . . the reasons set forth above."

9. When he heard the plaintiff's motion for alimony pending this action and the defendant's counter motion to dismiss this action, Judge Sink made findings of fact consonant with the matters stated above, and entered a final judgment dismissing this action on the specific ground that "the matters and things alleged in the complaint upon which this action is based were decided adversely to the plaintiff" by Judge Patton's ruling in the former action and that as a consequence "the matters and things alleged in the complaint in this action are *res judicata* as between the parties to this action."

10. The plaintiff excepted and appealed, assigning the dismissal of this action as error.

Rollins & Rollins for plaintiff, appellant.
No counsel contra.

ERVIN, J. The Code of Civil Procedure provides, in substance, that no judge shall undertake to adjudicate a litigated cause on its merits until issues of law or fact have been joined on the pleadings of the parties and the issues thus joined have been tried in the manner appointed by law. G.S. 1-171; G.S. 1-172; *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384. The Code specifies, moreover, that the only pleading by which the defendant can raise an issue relating to the merits of a litigated cause is either a demurrer or an answer. G.S. 1-124.

These fundamental provisions of the Code were set at naught in this action in the court below. The defendant did not challenge the legal sufficiency of the complaint by a demurrer. He did not controvert the factual validity of the complaint by an answer. For these reasons, no issue of any character pertaining to the merits of the plaintiff's claim for permanent alimony was before the court for decision on the hearing of this action. The court nevertheless proceeded to render a final judgment for the defendant on the merits of the cause.

In so doing, the court did more than transgress the limits of its judicial powers. It reached an erroneous conclusion respecting the legal effect of Judge Patton's ruling in the former action. Judge Patton merely passed upon the motion of the plaintiff for alimony pending the former action and counsel fees in it. The ruling in the former action has no bearing whatever on the merits of the present action for the very simple reason that the plaintiff's demand for permanent alimony was not involved in any way in the matter there heard and decided. *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53; *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349.

Indeed, the order of Judge Patton denying the plaintiff alimony pending the former action does not necessarily even foreclose the motion of the plaintiff for alimony pending the present action. It is well settled that "the estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties when in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." 50 C.J.S., Judgments, section 712 b.

Judge Patton denied the motion of the plaintiff for alimony pending the former action on this twofold ground: (1) That the plaintiff lacked the legal capacity to prosecute the former action in her own name because of her adjudged mental disability; and (2) that the plaintiff was not entitled to an award of alimony pending the former action at the time of the motion because the defendant was then providing her with adequate support through remittances to her mother. The present action is not subject to the first of these objections for the plaintiff appears in it by a next friend. G.S. 1-64. A judicial adjudication that a husband was supporting his wife in April does not conclusively establish that he was doing likewise in August.

We note, in closing, that the defendant does not seek the abatement of the present action in the mode prescribed by law on the ground that the former action has not been dismissed and that in consequence "there is another action pending between the same parties for the same cause." *McDowell v. Blythe Bros.,* 236 N.C. 396, 72 S.E. 2d 860. The defendant cannot raise this objection by demurrer because the pendency of the former action does not appear on the face of the complaint. G.S. 1-127. In consequence, he will waive the objection unless he takes it by answer. G.S. 1-133; G.S. 1-134. The plaintiff may forestall all controversy on this score by causing the prior action to be dismissed on a voluntary nonsuit. *Allen v. McDowell,* 236 N.C. 373, 72 S.E. 2d 746.

The judgment is

Reversed.

MOSES SAMET AND J. W. SAMET v. BOSTON INSURANCE COMPANY, STAR INSURANCE COMPANY OF AMERICA, AND TRINITY UNIVERSAL INSURANCE COMPANY.

(Filed 20 May, 1953.)

1. Trial § 23a—

The rule that the evidence will be considered in the light most favorable to plaintiff on motion to nonsuit does not relieve plaintiff of the duty of offering some substantial evidence in support of each essential element of his cause of action.

2. Evidence § 51: Appeal and Error § 39e—

The exclusion of expert testimony will not be held for reversible error when it appears that there was no request for a finding and that the court did not find that the witness was an expert, and further that the proffered testimony would have been of no material aid to the party offering it.

3. Insurance § 54—

In this action to recover on a policy of insurance for loss alleged to have been caused by lightning, the evidence tended to show that the building was damaged by the falling in of part of the roof, that the damage was discovered the morning after a violent storm accompanied by lightning and high winds, but whether the building was struck by lightning or whether the damage resulted from high winds and the vibration of the thunder, was left in speculation and conjecture. *Held:* Defendant insurers' motion to nonsuit was properly allowed.

4. Same—

Where, in an action on an insurance policy, the complaint alleges that the loss resulted from the insured building being struck by lightning, recovery may not be had on the theory not alleged in the complaint that the damage resulted from windstorm within the purview of the extended coverage provision of the policy.

5. Pleadings § 24a—

Plaintiff's recovery is to be had, if at all, on the theory of the complaint, and not otherwise.

APPEAL by plaintiffs from *Sharp, Special Judge,* November Civil Term, 1952, of High Point Division of the Superior Court of GUILFORD. Affirmed.

This was an action to recover for loss and damage to plaintiffs' building alleged to have been caused by lightning and covered by insurance policies of defendants.

The plaintiffs in their complaint alleged that the defendants issued their policies of insurance covering plaintiffs' two-story brick building in High Point, insuring against loss by fire and lightning, and that while the policies were in force, to wit, on 16 July, 1951, at about 6 o'clock p.m., the building so insured was "struck and damaged by lightning."

The defendants answered denying that the damage to plaintiffs' building was caused by lightning or that the loss alleged was within the coverage of the policies issued by the defendants.

After hearing the evidence offered by plaintiffs, and at the close of plaintiffs' evidence, the defendants' motion for nonsuit was allowed, and from judgment dismissing the action the plaintiffs appealed.

Crissman & Bencini for plaintiffs, appellants.

Smith, Sapp, Moore & Smith and Stephen P. Millikin for defendants, appellees.

DEVIN, C. J. The plaintiffs' appeal presents the question of the propriety of the judgment of involuntary nonsuit rendered by Judge Sharp at the close of plaintiffs' evidence.

In determining this question we are admonished by correct rules of appellate practice to consider the evidence in the light most favorable for the plaintiffs, but observance of this rule does not relieve the court of the duty of requiring that the plaintiffs offer some substantial evidence to support the allegations of the complaint.

The plaintiffs have alleged and staked their action upon the allegation that their building was struck and damaged by lightning. Conceding that no eye saw the lightning strike the building, the plaintiffs nevertheless bring the case here for review on the theory that they have offered circumstantial evidence sufficient to survive a nonsuit and to carry the case to the jury that the damage to their building was in fact caused by lightning.

We have examined the evidence set out in the record, and, without undertaking to quote the testimony, we reach the conclusion that it fails to show more than a possibility or to furnish more than material for conjecture as to the cause of the damage to plaintiffs' building. It does not measure up to that degree of "reasonable certainty as to probabilities arising from a fair consideration of the evidence" that would require submission of the issue to the jury. *Mfg. Co. v. R. R.*, 233 N.C. 661, 65 S.E. 2d 379. In the expressive language of *Justice Brogden* failure to apply this rule "would unloose a jury to wander aimlessly in the fields of speculation." *Poovey v. Sugar Co.*, 191 N.C. 722, 133 S.E. 12; *Mfg. Co. v. R. R.*, 233 N.C. 661 (670), 65 S.E. 2d 379; 32 C.J.S. 1116.

The material facts shown by plaintiffs' evidence may be briefly summarized as follows: On the evening of 16 July, 1951, there was a sudden violent storm, accompanied by lightning and thunder and a downpour of rain, lasting about 20 or 30 minutes. One witness thought there must have been a "cloudburst" of rain, and there were gusts of wind of unusually high velocity. Another witness who had been at work in a building

150 feet from plaintiffs' building, and left in a truck about the time the rain began, testified that before he left he saw a lightning flash and felt the vibration from it and the thunder that followed; that he heard a fire alarm, or bell from a fire truck, from a building across the street; that when he left he drove along the street by the plaintiffs' building and observed no sign of damage. The next morning about 7:30 a.m. it was discovered that a part of the roof of plaintiffs' two-story building (100 by 45 feet) had collapsed, and had broken through the second floor and deposited on the first floor a mass of splintered and broken timbers. Between 50 and 75 feet of the roof at the rear, to the width of 45 feet, had fallen in. This part of the roof sloped to the rear. According to a witness it appeared as if some force had struck the roof and "just pushed it through the second floor and on down to the first floor," and a lot of water had come in there. The roof was of five-ply felt, with asphalt and gravel, and it was estimated the roof weighed 500 or 600 pounds per 100 square feet. There were some tall trees near the building on the west side, and an electric power line strung on poles paralleled the east side. The building was equipped with electric wiring under the roof, metal flashing and metal downspout.

Plaintiffs noted exception to the ruling of the court in excluding the opinion evidence of the witness Murray White. This witness, a local insurance agent, had observed the storm from a distance of a quarter of a mile from plaintiffs' building, and saw the building the following day. He had studied physics at college, had kept up his studies, and as an insurance agent had investigated losses due to lightning. He was tendered by plaintiffs as an "expert in the field of damage by the elements." The defendants' objection was sustained. The court did not find he was an expert, and there was no request that the court do so. Stansbury, sec. 133; *LaVecchia v. Land Bank,* 218 N.C. 35 (41), 9 S.E. 2d 489; *Aydlett v. By-Products Co.,* 215 N.C. 700, 2 S.E. 2d 881; *Lumber Co. v. R. R.,* 151 N.C. 217, 65 S.E. 920. This witness, if permitted to give evidence as an expert would have testified that in his opinion "the damage to this particular building was caused as an indirect result of lightning in a very severe storm . . . And that lightning of a terrible degree of velocity occurred and as a result there was a vacuum created and this vacuum was coming together which caused an unusually high vibration called thunder and because of the impact of that vibration on this roof plus the wind velocity at the time caused the sudden pressure or force of a downward thrust on that roof and caused it to go in at that particular point." When asked if he thought the lightning itself directly struck the building he answered "No, I could see no visible evidence where lightning had made contact. It could have been but I could see no evi-

dence." It is not perceived that this witness' testimony would have been of material help to the plaintiffs. The court's ruling is upheld.

The evidence in this case leaves the matter in the realm of conjecture and is insufficient to support plaintiffs' allegation that the building was struck and damaged by lightning.

Plaintiffs call attention to the fact that in the insurance policies sued on the building was insured against direct loss by fire and lightning and that there was extended coverage to include loss from windstorm. But in their complaint the plaintiffs alleged only that the loss resulted from the building being struck by lightning. As was said in *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470, "Plaintiff's recovery is to be had, if at all, on the theory of the complaint and not otherwise," and in *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182, "If the plaintiffs are to succeed at all, they must do so on the case set up in their complaint." *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14.

We have examined the cases cited by plaintiffs and find they are distinguishable and not controlling on the evidence offered in this case.

The judgment of nonsuit is

Affirmed.

STATE v. CLARENCE EVANS.

(Filed 20 May, 1953.)

Criminal Law §§ 79, 80b—

Failure to file brief within the time allowed works an abandonment of the assignments of error, limiting the review to errors appearing on the face of the record, and when no error appears on the face of the record, the appeal will be dismissed on motion of the Attorney-General. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Phillips, J.,* and a jury, at Regular January Criminal Term, 1953. BUNCOMBE.

Criminal prosecution on an indictment containing three counts: First count charges a felonious breaking and entry into a storehouse, etc., with intent to steal; second count charges larceny of personal property of the value of $257.50; and third count charges receiving the said property knowing it to have been stolen. The jury returned a verdict of guilty on the first two counts in the indictment, and from judgment imposing sentences on both counts to run consecutively, the defendant appealed *in forma pauperis.* The affidavit upon which the order for appeal *in forma pauperis* was based, and the order of the presiding judge permitting him to appeal *in forma pauperis* are in proper form, and made in apt time.

STATE *v.* EVANS.

The Regular January Criminal Term, 1953, of Buncombe Superior Court convened 19 January. On 20 January the defendant was tried, found guilty by the jury, and sentenced by the court. On 30 January, 1953, the defendant through his counsel, Sanford W. Brown and William V. Burrow, filed in this Court the record proper and a petition for a writ of *certiorari* in regular form stating that on 22 January, 1953, in open court he appealed to the Supreme Court and on said date was authorized by the presiding judge to appeal *in forma pauperis;* that the court allowed the defendant thirty days in which to serve the case on appeal and the State twenty days thereafter in which to serve countercase or exceptions; that by the Rules of the Supreme Court appeals from the 19th Judicial District to the Spring Term, 1953, of the Supreme Court must be docketed not later than 10:00 a.m. 20 January, 1953, and that it is impossible for this defendant in the exercise of due diligence to docket his appeal within said time, and that his appeal shows a meritorious defense. This Court allowed the petition for *certiorari* 10 February, 1953; the Clerk of the Supreme Court on 11 February, 1953, notified Sanford W. Brown, counsel for the defendant, that petition had been allowed the day before; on 20 March, 1953, the said Clerk wrote Sanford W. Brown asking when he would send the case on appeal; on 1 April, 1953, the said Clerk notified Sanford W. Brown that the Court had set this case for argument at the end of the call of cases from the 8th and 13th Districts, to wit, 28 April, 1953. Appeals to be heard that week had to be docketed by 10:00 a.m. 7 April, 1953, and the appellant's brief had to be filed by noon 14 April, 1953.

The agreed case on appeal was filed in the office of the Clerk of the Superior Court of Buncombe County on 16 April, 1953; it does not show when it was agreed upon by the solicitor and counsel for the defendant. The agreed case on appeal was docketed in this Court on 17 April, 1953, and appellant's brief was filed in this Court on 20 April, 1953.

On 17 April, 1953, a few minutes after the agreed case on appeal was docketed, the Attorney-General made a motion that the defendant having failed to file the case on appeal in this Court on time, and no error appearing on the face of the record, that the judgment of the trial court be affirmed.

On 28 April, 1953, the Attorney-General moved, pursuant to Rule 28 of Rules of Practice in the Supreme Court, that the appeal and case be dismissed, for the appellant's brief was filed too late. The Attorney-General has filed no brief.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Sanford W. Brown and William V. Burrow for defendant, appellant.

PARKER, J. This appeal should have been docketed in this Court on or before 10:00 a.m. Tuesday, 7 April, 1953, and appellant's brief filed by noon 14 April, 1953, according to the order allowing the petition for writ of *certiorari.* Rules 5 and 28 of the Rules of Practice in the Supreme Court, 233 N.C. 749 and 750, *et seq. Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *S. v. Harrell,* 226 N.C. 743, 40 S.E. 2d 205.

"We have held in a number of cases that the Rules of this Court, governing appeals, are mandatory and not directory . . . The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly." (Citing authority.) *S. v. Moore,* 210 N.C. 459, 187 S.E. 586. It is said in *S. v. Presnell,* 226 N.C. 160, 36 S.E. 2d 927, these rules have been uniformly enforced since the decision in *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562.

While the agreed statement of the case on appeal was filed in this Court too late, yet it was filed a few minutes before the Attorney-General moved to affirm the judgment of the lower court. However, the appellant's brief, which should have been filed by noon 14 April, 1953, was filed in this Court on 20 April, 1953. The Attorney-General makes a motion to dismiss the appeal and to affirm the judgment below for failure of the defendant appellant to file his brief on time, pursuant to Rule 28 of the Rules of Practice in the Supreme Court. Conceding that the Attorney-General made his motion too late to affirm the court below for failure of the defendant appellant to file the agreed statement of the case on appeal in time, *Mitchell v. Melton,* 178 N.C. 87, 100 S.E. 124; McIntosh N. C. Prac. and Proc., Sec. 688, yet the filing by the defendant appellant of his brief too late works an abandonment of the assignments of errors, except those appearing on the face of the record, which are cognizable *ex mero motu. S. v. Robinson,* 214 N.C. 365, 199 S.E. 270.

"The defendants made a motion to dismiss plaintiffs' appeal 'that under Rule 28 of Practice in the Supreme Court, plaintiff appellants were required to file their brief by noon 13 February, 1937, and they failed to do so until 19 February 1937.' The plaintiffs' appeal is dismissed under the rule." *Wolfe v. Galloway,* 211 N.C. 361, at p. 365, 190 S.E. 213. See also *In re Bailey,* 180 N.C. 30, 103 S.E. 896; *Phillips v. Junior Order,* 175 N.C. 133, 95 S.E. 91.

No error appears on the face of the record, and the sentences passed against the defendant on each count were within the limits authorized by law. The judgments entered below are

Affirmed and appeal dismissed.

STATE v. PAUL ELMER HILL.

(Filed 20 May, 1953.)

1. Criminal Law § 79—

Exceptions not set out in the brief, or which are set out in the brief but are supported by no reason or argument, will be taken as abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 81c (2)—

Where, in a single instance in stating the State's contentions, the court charges that "the court says and contends . . ." but the *lapsus linguae* is immediately brought to the court's attention and corrected by the court, the inadvertence will not be held for prejudicial error.

3. Receiving Stolen Goods § 8—

In a prosecution for feloniously receiving stolen goods, the jury is not required to fix the value of the goods in its verdict. G.S. 14-71.

APPEAL by defendant from *McLean, Special Judge,* November Term, 1952, of DAVIDSON.

This is a criminal prosecution upon an indictment charging the defendant with larceny and receiving.

The State offered evidence to the effect that Otis Lindsey Michael and Guy Stanley Jordan stole eight rolls of copper wire from Davidson Electric Membership Corporation about 15 August, 1952, and hid it in the bushes in Hotchkiss Bottom on the backwaters of High Rock Lake; that each roll weighed approximately 200 pounds; that the wire stolen ranged in price from $34.18 to $37.00 per hundred pounds; that the defendant Hill did not participate in the theft of the wire but assisted in chopping it up and in burning off the insulation in an effort to make it difficult to identify; and that the defendant Hill carried the chopped up wire in his car to Salisbury, N. C., and sold it to a junk dealer.

Sam Swartz, the junk dealer, testified that he bought 238½ pounds of copper wire from the defendant Hill on 26 August, 1952, and paid him 17c a pound for it; that the wire looked like it had been chopped into small pieces and had been burned; that he later purchased 338 pounds of wire from the defendant in the same condition and for which he paid him 18c a pound; that when Hill sold this wire to him, he said his name was Otis Lindsey.

The jury returned a verdict of "guilty of receiving as charged in the bill of indictment," and from the judgment pronounced thereon the defendant appealed, assigning error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Gerald F. White, Member of Staff, for the State.

Phillips & Bower for defendant, appellant.

DENNY, J. The defendant does not bring forward the assignment of error based on his exception to the failure of the court below to sustain his motion for judgment as of nonsuit. In fact, in his brief, he brings forward and discusses only two of his six assignments of error.

Exceptions in the record not set out in the appellant's brief, or when set out therein, if no reason or argument is stated, or authorities cited in support thereof, will be taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544.

The defendant assigns as error the following portion of his Honor's charge: "So the Court says and contends that your verdict upon this evidence should be that of guilty as charged in the bill of indictment."

According to the record, while his Honor was giving a summation of the State's contentions and was repeatedly beginning sentences with the prefaced clause, "The State contends," in one sentence by a slip of the tongue he inadvertently said, "So the Court says and contends . . ." The Solicitor called the inadvertence to his Honor's attention and he immediately corrected it; and we perceive no prejudicial harm as having come to the defendant in this respect. *S. v. Rogers,* 216 N.C. 731, 6 S.E. 2d 499; *S. v. Brooks,* 225 N.C. 662, 36 S.E. 2d 238; *S. v. Deaton,* 226 N.C. 348, 38 S.E. 2d 81.

The defendant in his fifth assignment of error, contends that the jury in its verdict, should have fixed the value of the stolen property.

The indictment is under G.S. 14-71, and not under G.S. 14-72. It is provided in the latter statute that if the value of the stolen property be in doubt the "jury shall, in the verdict, fix the value of the property stolen." Here the indictment charged the defendant with knowingly and feloniously receiving stolen goods of the value of $210.05. And the verdict of "guilty as charged in the bill of indictment" necessarily included a finding beyond a reasonable doubt that the defendant knowingly and feloniously received the stolen goods as charged in the bill of indictment. The verdict is amply supported by the evidence. In fact, according to the evidence, the value of the wire received by the defendant before it was cut up and burned, was worth substantially more than the value set out in the bill of indictment. The evidence further tends to show that the defendant helped to destroy the value of the wire. And after it was cut up and the insulation burned off, he received more than $100.00 for it as junk.

In any event, in a prosecution under G.S. 14-71, the jury is not required to fix the value of the stolen goods in its verdict. *S. v. Morrison,* 207 N.C. 804, 178 S.E. 562. This assignment of error is without merit.

We find no prejudicial error in the trial below, and the judgment will be upheld.

No error.

STATE v. CARL L. BOWEN.

(Filed 20 May, 1953.)

Constitutional Law § 32: Criminal Law § 56—

Where a prosecution for assault and battery with a deadly weapon is transferred to the Superior Court from the Recorder's Court upon defendant's demand for a jury trial, initial trial in the Superior Court upon the original warrant is a nullity and the judgment will be arrested on appeal to the Supreme Court.

APPEAL by defendant from *McLean, Special Judge,* August Term, 1952, of DURHAM. Judgment arrested.

The defendant was charged in the warrant in the Recorder's Court of Durham County with the criminal offense of assault and battery with a deadly weapon. Upon request of the defendant for jury trial, the case was transferred to the Superior Court of Durham County.

In the Superior Court the defendant was put to trial on the warrant, found guilty by the jury and sentenced by the judge. Defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton for the State.

Edwards & Sanders for defendant, appellant.

PER CURIAM. In this Court the defendant moves in arrest of judgment. The Attorney-General concedes error in the judgment for the reason set out in *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

The motion in arrest of judgment is allowed, and the case remanded to the Superior Court of Durham County for trial upon a bill of indictment or for such other disposition as the law provides. *S. v. Williams, ante,* 436, 75 S.E. 2d 703; *S. v. Bailey, ante,* 273, 74 S.E. 2d 209; *S. v. Pitt, ante,* 274, 74 S.E. 2d 609.

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ANALYTICAL INDEX.

ABANDONMENT.

§ 1. Nature and Essentials of Abandonment of Property.

Mere failure to list and pay taxes on an interest in realty does not alone constitute conclusive evidence of abandonment of such interest. *Alexander v. Sand Co.*, 251.

ABATEMENT AND REVIVAL.

§ 5½. Abatement for Pendency of Prior Action.

Judgment of nonsuit in another state with limited prejudice to renew action only in same county of that state cannot deprive plaintiff from instituting action in this State on the transitory cause. *Howle v. Express, Inc.*, 667.

§ 6. Procedure to Raise Question of Pendency of Prior Action.

When the pendency of a prior action between the parties on the same cause of action does not appear on the face of the complaint, the objection may not be taken by demurrer, and if defendant fails to raise the matter by answer it will be deemed waived. *Flynt v. Flynt*, 754.

ACTIONS.

§ 2b. Persons Who May Sue—Nonresidents.

Nonresident may sue in this State as one of privileges guaranteed by Federal Constitution. *Howle v. Express, Inc.*, 667.

ADVERSE POSSESSION.

§ 1. Acquisition of Title by Adverse Possession in General.

Adverse possession for seven years under color of title, G.S. 1-38, or for twenty years without color of title, G.S. 1-40, ripens title in the possessor. *Newkirk v. Porter*, 115.

§ 2. Presumption of Title Out of State.

Where the State is not a party to the action, title is conclusively presumed to be out of the State. *Sessoms v. McDonald*, 720.

§ 3. Actual, Hostile and Exclusive Possession in General.

Adverse possession sufficient to ripen title in the possessor must be actual, open, visible, notorious, continuous and hostile to the true owner's title and to all persons for the full statutory period. *Newkirk v. Porter*, 115.

§ 5. Known and Visible Lines and Boundaries.

A deed inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative to fix known and visible lines and boundaries as a basis for a claim of adverse possession for twenty years. *Powell v. Mills*, 582.

§ 6. Continuity of Possession.

Claimant's possession must be continuous and uninterrupted for the full statutory period in order to ripen title in him, since if there is a break in his possession, the constructive possession of the true owner interferes and destroys the effectiveness of the prior possession. *Newkirk v. Porter*, 115.

ADVERSE POSSESSION—*Continued.*

In order to ripen title by adverse possession, the possession must be continuous, and isolated acts of possession, no matter how adverse, are insufficient for this purpose. *Sessoms v. McDonald*, 720.

§ 7. Tacking Possession.

The requirement of continuity of possession does not mean that one person must be in possession for the full statutory period, since the possessor may tack his possession with the possession of any person or persons with whom he is in privity, including the possession of his grantor when the deed embraces the property in dispute, or the possession of his ancestor from whom his title is cast. *Newkirk v. Porter*, 115.

Where the description in the grantee's deed does not embrace the land in dispute, the grantee ordinarily is not entitled to tack the possession of his grantor, since in such instance the grantee's possession is generally independent of the deed and is adverse to his grantor as well as all other persons. *Ibid.*

Plaintiff offered in evidence a deed to his father registered more than twenty years prior to the institution of the action, and trustee's deed to the purchaser at foreclosure, executed less than seven years prior to the institution of the action, and deed from such purchaser to plaintiff. *Held:* The failure of evidence of a transfer of the legal title by plaintiff's father to the trustee creates a *hiatus*, so that the evidence establishes continuity of possession only from the date of the execution of the trustee's deed, which, being less than seven years, is insufficient to be submitted to the jury either upon a claim of adverse possession for twenty years or for seven years under color. *Ibid.*

Where one of the heirs goes into adverse possession of a tract of land, but the ancestor dies before such possession has been held for twenty years, such possession prior to the ancestor's death may not be tacked to the heir's possession subsequent to the ancestor's death, and such heir's possession for less than twenty years subsequent to the ancestor's death does not ripen title in him. *Wilson v. Wilson*, 266.

§ 9. Color of Title.

A deed constitutes color of title only to the land designated and described in it, and the party claiming under a deed as color of title must by proof fit the description in the deed to the land it covers. *Powell v. Mills*, 582.

A deed which is inoperative because the land intended to be conveyed is incapable of identification from the description therein is inoperative as color of title. *Ibid.*

While the grantee in an unregistered deed may acquire title to the premises by adverse possession for twenty years, such possession is confined to the land actually occupied, since in such instance there is no claim under color of title. *Sessoms v. McDonald*, 720.

§ 13g. Adverse Possession Against Remaindermen.

Ordinarily possession is not adverse to remainderman until falling in of life estate. *Walston v. Applewhite & Co.*, 419.

§ 16. Pleadings.

Where the only color of title set up in the complaint is a deed executed less than seven years before the institution of the action, the complaint cannot state a cause of action for the acquisition of title by adverse possession under color of title. *Washington v. McLawhorn*, 449.

APPEAL AND ERROR—*Continued.*

§ 19. Sufficiency of Evidence and Nonsuit.

Evidence of continuous possession by using land for purposes for which it was ordinarily susceptible *held* sufficient. *Sessoms v. McDonald*, 720.

ANIMALS.

§ 1½. Sale of Domestic Animals.

Agreed facts that a cow, unaccompanied by a health certificate, was sold on a public livestock market regulated by statute, and that the purchaser signed a certificate that the animal was for immediate slaughter at a named abattoir in accordance with law, are *held* sufficient to support a finding that the cow was sold for immediate slaughter and for human consumption. *Draughon v. Maddox*, 742.

And purchaser could recover on implied warranty when latent disease rendered cow unfit for human consumption. *Ibid.*

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

A matter not presented in or decided by the lower court is not before the Supreme Court on appeal. *R. R. v. R. R.*, 88.

The jurisdiction of the Supreme Court is derivative and when the court below has no authority to enter the order from which the appeal is taken, the Supreme Court has no jurisdiction to entertain the appeal on its merits. *Lovegrove v. Lovegrove*, 307.

In the absence of a ruling by the lower court upon a particular matter, the Supreme Court on appeal may not determine the question, since in such instance it has no original jurisdiction. *Trust Co. v. Waddell*, 342; *Bizzell v. Bizzell*, 535.

§ 3. Parties Who May Appeal.

The party who, under the terms of the judgment construed in the light of the record, is required to suffer the loss in suit, is the party aggrieved, and has the right to appeal. *Coach Co. v. Coach Co.*, 697.

§ 6b. Time of Objecting and Entering Exception.

Objection and exception to a contention not supported by the evidence should be taken at the time such contention is asserted, and when the court does not submit such contention to the jury, objection thereto cannot be raised by an exception to an excerpt from the charge in which the court, at the instance of appellant, cautions the jury that there was no evidence to support the contention. *Karpf v. Adams*, 106.

§ 6c (1). Necessity for Objections and Exceptions, and Matters Cognizable Ex Mero Motu.

Supreme Court will take cognizance of error in charge in stating contention of law precluded by public policy notwithstanding absence of objection. *McLean v. McLean*, 122.

The Supreme Court will take judicial notice of a defect of jurisdiction *ex mero motu*. *Lovegrove v. Lovegrove*, 307; *Ellison v. Hunsinger*, 619.

APPEAL AND ERROR—*Continued.*

§ 6c (2). Exceptions to Judgment or to Signing of Judgment.

Where the findings are insufficient to support the judgment entered, an exception to the judgment must be sustained, the judgment reversed, and the cause remanded for further proceedings. *Williams v. Aldridge Motors*, 352.

A general exception to the judgment presents for review the single question whether the facts found support the judgment. *In re Appeal of Caldwell*, 600.

§ 6c (3). Exceptions to Findings of Fact.

An exception to the failure of the court to make certain specific findings in favor of appellant is untenable when the record discloses that appellant made only a general request that the court find the facts and made no request that the court make any specific findings. *Griffin v. Griffin*, 404.

§ 6c (5). Objections and Exceptions to Charge.

An exception to an excerpt from the charge does not ordinarily challenge the omission of the court to charge further on the same aspect of the case. *Karpf v. Adams*, 106.

§ 6c (6). Requirement That Misstatement Be Brought to Trial Court's Attention.

Where a party is not satisfied with the statement by the court of his contention that there was no evidence to support a contention of the adverse party, he should request further instructions on the point at the time. *Karpf v. Adams*, 106.

While ordinarily a misstatement of contentions must be brought to the court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it. *McLean v. McLean*, 122.

§ 8. Theory of Trial in Lower Court.

An appeal will be determined in accordance with the theory of trial, and therefore where the case is tried upon the theory of adverse possession, the cause may not be retained on the theory of a processioning proceeding. *Newkirk v. Porter*, 115.

An appeal will be determined in accordance with the theory of trial in the lower court. *Parrish v. Bryant*, 256.

§ 9. Appeal and Appeal Entries.

Where there is no appeal from judgment dismissing the action as to one defendant for failure of service of process, plaintiff may not later contend that the judge was without authority to dismiss the action because there was an outstanding valid *alias* summons at the time the ruling was made. *Foster v. Holt*, 495.

§ 10b. Service of Case on Appeal.

The rules requiring service to be made of case on appeal within the allotted time are mandatory, and when appellant fails to serve case on appeal within the time allotted there is no case on appeal. *Respass v. Respass*, 310.

§ 12. Appeals in Forma Pauperis.

The requirements of G.S. 1-288 relating to appeal *in forma pauperis* are mandatory and jurisdictional, and failure to comply with the statutory requirements necessitates dismissal. *Dobson v. Johnson*, 275.

APPEAL AND ERROR—*Continued.*

§ 16. Time for Docketing of Appeals in Supreme Court.

An appeal from a judgment rendered in the Superior Court prior to the beginning of the Fall Term of the Supreme Court must be taken to the Fall Term of the Supreme Court, and the cause docketed twenty-one days prior to the call of the district to which it belongs, and failure to docket within the time prescribed necessitates dismissal, since the rule is mandatory. Rule of Practice in the Supreme Court No. 5. *In re De Febio*, 269.

§ 22. Conclusiveness and Effect of Record.

The record imports verity, and the Supreme Court is bound thereby. *Respass v. Respass*, 310.

§ 29. Abandonment of Exceptions by Failure to Discuss Same in the Brief.

Exceptive assignments of error not brought forward in the brief, as well as those brought forward in the brief but in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court 28. *Karpf v. Adams*, 106.

Assignments of error not brought forward in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court 28. *Dowdy v. R. R.*, 519; *Beck v. Voncannon*, 707.

§ 31b. Dismissal for Want of Case on Appeal.

Failure to have statement of case on appeal does not in itself work a dismissal, but the Supreme Court may review the record proper for errors appearing upon its face. *Respass v. Respass*, 310.

§ 37. Scope and Extent of Review.

On appeal from the denial of one defendant's demurrer to the cross-action of his codefendant, the plaintiff is not a party to the appeal, and the complaint is not subject to demurrer *ore tenus* in the Supreme Court. *Taylor v. Press Co.*, 551.

§ 38. Presumptions and Burden of Showing Error.

Appellant has the burden not only of showing error but also that the alleged error was material and prejudicial, since verdicts and judgments are not to be set aside for mere error and no more. *Perkins v. Langdon*, 159; *White v. Price*, 347; *Harris v. Burgess*, 430; *Freeman v. Preddy*, 734.

§ 39c. Error Harmless Because Appellant Not Entitled to Relief.

Where appellant is not entitled to relief on any aspect of the record, as when the court would have been fully justified in giving a peremptory instruction or directing a verdict against him on the determinative issue or issues, any error committed during the trial will be deemed harmless. *Freeman v. Preddy*, 734.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Exception to the admission of evidence will not be sustained when it appears that evidence of similar nature was admitted at the trial without objection. *White v. Price*, 347.

An assignment of error to the exclusion of testimony will not be sustained when appellant fails to show that the excluded testimony was competent. *Lee v. R. R.*, 357.

The exclusion of expert testimony will not be held for reversible error when it appears that there was no request for a finding and that the court did not find that the witness was an expert, and further that the proffered testimony would have been of no material aid to the party offering it. *Samet v. Ins. Co.*, 758.

§ 39f. Harmless and Prejudicial Error in Instructions.

A technical inaccuracy in the charge will not be held for reversible error when it could not have prejudiced appellant. *Young v. Mica Co.*, 644.

§ 40d. Review of Findings of Fact.

The findings of fact of the trial court are conclusive on appeal when supported by competent evidence. *Coach Co. v. Coach Co.*, 697.

Where the findings of fact of the trial court are supported by competent evidence they will not be disturbed, and the fact that some incompetent evidence may also have been admitted cannot be held prejudicial. *Board of Managers v. Wilmington*, 179.

The rule that, nothing else appearing, it will be presumed that the judge found facts sufficient to support the judgment entered, does not apply when it is clearly apparent upon the record that the court acted under an erroneous conception of the applicable law. *Trust Co. v. Waddell*, 342.

§ 40f. Review of Orders on Motions to Strike.

The denial of a motion to strike certain portions of the complaint will not be disturbed on appeal when appellant has not been harmed or prejudiced thereby. *Ledford v. Transportation Co.*, 317.

§ 40i. Review of Judgments on Motions to Nonsuit.

Nonsuit will not be granted on appeal even though the record evidence is insufficient when the court below has denied the motion upon an erroneous conclusion as to the legal effect of the evidence introduced, since except for such erroneous ruling plaintiff might have offered evidence sufficient to withstand the motion. *Cherry v. Warehouse Co.*, 362.

§ 50. Remand.

Where the agreed statement of facts is insufficient to enable the Court to determine the questions presented by the appeal, the cause must be remanded. *Ellison v. Hunsinger*, 619.

Where parties necessary for a final determination of the cause are not parties of record, the cause will be remanded. *Ibid.*

§ 51b. Doctrine of Stare Decisis.

The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed, under the doctrine of *stare decisis*, except for most cogent reasons. *Williams v. Hospital*, 387.

§ 51c. Construction and Interpretation of Decisions of Supreme Court.

A decision of the Supreme Court must be interpreted in the light of the facts of the case in which it is rendered and the questions of law therein presented for decision. *Biddix v. Rex Mills*, 660.

ARREST AND BAIL.

§ 3. Resisting Arrest.

In a prosecution for resisting arrest, the failure of the State to introduce evidence tending to prove the validity of the warrant of arrest does not justify nonsuit when defendant does not challenge the validity of the warrant, since, in the absence of a showing to the contrary, it will be presumed that the warrant and order of arrest were legally adequate. *S. v. Honeycutt*, 595.

In this prosecution for resisting arrest, the failure of the court to charge that the jury must be satisfied beyond a reasonable doubt that the arresting officer had in his possession a valid warrant of arrest *held* not reversible error in view of the theory of trial in the lower court, the validity of the warrant not having been challenged during the trial. *Ibid.*

ASSAULT.

§ 8a. Elements and Essentials of Criminal Assault.

In order to constitute a criminal assault there must be an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. *S. v. Ingram*, 197.

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant, a man over eighteen years of age, drove his automobile slowly along a public highway and "leered" at prosecutrix as she was walking along a dirt road some distance away, that as she was passing through a small wooded area, she heard his motor stop and, although defendant was not then in sight, she ran some 215 feet until she cleared the woods, and then resumed walking, that she then saw defendant walking fast across some cultivated ground 65 or 70 feet away, that defendant stopped and that she continued walking to her destination, *is held* insufficient to be submitted to the jury in a prosecution under G.S. 14-33, since there is no evidence of any overt act, threat of violence, or offer or attempt to do immediate bodily injury to prosecutrix. *S. v. Ingram*, 197.

§ 14b. Instructions.

Where defendant in a prosecution for assault relies upon a plea of self-defense, an instruction to the effect that defendant would be guilty if he struck the prosecuting witness and committed an assault upon him as defined by the court, without reference or qualification as to his plea, must be held for prejudicial error notwithstanding later instructions pertaining to the law of self-defense, especially when the erroneous instruction is thereafter again repeated. *S. v. Messimer*, 617.

§ 15. Verdict and Judgment.

Simple assault is misdemeanor punishable by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days. *S. v. Norman*, 205.

AUTOMOBILES.

§ 5. Sale and Transfer of Title. (Lien of mortgage see Chattel Mortgages.)

Whether plaintiffs were *bona fide* purchasers without notice that car had not been paid for by original purchaser *held* for jury. *Motor Co. v. Wood*, 318.

AUTOMOBILES—*Continued.*

§ 8a. Due Care in General.

The operator of a motor vehicle is under duty in the exercise of due care to keep his vehicle under control and to maintain a proper lookout to avoid collision with persons or vehicles, he being under duty to anticipate the presence of others on the highway and to see what he should see in the exercise of due care. *Adams v. Service Co.*, 136; *Garner v. Pittman*, 328.

§ 8d. Parking on Highway.

Plaintiff's contributory negligence in parking on highway *held* for jury. *Parrish v. Bryant*, 256.

Allegations to the effect that defendant's car was parked in the daytime on the hardsurface of the highway and left unattended in violation of statute, that plaintiff was forced to stop his car behind the parked car because of on-coming traffic, and that another car then rammed into the back of plaintiff's car, resulting in the injury in suit, *is held* insufficient to state a cause of action against defendant, and defendant's demurrer was properly sustained. *Hooks v. Hudson*, 695.

§ 8e. Backing.

It is not negligence *per se* to back an automobile on the highway, but in doing so the operator must exercise ordinary care to avoid injury to others by ascertaining the presence of others in the vicinity who may be injured by such movement. *Adams v. Service Co.*, 136.

§ 8i. Intersections.

The driver of a vehicle entering a public highway from a private road or drive is required to look for vehicles approaching on the highway and to look at a time when his precaution may be effective, and to yield the right of way to vehicles traveling on the highway, G.S. 20-156 (a). Operators of vehicles on the highway, in the absence of anything that gives or should give notice to the contrary, may assume, and act upon the assumption, even to the last moment, that an operator entering the highway from a private road or drive will yield the right of way as required by law. *Garner v. Pittman*, 328.

Where two vehicles approach each other along intersecting streets or highways at about the same time, it is the duty of the driver of the vehicle on the left to decrease his speed or even stop, and yield the right of way to the driver on his right in order to avoid a collision, and the operator of the vehicle on the right may assume that the operator of the vehicle on the left will yield the right of way in accordance with the statute, G.S. 20-155 (a). It is only when the vehicle on the right is a sufficient distance away to warrant the assumption by the driver on the left that he can proceed into the intersection in safety before the vehicle on the right, operated at a reasonable speed, reaches the intersection, that the vehicle on the left is not required to slacken speed or stop. *Bennett v. Stephenson*, 377.

If two cars approach each other along intersecting streets or highways, but the car on the left reaches the intersection first and has already entered the intersection, the operator of the vehicle on the right is under duty to permit it to pass in safety. *Ibid.*

Plaintiff's allegations and evidence to the effect that he was already in an intersection when defendant drove his car into the intersection from plaintiff's right, at excessive speed without proper caution and maintenance of proper lookout, *is held* sufficient to overrule defendant's motion to nonsuit. *Cook v. Hobbs*, 490.

AUTOMOBILES—*Continued.*

Failure of motorist to sound horn before attempting to pass defendant's car *held* to preclude recovery for defendant's turning into private driveway without giving signal. *Lyerly v. Griffin*, 686.

The fact that a motorist reaches an intersection a fraction ahead of a vehicle approaching the intersection from his right does not entitle him to proceed into the intersection, but it is required that he yield the right of way to the vehicle on his right unless it is a sufficient distance away to permit him to proceed in safety without creating an unnecessary traffic hazard, and his failure to do so is negligence or contributory negligence as the case may be. *Freeman v. Preddy*, 634.

Entering through street intersection when vehicle traveling along through street was 225 feet away from intersection *held* not to show contributory negligence as matter of law, and evidence that vehicle was traveling along through street at excessive speed *held* to take issue of negligence to jury. *Mikeal v. Pendleton*, 690.

§ 14. Passing Vehicles Traveling in Same Direction.

Before attempting to pass another vehicle traveling in the same direction on the highway in front of him, a driver must exercise due care to see that he can pass in safety and must sound his horn in reasonable time to give warning so as to avoid injury which would likely result if the preceding vehicle should make a left turn. *Lyerly v. Griffin*, 686.

§ 16. Pedestrians.

The failure of a pedestrian to yield the right of way to vehicular traffic as required by G.S. 20-174 (a) or (d) is not negligence or contributory negligence *per se*, but is only evidence to be considered with other evidence upon the issue, and therefore an instruction to the effect that if plaintiff's intestate violated the provisions of the statute, such violation in itself would constitute contributory negligence *per se* must be held for reversible error. G.S. 20-174 (e). *Simpson v. Curry*, 260.

A pedestrian is not guilty of contributory negligence as a matter of law because he fails to yield the right of way to a vehicle on the highway when crossing such highway at an unmarked crossing other than at an intersection. *Goodson v. Williams*, 291.

§ 17. Duty of Motorist in Respect to Children on or Near Highway.

It is the duty of a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of due care should see, on or near highway. *Hawkins v. Simpson*, 155.

When a motorist sees, or by the exercise of due care should see, a child or children on or near the highway he must immediately recognize the peril attendant their immaturity and must proceed in such manner and at such speed as is reasonably calculated to avoid striking such child or children. *Greene v. Board of Education*, 336.

§ 18a. Pleadings and Parties.

A truck and a car collided. In the suit by the administratrix of a passenger in the car, who was fatally injured in the collision, against the owner and operator of the truck, the defendants are entitled to have the driver of the car joined as a codefendant for contribution, together with her husband upon the theory that he was liable for her negligence under the family car doctrine, but it is incumbent upon them to allege and prove that the driver of the car was

guilty of negligence which concurred in producing the injury. *Stansel v. McIntyre*, 148.

Prior judgment between owners of vehicles involved in collision *held* properly pleaded by one of them in subsequent action by administratrix of passenger in car. *Ibid.*

Allegations that plaintiff suddenly put on brakes upon meeting vehicle having flashing red lights and red flags on its front, and was rammed by car which was following her too closely *held* not to state cause of action against owner of vehicle, since, upon facts, any negligence in having red lights and flags was not proximate cause of injury. *Hollifield v. Everhart*, 313.

Allegations referring to liability and collision insurance *held* properly stricken on motion. *Foster v. Holt*, 495.

Allegations to the effect that defendant's car was parked in the daytime on the hardsurface of the highway and left unattended in violation of statute, that plaintiff was forced to stop his car behind the parked car because of on-coming traffic, and that another car then rammed into the back of plaintiff's car, resulting in the injury in suit, *is held* insufficient to state a cause of action against defendant, and defendant's demurrer was properly sustained. *Hooks v. Hudson*, 695.

§ 18d. Concurring and Intervening Negligence.

Plaintiff suddenly put on brakes upon meeting vehicle having flashing red lights and flags on its front, and was rammed by car which was following her too closely. *Held:* Even if owner of vehicle was negligent in having red lights and flags, such negligence was not proximate cause of injury. *Hollifield v. Everhart*, 313.

Negligence of driver in entering highway from warehouse driveway without yielding right of way to cars on highway *held* sole efficient proximate cause of collision with car traveling on highway, and driver of car on highway could not be held as joint tort-feasor notwithstanding evidence he was exceeding speed limit. *Garner v. Pittman*, 328.

§ 18g (1). Presumptions and Burden of Proof.

No inference of negligence from mere fact of accident. *Adams v. Service Co.*, 136.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Plaintiff's evidence tended to show that the operator of a vehicle backed same at a rapid rate, struck the pony upon which plaintiff, a seven year old boy, was riding, knocking him from the pony to the ground and running over his body with the rear wheel of the vehicle. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence. *Adams v. Service Co.*, 136.

Evidence *held* for jury on question of negligence in striking pedestrian on highway. *Goodson v. Williams*, 291.

Evidence *held* insufficient to show negligence on part of defendant entering intersection from plaintiff's right. *Bennett v. Stephenson*, 377.

Evidence *held* for jury on question of defendant's negligence in entering intersection at excessive speed, even though he entered intersection from plaintiff's right. *Cook v. Hobbs*, 490.

Evidence that defendant traveling along through street entered intersection at excessive speed and hit car which had almost cleared intersection *held* sufficient for jury on issue of negligence. *Mikeal v. Pendleton*, 690.

AUTOMOBILES—*Continued.*

§ 18h (3). Nonsuit on Ground of Contributory Negligence.

Evidence tending to show that intestate was crossing the highway at nighttime and was struck by defendant's car just before he had cleared the hard surface on defendant's right, that the highway was straight and unobstructed except for one vehicle traveling in the opposite direction, *is held* not to disclose contributory negligence on intestate's part as a matter of law. *Goodson v. Williams*, 291.

Plaintiff's own evidence tended to show that he turned to his left on the highway in an attempt to pass a truck traveling in the same direction, but that he did not sound his horn to give warning of his intention to pass the truck, and that the truck without warning or signal turned to its left in front of plaintiff's car in order to enter a private driveway on the left of the highway, and that plaintiff immediately applied his brakes and turned to the right but was unable to avoid a collision. *Held:* Plaintiff's own evidence discloses contributory negligence constituting one of the proximate causes of the injury as a matter of law, and nonsuit was properly entered. *Lyerly v. Griffin*, 686.

Entering through street intersection after stopping when car approaching along through street was 225 feet away *held* not contributory negligence as matter of law. *Mikeal v. Pendleton*, 690.

§ 18h (4). Nonsuit on Ground of Intervening Negligence.

Nonsuit for intervening negligence *held* proper as to defendant traveling on highway and colliding with car entering highway from private drive without yielding right of way. *Garner v. Pittman*, 328.

§ 18i. Instructions in Auto Accident Cases.

When presented by the evidence adduced, it is incumbent upon the court to instruct the jury with respect to the duty imposed by law upon a motorist to avoid injuring children whom he sees or by the exercise of reasonable care should see on or near the highway. *Hawkins v. Simpson*, 155.

A charge as to the duty of a motorist to stop in obedience to a red flashing signal as required by municipal ordinance before entering an intersection within the municipality must be held for prejudicial error when there is no allegation in the complaint making any reference to such signals or municipal ordinance. *Cook v. Hobbs*, 490.

Defendant's car hit plaintiff's car, which was parked some 18 inches on highway, when defendant swerved to left to avoid hitting pedestrian. Twenty-four feet of hardsurface was unobstructed to left of plaintiff's car. *Held:* Court was not required to instruct on proviso of G.S. 20-161; further, there being no contention that plaintiff's car was not "parked," court was not required to charge on distinction between parking and momentary stop. *Parrish v. Bryant*, 256.

The failure of a pedestrian to yield the right of way to vehicular traffic as required by G.S. 20-174 (a) or (d) is not negligence or contributory negligence *per se*, but is only evidence to be considered with other evidence upon the issue, and therefore an instruction to the effect that if plaintiff's intestate violated the provisions of the statute, such violation in itself would constitute contributory negligence *per se* must be held for reversible error. G.S. 20-174 (e). *Simpson v. Curry*, 260.

§ 21. Persons Liable to Guests Injured in Collision.

Guest in car entering highway from private drive without yielding right of way may not hold driver of car traveling on highway and colliding with car

in which she was riding when evidence discloses that negligence of driver of her car was sole, efficient proximate cause. *Garner v. Pittman*, 328.

§ 24e. Liabilities Under Lease in Interstate Commerce.

Lessee of vehicle in interstate commerce *held* entitled to indemnity against lessor under contract of lease. *Newsome v. Surratt*, 297.

§ 24½. Actions Against Employer—Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

Under the provisions of G.S. 20-71.1 proof of ownership by a defendant of a vehicle involved in a collision while being driven by another constitutes *prima facie* evidence that at the time and place of the collision the vehicle was being operated by the owner's employee with his authority, consent and knowledge, and is therefore sufficient to carry the case to the jury upon the issue of *respondeat superior*. *Travis v. Duckworth*, 471.

Plaintiff offered evidence that the vehicle involved in a collision with the car of his intestate was owned by defendant. But the evidence further disclosed that the driver of defendant's vehicle detached the trailer thereof and left it at a point on his authorized route, and that when the accident occurred he was driving the detached tractor on a journey of some 75 miles to a city off his route on a purely personal errand, without the knowledge or consent of his employer. *Held:* While the provisions of G.S. 20-71.1 preclude nonsuit, defendant employer was entitled to an instruction that if the jury found the facts to be as the evidence tended to show, to answer the issue of *respondeat superior* in the negative. *Ibid.*

§ 25. Family Car Doctrine.

The family purpose doctrine obtains in North Carolina. *Stansel v. McIntyre*, 148.

§ 25½. Rights and Remedies of Employer Against Third Person.

If the driver is an employee, and at the time of the accident is acting within the scope of his employment in operating the employer's motor vehicle, the driver's contributory negligence will be attributed to the employer, barring the employer's right to recover against a third person for damage to his vehicle. *Dowdy v. R. R.*, 519.

§ 28e. Manslaughter Prosecutions—Sufficiency of Evidence and Nonsuit.

The State's evidence tending to show that defendant, in an intoxicated condition, was driving 65 or 70 miles an hour in a zone limited to his knowledge to a speed not in excess of 35 miles per hour, and struck a five-year-old child with the left front of his car after the child had crossed his lane of travel and was about one and one-half feet to defendant's left of the center line of the highway, with other corroborating circumstances shown in evidence, *is held* sufficient to be submitted to the jury upon the question of defendant's culpable negligence in a prosecution for involuntary manslaughter. *S. v. Triplett*, 604.

§ 30d. Prosecutions for Drunken Driving.

In a prosecution for driving an automobile on the highways of the State while under the influence of intoxicants, an instruction that a person is under the influence of intoxicants when he has drunk a sufficient quantity thereof to "perceptibly" impair his bodily or mental faculties will not be held for prejudicial error. *S. v. Lee*, 263.

BETTERMENTS.

§ 1. Nature and Requisites of Claim for Betterments in General.

The right to betterments is based upon the equitable principle that a person in possession who has made valuable improvements under the *bona fide* belief that he is the owner of the land should not be required to surrender possession to the true owner without compensation for such betterments to the extent that they permanently enhance the value of the land, and therefore claim for betterments cannot accrue until the owner seeks and obtains the aid of the court to enforce his right of possession. *Comrs. of Roxboro v. Bumpass*, 143.

The remaindermen had a tax foreclosure set aside to the extent that the tax deed purported to convey the remainder, but the conveyance of the life estate by the tax foreclosure was not affected. *Held:* Persons in possession under the tax foreclosure are not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman. *Ibid.*

§ 6. Petition and Proceedings.

Since the statute requires that petition for betterments be filed in the action in which judgment for the land has been rendered, the filing of such petition by several claimants cannot result in a misjoinder of parties and causes, although the better practice would be for each claimant to file his claim separately. *Ibid.*

BOUNDARIES.

§ 3b. Calls to Natural Objects.

Where the calls in a deed are inconsistent, the general rule is that natural objects and monuments control courses and distances, and ordinarily another's line, when called for and if known and established, is a monument within the meaning of the rule. *Newkirk v. Porter*, 115.

The fact that the right of way of streets and highways is increased to greater widths than originally laid out has no effect upon the location of the boundaries of the fee in lands adjacent thereto, containing call to the highway. *Linder v. Horne*, 129.

A call in a deed to a natural object will control courses and distances at variance therewith. *Cherry v. Warehouse Co.*, 362.

§ 3c. Reversing Calls.

Resort to reversing call may be had in conjunction with ascertainment of corner in contiguous tract. *Linder v. Horne*, 129.

Ordinarily, lines should be run with the calls in the regular order from a known beginning, and reversing a call may be resorted to only when the terminous of a call may not be ascertained by running forward but can be fixed with certainty by running reversely the next succeeding line. *Powell v. Mills*, 582.

§ 3e. Junior and Senior Deeds.

Where the junior deed calls for a corner or line in a prior deed as the dividing line between the adjoining tracts, the dividing line must be located from the description in the prior deed, even to the extent of reversing a call in such prior deed when necessary, before resort may be had to any call in the junior deed, and in such circumstance the question of lappage cannot arise. *Goodwin v. Greene*, 244.

BOUNDARIES—*Continued.*

§ 4. Magnetic and True Poles.

In running a magnetic course, allowance should be made for variations in magnetic north. *Goodwin v. Greene*, 244.

§ 5a. Definiteness of Description and Admissibility of Evidence Aliunde.

A description must furnish means for identifying the land intended to be conveyed, and therefore a patently ambiguous description is ineffective, but where the description is latently ambiguous it may be made definite and certain by evidence *aliunde* provided the deed itself refers to such extrinsic matter. *Linder v. Horne*, 129; *Cherry v. Warehouse Co.*, 362; *Powell v. Mills*, 582.

§ 5d. Declarations.

Where it appears that declarant's statement was made subsequent to the time he divested himself of title to the land in question and before controversy arose, testimony of such declaration is competent. *White v. Price*, 347.

§ 5h. Location of Corner of Contiguous Tract.

The deed in suit called for a corner beginning at the intersection of two roads or streets which had been widened subsequent to the execution of the deed. The terminus of the second call was to a stake in the line of a contiguous tract as shown by a recorded plat. *Held:* The description in the deed was properly made definite and certain by running the line of the contiguous tract so as to establish its terminus at the street, and then by reversing the call in the deed to locate the stake in the line of the contiguous tract constituting a corner, from which the remaining corners could be ascertained. *Linder v. Horne*, 129.

§ 6. Processioning Proceedings in General.

In a processioning proceeding, what constitutes the dividing line is a question of law for the court but the location of the line is a question for the jury under correct instructions based upon competent evidence. When the case is referred, the referee must find the facts in accordance with the law upon competent evidence. *Linder v. Horne*, 129.

Where the parties admit that each is the owner of the land covered by his respective deed, and the only controversy is as to the dividing line between the two adjoining tracts, the action in so far as it relates to the location of the dividing line is in effect a processioning proceeding notwithstanding plaintiff's claim for damages on the theory of trespass. *Goodwin v. Greene*, 244.

§ 11. Processioning Proceedings—Issues and Verdict.

In a processioning proceeding, the issue should be as to the location of the true dividing line between the lands of the parties, and an issue as to whether plaintiff is the owner and entitled to possession of the lands as alleged, in connection with the court's instruction that defendant admitted plaintiff's ownership of the land, does not determine the controversy, and in the absence of a determination as to the location of the true dividing line, the subsequent issues of trespass and damage are speculative and the verdict thereon may not stand. *Goodwin v. Greene*, 244.

§ 12. Processioning Proceedings—Instructions.

In a processioning proceeding it is the duty of the court to instruct the jury as to what constitutes the dividing line between the lands of plaintiff and defendant and to explain the law and apply it to the evidence in the case in

BOUNDARIES—*Continued.*

order that the jury may correctly evaluate the evidence in locating the true dividing line. G.S. 1-180. *Goodwin v. Greene*, 244.

BRIBERY.

§ 2. Prosecution and Punishment.

Evidence of policemen's guilt of accepting bribes to permit lottery operations *held* sufficient. *S. v. Smith*, 1. Instructions *held* without error. *Ibid.*

BURGLARY AND UNLAWFUL ENTRIES.

§ 14. Sentence and Judgment.

The maximum imprisonment for felonious breaking and entering is a period of ten years. G.S. 14-54. *S. v. Templeton*, 440.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 8. Parties.

Where it is conceded that the deed in question conveyed some estate to the grantees, a stranger to the instrument cannot maintain an action to vacate or annul the deed or subsequent deeds of trust executed by the parties on the ground of mental incapacity of the grantors or fraud and undue influence or want of consideration, since the right to attack the deeds on these grounds rests exclusively in the grantors, or in case of their mental incapacity, in a person duly appointed to prosecute the action in their behalf. *Bizzell v. Bizzell*, 535.

But where the stranger asserts title as remainderman he may attack the instruments on the ground that they constitute cloud on his title. *Ibid.*

CARRIERS.

§ 2. State Regulation and Control.

Carrier transporting passengers to and from military reservation is exempt from regulation only if it has been procured for the job by Federal Government or is under control of United States. *Bryant v. Barber*, 480.

§ 7½. Rights and Remedies of Carrier Under Franchise.

A franchise carrier may maintain an action in the Superior Court to restrain another carrier from illegal operation along his route without a certificate or permit from the Utilities Commission when such illegal operation by such other carrier interferes with its franchise rights. G.S. 62-121.72 (2). *Bryant v. Barber*, 480.

Where plaintiff contract carrier, having a permit from the Utilities Commission, has contracts with numerous persons living along his route obligating such persons to ride on plaintiff's buses exclusively, plaintiff is entitled to recover the damages sustained by reason of wrongful acts of another carrier, operating without certificate or permit, in inducing plaintiff's passengers to breach their contracts with plaintiff. *Ibid.*

§ 9. Carriage of Goods—Bills of Lading.

A shipper's prepaid receipt for a shipment in interstate commerce is a bill of lading. *Schroader v. Express Agency*, 456.

CARRIERS—*Continued.*

§ 11. Carriage of Goods—Delay or Injury to Shipment.

Under the provisions of U.S.C.A., Title 49, sec. 20, the liability of a carrier for loss of or damage to a shipment of chicks in interstate commerce, when the shipper does not declare a greater valuation, is limited to $50.00 or to 50c per pound for shipments in excess of 100 pounds, and therefore when there is no evidence that the shipper declared a greater valuation, an instruction on the issue of damages to the effect that the damages would be the fair market value of the chicks at the time of their delivery to the carrier, is reversible error. *Schroader v. Express Agency*, 456.

§ 14¾. Lease of Vehicles for Interstate Commerce.

Lessee *held* entitled to indemnity against lessor of vehicle for interstate trip under terms of lease contract. *Newsome v. Surratt*, 297.

CEMETERIES.

§ 1. Control and Regulation.

A cemetery sold its property to a municipality by contract under which the city assumed all obligations of the cemetery in connection with maintenance of the cemetery and perpetual care of the lots. The sale price was a stipulated amount, less the amount of the trust fund set up by the cemetery for perpetual care of lots. The cemetery had sold interment rights in several lots with agreement for perpetual care under the statute and also subject to G.S. 65-29. *Held:* The contract of sale to the city complied with provisions of the statutes, G.S. 65-26, G.S. 65-29, and upon completion of the sale the cemetery is entitled to order that the trustee turn over to it the amount in the trust fund. *Memorial Park v. Bank*, 547.

CHARITIES.

§ 4. Liability for Torts.

Charitable institution is not liable for negligent injury inflicted by its employees if it has used due care in their selection and retention, even though person injured was paying patient. *Williams v. Hospital*, 387.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 8a. Lien of Mortgage Registered in Another State.

An automobile subject to a chattel mortgage, executed in another state and duly registered in such other state in accordance with its laws, was brought into this State after the effective date of G.S. 44-38.1. The evidence and facts agreed disclose that the mortgagor sold it to a used car dealer in this State who, after keeping the truck some eight weeks, sold it to an innocent purchaser for value without notice, and that mortgagee repossessed it some fifteen days later. *Held:* Under the provisions of G.S. 44-38.1 (a) the vehicle acquired a *prima facie situs* in this State, but such *prima facie* case does not compel a finding by the jury to this effect, and therefore defendant purchaser is not entitled to a nonsuit, but a directed verdict in the mortgagee's favor is error, the issue being for the determination of the jury upon the evidence and facts agreed. *Finance Co. v. O'Daniel*, 286.

§ 17. Right to Foreclose and Defenses.

Where mortgagor admits default in the payment of an installment due on the note secured he may not contend that mortgagee unlawfully converted the

chattel to its own use because of the repossession and sale of the chattel by the mortgagee in accordance with the terms of the instrument. *Wilkins v. Finance Co.*, 396.

CLERKS OF COURT.

§ 2. Deputy Clerks.

A deputy clerk appointed by the clerk under authority of G.S. 2-13 is not an independent officer of the court but has only derivative authority, and must do all things in the clerk's name except where statute expressly provides otherwise. *Beck v. Voncannon*, 707.

COMPROMISE AND SETTLEMENT.

§ 1. Transactions Operating as Compromise and Settlement.

Settlement of business disputes is favored by the law, and where a check is tendered in full settlement of a disputed item, the acceptance of the check and use of the proceeds will be regarded as complete satisfaction of the claim. *Moore v. Greene*, 614.

A check given in full settlement of a disputed item as to the employee's right to a part of the profits under his contract of employment will not bar the employee's right to recover the amount of a deduction from his salary check for the last month of the employment when the check was deposited to the employee's credit in his absence. *Ibid.*

CONSPIRACY.

§ 3. *Nature and Elements of Crime of* Criminal Conspiracy.

A criminal conspiracy is an unlawful concurrence of two or more persons in an agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means, and since the unlawful agreement itself is the crime, no overt act in the execution of the agreement is necessary. *S. v. Smith*, 1.

§ 5. Competency of Evidence.

The testimony of an accomplice relating to matters in furtherance of the common design is competent against a defendant in a prosecution for conspiracy. *S. v. Bennett*, 749.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence tending to show an agreement under which an employee of a woodworking plant was to steal doors from his employer and deliver them to defendant's premises at an agreed price per door is sufficient to overrule nonsuit in a prosecution for conspiracy to commit larceny. *S. v. Bennett*, 749.

§ 5. *Competency of Evidence in Prosecutions for* Conspiracy.

In this prosecution for conspiracy to bribe police officers to afford protection for defendant's lottery operations, testimony tending to show that during the period in question defendant had paid another witness not to testify against him in a previous prosecution for gaming, *is held* competent for the purpose of showing *quo animo*, intent, design, guilty knowledge or *scienter* and also as a circumstance so connected with the offense as charged as to throw light thereon, even though the bribery of the witness was not included in the indictment. *S. v. Smith*, 1.

CONSPIRACY—*Continued.*

§ 6. Sufficiency of Evidence and Nonsuit in Prosecutions for Criminal Conspiracy.

Evidence need not show that each conspirator agreed with all his co-conspirators, agreement with any one of them being sufficient. *S. v. Smith*, 1.

Direct evidence of conspiracy is not required, but a conspiracy may be established by a number of indefinite acts, which standing alone may be of little probative force, but which taken collectively point unerringly to the existence of the conspiracy. *Ibid.*

§ 7. Instructions in Prosecutions for Conspiracy.

An instruction defining conspiracy as an agreement to do an unlawful thing or an agreement to do a lawful thing in an unlawful manner with further instructions that the jury must find that at least two of defendants combined and agreed in order to constitute the offense of conspiracy, *is held* sufficient, in the absence of request for special instructions. *S. v. Smith*, 1.

CONSTITUTIONAL LAW.

§ 4. General Rules of Construction of Constitution.

Questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments. *Perry v. Stancil*, 442.

In construing a constitutional provision, the prime purpose of the established canons of judicial construction is to give effect to the intent of its framers and the people adopting it. *Ibid.*

A literal meaning will not be accorded words of a constitutional provision when to do so would contravene the dominant purpose or intent clearly apparent when the words are read in context. *Ibid.*

§ 6. Construction of Amendments to Constitution.

An amendment to the Constitution must be construed to ascertain the intent, and to this end the courts must consider the conditions as they existed at the time of its adoption and the purpose sought to be accomplished or the remedy sought to be provided. *Perry v. Stancil*, 442.

§ 8a. Legislative Powers in General.

A statutory provision that no local act shall have the effect of repealing or altering any public law unless the caption of the local act refers to the public law *is held* ineffectual, since one General Assembly cannot restrict or limit the constitutional power of a succeeding Legislature. *S. v. Norman*, 205.

Whether some change should be made in the doctrine of immunity of a charity for the negligence of its servants and employees if the charity has used due care in their selection and retention, is a question of broad public policy to be pondered and resolved by the lawmaking body. *Williams v. Hospital*, 387.

General Assembly has power to declare that proof of certain facts should constitute *prima facie* proof of ultimate fact. *Travis v. Duckworth*, 471.

Public policy is exclusive province of Legislature. *Deaton v. Deaton*, 487.

§ 8c. Delegation of Powers by General Assembly.

The lawmaking power is the exclusive function of the legislative department, and the General Assembly may not delegate such power to any other department or body except municipal corporations. Constitution of North Carolina, Articles VII, VIII, IX. *Coastal Highway v. Turnpike Authority*, 52.

CONSTITUTIONAL LAW—*Continued.*

While the General Assembly may delegate to administrative boards or governmental agencies the authority to find facts determinative of whether or not a law should apply or another agency of government should come into existence, provided the Legislature prescribes adequate standards to guide the administrative board or governmental agency, the General Assembly may not delegate the power to apply or withhold the application of a law in the absolute and unguided discretion of an administrative board or governmental agency or confer upon it the power to make law or determine questions of public policy. *Ibid.*

General Assembly may not delegate power to another agency to create municipal corporation in exercise of its unguided discretion. *Ibid.*

Statute requiring zoning authority of city to zone third corner in conformity with the two other corners upon application of owner of such third corner is not delegation of legislative power to owner of third corner. *Marren v. Gamble*, 680.

§ 10a. Judicial Power in General.

Where the language of a statute is plain and unambiguous, the courts are without power to attribute any other meaning to its words on the ground of public policy, since public policy is in the exclusive province of the General Assembly. *Deaton v. Deaton*, 487.

§ 10b. Power and Duty of Courts to Determine Constitutionality of Statutes.

All reasonable doubt must be resolved in favor of the constitutionality of an act of the General Assembly, and a statute will not be declared unconstitutional unless it is clearly so. But when a statute clearly transgresses the authority vested in the Legislature by the Constitution, it is the duty of the Court to declare the act unconstitutional. *Board of Managers v. Wilmington*, 179.

§ 11. Police Power. (Of Municipal Corporations see Municipal Corporations.)

The police power is as extensive as required for the protection of the public health, safety, morals and general welfare. *S. v. McGee*, 633.

§ 18. Equal Privileges, Protection and Application of Laws.

A nonresident has full right to bring an action in our courts as one of the privileges guaranteed the citizens of the several states by the Federal Constitution. *Howle v. Express, Inc.*, 667.

§ 19½. Religious Liberty.

A municipal ordinance proscribing the operation of places of amusement during the hours of 6:30 p.m. and 9:00 p.m. on Sunday will not be held invalid as contravening the First Amendment of the Federal Constitution or Art. I, sec. 26, of the Constitution of North Carolina, since even though the governing body of the city, in determining the hours during which commercial amusements should be proscribed, may have taken into consideration the fact that churches usually have religious services at such hours, such ordinance neither purports to compel nor to deny the observance of any religious duty, and therefore does not impinge upon the freedom of conscience. *S. v. McGee*, 634.

§ 20a. Due Process of Law—Takings.

Fact that value of property is adversely affected by zoning regulations is not unconstitutional taking, since it is incident to police power. *Marren v. Gamble*, 680.

CONSTITUTIONAL LAW—*Continued.*

§ 21. Due Process—Notice and Opportunity to Be Heard.

Constitutional requirement of notice relates to original process whereby court acquires jurisdiction, and not to procedural matters. *Collins v. Highway Com.*, 277.

Where statute decrees result upon establishment of certain facts, hearing to establish facts meets constitutional requirements even though parties may not controvert result upon facts established. *Marren v. Gamble*, 680.

§ 32. Necessity for Indictment.

A person charged with a misdemeanor may not be tried initially in the Superior Court except upon an indictment by a grand jury unless he waives indictment in accordance with regulations prescribed by the Legislature. Constitution of N. C., Art. I, sec. 12; G.S. 15-137. *S. v. Norman*, 205.

Upon transfer of cause from recorder's court without trial, defendant may be tried in Superior Court upon an indictment. *Ibid.*

Where, upon defendant's demand for a jury trial, the prosecution is transferred from the recorder's court to the Superior Court in accordance with statute, and the defendant is tried in the Superior Court on the original warrant without an indictment, the judgment must be arrested. *S. v. Bailey*, 273; *S. v. Williams*, 436; *S. v. Bowen*, 766.

§ 33. Constitutional Right to Jury Trial.

The evidence in this case *held* to support the court's findings that petitioner, acting through his attorneys, waived his right to challenge the competency of the petit jurors by purposely refraining from asserting such right in the original criminal action, and also that no Negroes were intentionally excluded from the grand and petit juries on account of their race or color. *Miller v. State*, 29.

Where there is nothing of record to indicate the race of persons whose names appeared on the jury list, testimony of witnesses identifying a few of them as Negroes has no probative force as to the number or proportion of Negroes thereon when it appears that the witnesses had no knowledge as to the race of the remainder. *Ibid.*

A Negro citizen charged with crime has the constitutional right that members of his race be not intentionally excluded either from the grand or petit juries solely because of their race or color. Fourteenth Amendment to the Federal Constitution; Article I, Section 17, of the State Constitution. *Ibid.*

A Negro accused of crime has no right to demand that the grand or petit jury shall be composed in whole or in part of citizens of his own race nor has he the right to proportional representation of his race thereon, but only that Negroes not be intentionally excluded therefrom because of their race or color. *Ibid.*

The requirements that persons whose names are placed on the jury list be adult residents of the State, be of good moral character and have sufficient intelligence to serve as members of the grand and petit juries, are relevant qualifications which do not offend either the State or Federal Constitutions, there being no discrimination against any class of citizens solely because of race. G.S. 9-1. *Ibid.*

A Negro objecting to a grand or petit jury because of alleged discrimination against Negroes in its selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race or color. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

A Negro accused of crime is entitled to a fair opportunity to have the question of whether members of his race have been intentionally excluded from the grand or petit juries because of race determined by adequate and timely procedure. *Ibid.*

Objection of a Negro defendant that members of his race were intentionally excluded from the petit jury because of their race or color must be raised by challenge to the array or motion to quash the panel or venire before entering upon the trial, and the considered conclusion of his duly appointed attorneys not to raise the question and the entering of a plea of not guilty without following such procedure, *is held* a waiver for all time of defendant's right to raise the objection. *Ibid.*

§ 40. Waiver of Constitutional Guarantees by Persons Accused of Crime.

The accused in a criminal action may waive a constitutional right relating to a matter of mere practice or procedure, including the constitutional right of a Negro that members of his race be not intentionally excluded from the grand or petit juries. A waiver of such right by defendant's attorneys is binding on him. *Miller v. State*, 29.

CONTRACTS.

§ 8. General Rules of Construction.

Parties to a contract are conclusively presumed to have executed the agreement with full knowledge of the existing statute law. *Memorial Park v. Bank*, 547.

Where the language of a contract is free from ambiguity, the ascertainment of its meaning and effect is for the court, and it is the duty of the court to instruct the jury as to its meaning. *Young v. Mica Co.*, 644.

§ 18. Waiver of Breach.

Where there is a breach of a contract or some provision thereof which does not go to the substance of the whole contract and indicate an intention to repudiate it, the breach may be waived by the innocent party, who may elect to treat the contract as still subsisting and continue performance on his part. *Towery v. Dairy*, 544.

§ 25a. Measure of Damages for Breach in General.

The measure of damages for breach of contract is the amount which would have been received if the contract had been performed as made, including loss of prospective profits when such loss is the natural and proximate result of the breach, may be ascertained with reasonable certainty, and be such as may reasonably be supposed to have been within the contemplation of the parties when the contract was executed. Plaintiff must allege and prove such special damage. *Perkins v. Langdon*, 159.

§ 26. Interference With Contract Rights by Third Person.

Franchise carrier may maintain action against another for wrongfully inducing persons under contract to ride plaintiff's buses to breach their contracts. *Bryant v. Barber*, 480.

CORPORATIONS.

§ 7. Liability of Corporate Officers and Directors for Torts.

An officer or director of a corporation who makes no misrepresentations to a third person as to the financial worth of the corporation and is without

CORPORATIONS—*Continued.*

knowledge of the making of such representations by any other officer or director, cannot be held liable in fraud for damage resulting to such third person in extending credit to the corporation upon the strength of misrepresentations made by any other officer or director. G.S. 55-56. *Knitting Mills Co. v. Earle*, 97.

Evidence *held* insufficient to sustain allegations of fraud on part of corporate officers inducing plaintiff to extend credit to corporation. *Ibid.*

COSTS.

§ 4d. Assessment of Costs in Equitable Matters.

In a suit under the Declaratory Judgment Act the court may make such award of costs as may seem equitable and just, and where the proceeding is to declare the rights, status and other legal relations existing among the three parties to the suit, it is equitable that the costs be equally divided among the three parties. *Board of Managers v. Wilmington*, 179.

COURTS.

§ 3a. Jurisdiction of Superior Courts in General.

Under the Constitution of N. C., Art. IV, sec. 12, the General Assembly has bestowed upon the Superior Court original jurisdiction of all criminal actions in which the punishment may exceed a fine of fifty dollars or imprisonment for thirty days, G.S. 7-63, and since the jurisdiction of justices of the peace under Art. IV, sec. 27, is not exclusive, the General Assembly has the power to bestow upon the Superior Court original concurrent jurisdiction with justices of the peace of misdemeanors the punishment for which does not exceed a fine of fifty dollars or imprisonment for thirty days. *S. v. Norman*, 205.

The Superior Court has statewide jurisdiction and is but a single court with terms of court in each county in the State at least twice in each year. Constitution of N. C., Art. IV, sec. 2; Art. IV, sec. 10. *Lovegrove v. Lovegrove*, 307.

§ 3c. Concurrent Jurisdiction of Superior Court.

Chap. 589 Session Laws 1951 has the effect of conferring upon the Superior Court concurrent original jurisdiction with the Recorder's Court of Washington County of misdemeanors punishable by a fine not exceeding fifty dollars or imprisonment of thirty days, and bestows upon the Superior Court exclusive original jurisdiction of general misdemeanors in cases where either the prosecuting attorney or the defendant makes a demand for a jury trial in the Recorder's Court, and the statute is a valid exercise of the power vested in the General Assembly by Art. IV, sec. 12, of the State Constitution. *S. v. Norman*, 205.

§ 5. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

Order entered out of county without consent of parties is nullity and does not preclude another Superior Court from entering subsequent order at variance therewith. *Chappell v. Stallings*, 213.

Upon hearing of order to show cause, judgment that order be vacated and commissioner be authorized to proceed with sale does not adjudicate the merits of the action to vacate the judgment of sale, and does not preclude another Superior Court judge from hearing the merits of the cause. *Ibid.*

COURTS—*Continued.*

§ 7½. Juvenile Courts.

The denial of motion by respondent parents for modification of order committing the custody of their minor children to the State Board of Public Welfare does not preclude the parents from later moving for modification of the judgment on the ground of changed conditions. *In re DeFebia*, 269.

The juvenile court has exclusive original jurisdiction of all cases involving the custody of a minor under 16 except in contests between the parents, undivorced but living in a state of separation, G.S. 17-39, or where divorce proceedings have been instituted and are pending in this State, G.S., 50-13, or where the parents have been divorced by decree of another state, G.S. 50-13, and the judge of the Superior Court is without jurisdiction to issue a writ of *habeas corpus* for control of such minor child in a contest between the child's father and its maternal grandmother, and such order is void and the denial of a motion to modify such order will be reversed on appeal. *In re Melton*, 386.

§ 8. Establishment of Courts Inferior to Superior Court.

Court inferior to Superior Court may not be created by special act. *S. v. Norman*, 205.

A county recorder's court is a court for the county wholly independent of any other court or system of courts. *Lovegrove v. Lovegrove*, 307.

§ 11. Jurisdiction of Courts Inferior to Superior Courts.

Jurisdiction of such courts may be changed by special act. *S. v. Norman*, 205.

The General Assembly has the power to bestow upon any court inferior to the Superior Court other than a court of a justice of the peace either concurrent or exclusive jurisdiction of general misdemeanors, and may grant such inferior court concurrent original jurisdiction of misdemeanors the punishment for which does not exceed a fine of fifty dollars or imprisonment of thirty days, or even grant a municipal court exclusive jurisdiction of such petty misdemeanors committed within its corporate limits. *Ibid.*

General Assembly may transfer inferior court's jurisdiction over petty misdemeanors to Superior Court. *Ibid.*

A recorder's court of one county has no jurisdiction to order a cause pending therein transferred to the recorder's court of another county, and such order confers no jurisdiction upon the second court and proceedings had therein subsequent thereto are a nullity. *Lovegrove v. Lovegrove*, 307.

§ 13. Administration of Federal Statutes in State Courts.

In interstate commerce, the contract between the shipper and carrier consonant with the Federal statutes, or valid regulations of the Interstate Commerce Commission, attach and govern the rights of the parties concerning the shipment. *Schroader v. Express Agency*, 456.

Party invoking jurisdiction of court of this State in action under Federal Employers' Liability Act may be restrained from prosecuting action in another state. *Amos v. R. R.*, 714.

§ 16. Conflict of Laws—As Between State Jurisdictions.

Where all the evidence shows that the sale of the automobile in suit took place in the District of Columbia, its laws, unless contrary to public policy of this State, govern substantive features of the case under the doctrine of comity, but the laws of this State govern matters of procedure, including the pleadings. *Motor Co. v. Wood*, 318.

COURTS—*Continued.*

In an action to determine title to personalty sold to an innocent purchaser for value by a wrongdoer who obtained possession from the true owner by false pretense, the law of the state of the *situs* of the personalty controls, and will be applied in an action instituted in this State unless contrary to the public policy of this State. *Ellison v. Hunsinger*, 619.

The *lex loci* will be applied under the doctrine of comity unless it is made to appear that it is against good morals or natural justice or that for some other reason the enforcement of it would be prejudicial to the general interest of the citizens of the forum, and therefore against public policy. *Ibid.*

Actions are transitory when the transaction on which they are based might take place anywhere, and are local when they could not occur except in some particular place. *Howle v. Express, Inc.*, 667.

An action to recover for personal injuries resulting from an accident occurring in another state between plaintiff's car and the truck of a motor freight carrier is a transitory cause which may be instituted here in the county in which the motor carrier maintains its principal place of business, G.S. 1-97, and in such action the *lex loci* governs all matters pertaining to the substance of the cause of action while all matters of procedure are governed by the *lex fori*. *Ibid.*

In an action instituted in South Carolina to recover for personal injuries sustained in an automobile accident occurring in that state, voluntary nonsuit was entered with limited prejudice to plaintiff to renew his action only in the same county of that state. *Held:* In an action instituted in this State the order of limited prejudice refers to a matter of procedure not binding here, and further the order will be interpreted as not extending beyond the territorial limits of the State of South Carolina and as solely relating to change of venue in that State, and therefore the order will not support a plea of abatement in the action instituted here. *Ibid.*

CRIMINAL LAW.

§ 9. Parties and Offenses.

All persons who participate in treason or the commission of misdemeanors, or petit larceny, even though it be a felony, are guilty as principals, the distinction between principals and accessories being made only in respect to felonies generally. *S. v. Bennett*, 749.

§ 11. Crimes and Misdemeanors.

Simple assault is misdemeanor. *S. v. Norman*, 205.

§ 12c. Jurisdiction—Degree of Crime.

Superior Court may be given concurrent jurisdiction of petty misdemeanor with recorder's court. *S. v. Norman*, 205.

§ 29b. Competency of Evidence of Guilt of Other Offenses.

While ordinarily evidence of guilty of a crime other than that charged in the indictment is not competent, proof of the commission of other like offenses is competent when such proof tends to show *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect to the matter on trial. *S. v. Smith*, 1.

§ 31b. Medical Expert Testimony.

A physician may testify as to the result of his personal examination of deceased. *S. v. Bright*, 475.

CRIMINAL LAW—*Continued.*

§ 37. Best and Secondary Evidence.

Testimony that the incriminating writing in question had been destroyed lays the foundation for the introduction of testimony as to its purport. *S. v. Smith*, 1.

§ 42f. Rule That Party Is Bound by Testimony of Own Witness.

Introduction by State of testimony of exculpatory statement made by defendant does not preclude State from showing contrary by other testimony. *S. v. Bright*, 475; *S. v. Brady*, 675.

§ 44. Time of Trial and Continuance.

A motion for a continuance is addressed to the discretion of the trial court, and when it appears that the motion was based on the absence of defendant's counsel, but that defendant was nevertheless represented by other counsel who was thoroughly familiar with the case, and who ably represented defendant throughout the trial, the record fails to show abuse of discretion in denying the motion. *S. v. Bennett*, 749.

§ 48c. Evidence Competent for Restricted Purpose.

Where at the time of their admission in evidence and again in the charge, the court instructs the jury that the confessions of codefendants should not be considered against defendant, the admission of the confessions cannot be held for error as to the defendant. *S. v. Bennett*, 749.

§ 50d. Expression of Opinion by Court During Progress of Trial.

The discretionary act of the court in ordering defendant into custody during the progress of the trial cannot be held prejudicial when the record discloses that the court was careful to do so in the absence of the jury and that there was no conduct thereafter in the presence of the jury to indicate that defendant was in custody. *S. v. Smith*, 1.

§ 50f. Arguments and Conduct of Solicitor.

Where several defendants offer evidence, the State has the right to open and conclude the argument to the jury, and the one defendant who offers no evidence may not object to the refusal of the court to permit his counsel to make the concluding argument. *S. v. Smith*, 1.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to every reasonable intendment from the evidence, and every reasonable inference to be drawn therefrom. *S. v. Smith*, 1.

On motion to nonsuit, defendant's evidence in conflict with that of the State is not to be considered, but defendant's evidence which explains or makes clear that which has been offered by the State may be considered. *Ibid.*

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

Evidence which tends to prove the fact in issue and which reasonably conduces that conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, should be submitted to the jury. *S. v. Smith*, 1.

A conviction may rest upon the unsupported testimony of an accomplice alone if the testimony, though scrutinized, is sufficient to produce the conclusion of guilt beyond a reasonable doubt. *Ibid.*

CRIMINAL LAW—*Continued.*

In order to sustain conviction of a criminal offense there must be legal evidence of the commission of the offense charged, and evidence which raises a mere suspicion or conjecture is insufficient. *S. v. Ingram*, 197.

Testimony introduced by the State as to an exculpatory statement made by defendant does not bind the State if other evidence offered by it points to a different conclusion and raises a reasonable inference to the contrary, and therefore in such circumstance such testimony does not justify nonsuit. *S. v. Bright*, 475.

§ 52a (3). Sufficiency of Circumstantial Evidence.

While the court should charge that circumstantial evidence must be inconsistent with the defendant's innocence in order to be sufficient to sustain conviction, in passing upon defendant's motion to nonsuit, the question for the court to determine is whether there is any substantial evidence to support the State's case, it being for the jury to determine under proper instructions as to the *quantum* and intensity of proof, whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt. *S. v. Bright*, 475.

§ 52a (4). Nonsuit for Conflicts in State's Evidence.

The introduction by the State of testimony of an exculpatory statement made by defendant does not preclude the State from showing from other facts or circumstances that the exculpatory statement was false, and when the State introduces other evidence sufficient to raise a reasonable inference to that effect, the exculpatory statement does not justify nonsuit. *S. v. Brady*, 675.

§ 52a (6). Nonsuit for Variance.

A fatal variance between *allegata et probata* may be taken advantage of by motion for judgment as of nonsuit. *S. v. Smith*, 1.

Allegation that defendant feloniously received goods of "Tom Harris and other persons" with proof that goods were property of persons other than "Tom Harris" *held* not fatal variance. *S. v. Brady*, 675.

§ 53b. Instructions on Presumptions and Burden of Proof.

Where the court correctly charges on the presumption of innocence and correctly places the burden on the State to prove defendant's guilt to a moral certainty or beyond a reasonable doubt, the charge is sufficient on the question of the burden of proof in the absence of request for special instructions, and will not be held for error in failing to charge the jury that reasonable doubt might arise either on the evidence or from the insufficiency of the evidence in the case. *S. v. Lee*, 263.

A correct instruction defining reasonable doubt and charging that a reasonable doubt might grow out of the evidence or the insufficiency of the evidence in the case, will not be held for error because of a further instruction that if, after weighing the evidence, the minds of the jurors are left in such condition that they cannot say that they have an abiding faith to a moral certainty of defendant's guilt, that they have a reasonable doubt, otherwise no. *S. v. Bright*, 475.

§ 53d. Statement of Evidence and Explanation of Law Arising Thereon.

Where the State's direct evidence is sufficient to warrant conviction, the failure of the court to give specific instructions on the circumstantial evidence is not error. *S. v. Bennett*, 749.

CRIMINAL LAW—*Continued.*

§ 53f. Expression of Opinion on Evidence in Charge.

The fact that the court necessarily takes more time in giving the contentions of the State than in giving those of the defendants will not be held for error when the court gives equal stress to the contentions of both parties and instructs the jury that the fact that it had taken longer to give a summary of the State's evidence than that of defendants was to be given no significance. *S. v. Smith*, 1.

§ 53i. Instructions on Character Evidence.

An instruction that the jury had the "right to consider" defendant's evidence of good character upon the question of his guilt or innocence, and also "ought to consider it" as corroborative evidence, *held* not prejudicial, it appearing that the jury was given to understand that it was their duty to consider the character evidence in both aspects. *S. v. Buck*, 434.

§ 53j. Charge on Credibility of Witnesses.

Where the testimony of accomplices is introduced as substantive proof of guilt, and any corroboration of the one by the other is purely incidental, the court is not required to give any instructions in regard to corroborative evidence by accomplices. *S. v. Smith*, 1.

The court's charge on the credibility to be given the testimony of accomplices *held* without error in this case. *Ibid.*

Instructions of the court in one part of the charge as to the credibility to be given the testimony of accomplices, and in a subsequent part of the charge as to the credibility to be given the testimony of witnesses generally, *held* not to result in misleading or inconsistent statements, the charge being read contextually. *Ibid.*

§ 53l. Requests for Instructions.

The court is not required to give requested instructions verbatim but it is sufficient if the court give the requested instructions substantially. *S. v. Smith*, 1.

The court correctly refuses to give requested instructions embodying an erroneous statement of the law. *Ibid.*

A requested instruction at variance with the evidence in the case is properly refused. *Ibid.*

§ 56. Arrest of Judgment.

Where, upon defendant's demand for a jury trial, the prosecution is transferred from the recorder's court to the Superior Court in accordance with statute, and the defendant is tried in the Superior Court on the original warrant without an indictment, the judgment must be arrested. *S. v. Bailey*, 273; *S. v. Williams*, 436; *S. v. Bowen*, 766.

A motion for arrest of judgment must be based upon matter appearing in the record, or upon an omission from the record of some matter which should appear therein. *S. v. Scott*, 432.

Judgment arrested for void indictment. *Ibid.*

In absence of case on appeal, only record proper is before Supreme Court, and motion in arrest may not be based on matter not appearing therein. *S. v. Williams*, 435; *S. v. Bryant*, 437.

Where defendant charged with felony pleads guilty to misdemeanor, motion in arrest for defect in indictment will not lie. *S. v. Brown*, 439.

CRIMINAL LAW—*Continued.*

§ 62a. Severity of Sentence.

Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty, and when the indictment does not so charge, the court is without power in law to impose a judgment in excess of that prescribed for a first offense. *S. v. Miller*, 427.

Where sentence is excessive, defendant is not entitled to discharge, but only to vacation of judgment and remand for proper sentence. *Ibid.; S. v. Templeton*, 440.

§ 62f. Suspended Judgments and Sentences.

The Superior Court has jurisdiction to suspend judgment on condition that defendant remain lawabiding for a reasonable period of time, and such conditions will be upheld as favorable to the defendant and consonant with sound public policy. *S. v. Doughtie*, 368.

The suspension of sentence on condition that defendant leave the State and not re-enter its boundaries for a period of two years is void as contrary to public policy, and upon defendant's appeal from order executing the sentence for condition broken, the order and the original sentence will be vacated, and the cause remanded for a proper sentence. *Ibid.*

§ 64½b. Post-Conviction Hearing Act.

In a proceeding under the Post-Conviction Hearing Act upon proper petition, the court correctly hears evidence, finds the facts, makes his conclusions of law, and enters judgment in accord therewith. G.S. 15-221. *Miller v. State*, 29.

Such findings are conclusive if supported by evidence. *Ibid.*

Exception "to each of findings of fact" *held* ineffectual. *Ibid.*

Post-Conviction Hearing Act is not designed to add to law's delays by giving accused right to raise constitutional questions which he could and should have raised during trial. *Ibid.*

§ 67b. Judgments Appealable.

The denial of defendant's motion in the Superior Court to remand the cause to the Recorder's Court of the county is not a judgment final in its nature, and an appeal therefrom is premature and will be dismissed. *S. v. Gaskins*, 438.

§ 73d. Case on Appeal.

Want of case on appeal does not warrant dismissal, since appeal is exception to judgment and presents record proper for review. *S. v. Bryant*, 437; *S. v. Scott*, 432.

§ 77a. Necessary Parts of Record Proper.

Search warrant is no part of record proper. *S. v. Bryant*, 437.

§ 78b. Theory of Trial in Lower Court.

The theory upon which a case is tried in the lower court must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions. *S. v. Honeycutt*, 595.

An assignment of error to the refusal of the court to quash the warrant on a ground not advanced during the trial and not ruled on by the trial court, does not present the matter for decision on appeal. *S. v. Wilson*, 746.

CRIMINAL LAW—*Continued.*

§ 78c. Necessity for Exceptions and Matters Cognizable Ex Mero Motu.

Motion for arrest of judgment for defect appearing upon the face of the record proper may be made in the Supreme Court on appeal, and even in the absence of such motion, the Supreme Court will examine the whole record and arrest the judgment *ex mero motu* for such defect. *S. v. Scott*, 432.

Appeal itself is exception to judgment. *S. v. Bryant*, 437.

§ 78e (1). Exceptions to Charge.

An exception that the court in charging the jury failed to comply with G.S. 1-180 is untenable. *S. v. Bright*, 475.

An exception to the failure of the court to charge "the law on every substantial feature of the case embraced within the issues and arising on the evidence . . ." *is held* ineffectual as a broadside exception. *S. v. Triplett*, 604.

An exception to what the court did say does not necessarily challenge the court's omission to charge further on any related phase of the case. *S. v. Honeycutt*, 595.

§ 78e (2). Requirement That Misstatement of Evidence or Contentions Be Brought to Attention of Trial Court.

A misstatement of the evidence or the contentions of the parties arising thereon must be called to the attention of the trial judge at the time so as to afford an opportunity for correction, and such inaccuracies may not be challenged for the first time on appeal. *S. v. Honeycutt*, 595.

§ 79. Briefs.

Failure to file brief within the time allowed works an abandonment of the assignments of error, limiting the review to errors appearing on the face of the record, and when no error appears on the face of the record, the appeal will be dismissed on motion of the Attorney-General. *S. v. Evans*, 761.

Exceptions not set out in the brief, or which are set out in the brief but are supported by no reason or argument, will be taken as abandoned. *S. v. Hill*, 764.

§ 80. Dismissal of Appeals.

Want of case on appeal does not warrant dismissal. *S. v. Bryant*, 437.

Failure to file brief works abandonment of assignments of error and limits review to record proper, and when no error appears on face thereof appeal will be dismissed. *S. v. Evans*, 761.

§ 81b. Presumptions and Burden of Showing Error.

Verdicts and judgments are not to be set aside for mere error and no more, and appellant has the burden not only to show error but also that the alleged error is material and prejudicial. *S. v. Honeycutt*, 595.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

A *lapsus linguae* which, when the charge is construed contextually, could not have misled the jury, will not be held for prejudicial error. *S. v. Smith*, 1.

A *lapsus linguae* in failing to charge an essential element of the offense must be *held* for reversible error. *S. v. Brady*, 675.

Where, in a single instance in stating the State's contentions, the court charges that "the court says and contends . . ." but the *lapsus linguae* is immediately brought to the court's attention and corrected by the court, the inadvertence will not be held for prejudicial error. *S. v. Hill*, 764.

CRIMINAL LAW—*Continued.*

§ 81c (3). 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 admitted without objection. *S. v. Bright*, 475.

The admission of evidence which could not have affected the verdict will not be held for reversible error. *S. v. Bennett*, 749.

§ 81h. Review of Findings of Fact in Criminal Proceedings.

In a proceeding under the Post-Conviction Hearing Act, the findings of fact by the court are binding upon review if they are supported by the evidence. *Miller v. State*, 29.

An exception in general terms "to each of the findings of fact . . ." with assignment of error that the court committed prejudicial error in finding the facts as he did, *is held* insufficient to present for review the sufficiency of the evidence to support the findings. However, in this case the findings are reviewed as though appropriate exceptions and assignments of error had been entered, since the life of petitioner is at stake. *Ibid.*

§ 83. Determination and Disposition of Cause.

Where the court imposes a sentence in excess of the limit prescribed by law, the prisoner is not entitled to a discharge or to a new trial, but the judgment will be vacated and the cause remanded for proper sentence, with allowance for the time already served. *S. v. Miller*, 427; *S. v. Templeton*, 440.

DAMAGES.

§ 1c. Special Damages.

Loss of prospective profits may be recovered when such loss is the natural and proximate result of the breach, may be ascertained with reasonable certainty, and be such as may reasonably be supposed to have been within the contemplation of the parties when the contract was executed. Plaintiff must allege and prove such special damage. *Langdon v. Perkins*, 159.

§ 11. Relevancy and Competency of Evidence on Issue of Damages.

Prospective profits lost by reason of wrong may be established by evidence of past profits, with adjustment for nonrecurring expenses, reasonable prospects of the business under the conditions, and expert testimony as to the value of the business. *Perkins v. Langdon*, 159.

§ 13a. Instructions.

The failure of the court to give the jury any rule for the measurement of damages constitutes prejudicial error. *Adams v. Service Co.*, 136.

The court's charge on the issue of damages *held* without error in this case. *Perkins v. Langdon*, 159.

DECLARATORY JUDGMENT ACT.

§ 2a. Subject of Action.

The determination of the obligation of a municipality to make payments to a hospital under local acts of the Legislature is a proper case for a declaratory judgment, and nonsuit is properly denied in such action upon pleadings and evidence properly presenting such question. *Board of Managers v. Wilmington*, 179.

DEEDS.

§ 13a. Estates Created by Construction of Instrument.

A clause inserted in a deed following the description of the land may not be construed to defeat the meaning of the language used in the granting clause. *Whitson v. Barnett*, 482.

§ 13b. Estates Created—Rule in Shelley's Case.

The rule in *Shelley's case* does not apply when it is apparent from the language employed in the instrument that the words "bodily heirs" or "heirs of the body" of the first taker are not used in their technical sense as heirs general, but mean children or designated particular persons. *Whitson v. Barnett*, 483.

A conveyance to a person "and bodily heirs, and their heirs and assigns," with like provision in the *habendum* and warranty, *is held* to grant a life estate to the first taker with remainder in his children, it being apparent from the language of the instrument that the words "bodily heirs" were intended to mean "children" and not heirs general in the technical sense. *Ibid.*

§ 16b. Restrictive Covenants.

Where land within a given area is developed in accordance with a general plan or uniform scheme of restriction, ordinarily anyone purchasing in reliance on the restrictions may sue and enforce the restrictions against any other lot owner taking with record notice, regardless of whether he was an earlier or later purchaser, upon the principle that such restrictions create servitudes upon each lot in favor of each of the rest of the lots in the restricted area, which servitudes amount to negative easements constituting an interest in land. *Craven County v. Trust Co.*, 502.

To be effective, restrictive covenants must be part of a general plan or scheme of development which bears uniformly upon the area affected. *Ibid.*

Where the developer imposes restrictions in accordance with a plan of development by separate, distinct divisional units within the larger area, rather than a single development project, effect will be given to the restrictive covenants only as they relate to each separate unit. *Ibid.*

Where all of the land embraced within an area developed as a unit is conveyed to one person by deed containing a restrictive covenant, there is no dominant tenement upon which the covenant can rest, and therefore it stands only as a personal covenant between the parties and does not run with the land. *Ibid.*

DIVORCE AND ALIMONY.

§ 2a. Absolute Divorce on Ground of Separation.

Antenuptial agreement that after marriage parties would separate and obtain divorce is void and does not authorize husband to separate from wife. *McLean v. McLean*, 122.

The fact that plaintiff has married under a mistaken belief that he had obtained a valid decree of divorce may not be considered in determining whether the separation from his wife was due to his own fault. *Ibid.*

In the husband's action for absolute divorce on the ground of separation, it is not required that he establish as a constituent element of his cause of action that he is the injured party, but the wife may establish as an affirmative defense that the separation of the parties was occasioned by the act of the husband in willfully abandoning her. *Johnson v. Johnson*, 383.

DIVORCE AND ALIMONY—*Continued.*

§ 8b. Sufficiency of Evidence and Nonsuit in Actions for Divorce on Ground of Separation.

In the husband's action for divorce on the ground of two years separation, G.S. 50-6, defendant alleged that whatever estrangement existed between them was occasioned by plaintiff's own wrongful conduct and willful abandonment. *Held:* The answer raises matters of defense upon which defendant has the burden of proof, and therefore defendant is not entitled to nonsuit on the issue of separation upon her evidence in support of such defense. *McLean v. McLean*, 122.

§ 9b. Instructions in Actions for Divorce on Ground of Separation.

Where the husband seeks to justify his separation from his wife on the ground of an antenuptial agreement that they would separate immediately after the marriage and obtain a divorce, the court of its own motion should take judicial notice that such agreement is contrary to public policy, and exceptions to the court's charge stating the husband's contentions in this respect will be sustained notwithstanding the absence of objection in the record to his allegation and evidence in support thereof. *McLean v. McLean*, 122.

§ 12. Alimony Pendente Lite.

In the husband's suit for absolute divorce on the ground of separation, G.S. 50-6, the wife, upon a proper showing, is entitled to support during the pendency of the action and counsel fees for her attorneys if she sets up a cross action for divorce from bed and board on the ground of abandonment. G.S. 50-7 (1), or merely sets up abandonment as an affirmative defense to his cause of action, or even if she merely denies the validity of the cause of action stated in his complaint. *Johnson v. Johnson*, 383.

The ruling of the court upon hearing of a motion for alimony *pendente lite* can have no bearing on the merits, and cannot constitute *res judicata* of the cause of action for divorce. *Flynt v. Flynt*, 754.

Order denying alimony *pendente lite* on the ground that defendant was then providing plaintiff with adequate support and for that plaintiff had no legal capacity to sue because she had been adjudged mentally incompetent, does not preclude a motion for alimony *pendente lite* in a subsequent action instituted by plaintiff by a next friend, G.S. 1-64, if the fact of support has been altered in the meantime. *Ibid.*

§ 15. Alimony After Absolute Divorce.

Whether a wife is entitled to payments for her support in accordance with a separation agreement and is entitled to enforce such payments under statutory provisions, is a question of law for the court, and the finding of the jury upon such issue constitutes no proper basis for a judgment requiring the husband to continue to pay alimony after the dissolution of the marital status. *Merritt v. Merritt*, 271.

The judge entering a decree of divorce *a vinculo* is without jurisdiction to enter an order requiring the husband to continue to support his divorced wife. *Ibid.*

A decree of absolute divorce obtained by the wife on the ground of two years separation, G.S. 50-6, does not annul the right of the wife to receive permanent alimony under a judgment rendered in her action for alimony without divorce before the commencement of the proceedings for absolute divorce, since such case falls squarely within the second proviso of G.S. 50-11. *Deaton v. Deaton*, 487.

DIVORCE AND ALIMONY—*Continued.*

§ 19. Custody of Children—Findings and Decree.

Conflicting evidence as to character of father as suitable for partial custody or visitation privileges of son *held* for determination of court, and its findings upon such conflicting evidence are conclusive. *Griffin v. Griffin*, 404.

Under G.S. 50-13 the court has discretionary power, upon supporting findings of fact, either to divide custody between the parents for alternating periods or to award custody to one parent subject to visitation privileges in favor of the unsuccessful parent, and therefore a decree providing for the father's access to the child at stated intervals comes within the permissive bounds of the statute regardless whether it be called partial custody or visitation privilege. *Ibid.*

While the welfare of the child is the paramount consideration in awarding its custody under G.S. 50-13, the court is given wide discretionary power in reaching decisions in particular cases. Such decree is subject to alteration upon a change of circumstances affecting the welfare of the child. *Ibid.*

EASEMENTS.

§ 1. Creation of Easement by Deed.

The creation of an easement by deed must not be so uncertain, vague and indefinite as to prevent identification with reasonable certainty. *Borders v. Yarbrough*, 540.

The deed to defendant stated that the lot was subject to a perpetual easement across same for a sewerage line running "from lot No. 5 to the disposal in the street." Prior to the execution of the deed to defendant the sewerage line across defendant's lot had been constructed, and was used for some time after defendant acquired title to lot No. 6. *Held:* The dominant and servient tenements were identified, and the user of the easement, acquiesced in by the owner of the servient estate, locates the way with sufficient certainty, and therefore the description in the deed is sufficiently definite and certain to create the easement, irrespective of any way of necessity or whether the easement is apparent or not. *Ibid.*

Grantees take title to land subject to duly recorded easements which have been granted by their predecessors in title. *Ibid.*

§ 4. Creation of Easement by Payment of Permanent Damage.

When municipality pays permanent damage resulting from running of sewer line over plaintiff's property, it is entitled to easement to maintain the sewer line in reasonable manner. *McLean v. Mooresville*, 498.

EJECTMENT.

§ 15. Pleadings and Burden of Proof.

In an ejectment action in which the parties claim through a common source, the burden rests upon plaintiff to connect his title to the common source by an unbroken chain and show that the land in controversy is embraced within the bounds of the instruments under which he relies and that the title thus acquired is superior to that of defendant. Defendant may then attack any link in the chain of title relied on by plaintiff without prior supporting allegation. *Jones v. Percy*, 239.

When plaintiff in ejectment offers in evidence a foreclosure deed as constituting a link in his chain of title, defendant may attack it for failure of the trustee to advertise the foreclosure sale as required by law, without having

EJECTMENT—*Continued.*

pleaded such invalidity, and certainly where plaintiff alleges that the foreclosure sale was invalid and an issue as to due advertisement is submitted to the jury without exception, plaintiff may not successfully contend that the question is not raised for decision. *Ibid.*

The burden of proving irregularity of foreclosure of deed of trust under which plaintiff claims is on defendant asserting such invalidity. *Ibid.*

In this action in ejectment one of plaintiff's muniments of title is a deed of trust executed by the male defendant after the execution of a deed of separation by himself and the *feme* defendant, and the foreclosure of such deed of trust. *Held:* Defendants' defense that the deed of separation was rendered void by reason of the subsequent reconciliation between the parties is not presented for decision in the absence of supporting allegation in the answer or tender of issue directed to this question or exception. *Ibid.*

ELECTIONS.

§ 10. Ballots.

A ballot for a school bond election which states the question submitted for approval or disapproval followed by a brief statement of the purposes for which the proceeds of the proposed bonds are to be used and that a tax would be levied to pay the principal and interest on the bonds in event of approval, followed by the word "Yes" and the word "No" and a square opposite each with instructions as to how the ballot should be marked, *is held* to comply with G.S. 163-95 and G.S. 163-150, and the fact that the number of proposed projects necessarily results in a ballot somewhat longer than usual is not objectionable. *Parker v. Anson County*, 78.

ELECTRICITY.

§ 7. Liability for Injuries—Condition of Wires, Poles and Equipment.

Plaintiff's evidence tended to show that his intestate, a boy twelve years old, was flying a kite with a line composed in large part of metal wire, and that the metal wire came in contact with defendants' high voltage wire maintained not less than 25 feet above the ground. Remnants of another kite had been hanging from the transmission wire nearby for a couple of months preceding the tragedy. *Held:* Even conceding that the power company had constructive notice that children were in the habit of flying kites in the neighborhood, the power company was not under duty to foresee that conductive material would be used as a kite string, and therefore the injury was not within reasonable anticipation, and motion to nonsuit was properly sustained. *Pugh v. Power Co.*, 693.

EMINENT DOMAIN.

§ 3. Acts Constituting "Taking" of Property.

Where a municipality, in the exercise of a governmental function, erects a water storage tank in a section zoned for residences exclusively, it may be held liable in damages for the depreciation in value of contiguous property incident to the maintenance of such tank, since to that extent it amounts to a "taking" of property for which compensation must be paid. *McKinney v. High Point*, 66.

§ 10. Measure of Damages for Injury to Contiguous Land.

Plaintiffs' complaint alleged that defendant municipality erected a water storage tank across the street from property owned by plaintiffs in a section of the city zoned for residences exclusively, and that the maintenance of the

EMINENT DOMAIN—*Continued.*

tank materially depreciated the value of their property. *Held:* The complaint states a cause of action in favor of plaintiffs to recover compensation as for the taking of property, but allegations to the effect that the maintenance of the tank created a constant hazard to plaintiffs' property from airplanes, windstorms, tornadoes, cyclones and electrical storms and danger from the leaking or bursting of the tank, relate to matters too contingent, uncertain and speculative to be considered as elements of damage. *McKinney v. High Point*, 66.

§ 14. Procedure to Take Land and Assess Compensation in General.

Except where specific provision is made in the statutes governing condemnation, the general rules respecting civil procedure and notice are applicable to a special proceeding in condemnation. G.S. 40-11. *Collins v. Highway Comm.*, 277.

When the answer in a condemnation proceeding challenges the right of petitioner to maintain the proceeding, the clerk must hear the matter and pass upon the validity of the challenge before appointing commissioners, and such hearing by the clerk may be had only after notice to the parties. *Ibid.*

§ 17. Exceptions to Report and Hearings and Order of Clerk.

An order of the clerk confirming the report of the commissioners in condemnation proceedings is irregular if it is entered without notice to the parties or if it is entered prior to the expiration of the twenty days allowed by statute for the filing of exceptions to the commissioners' report, but such irregular order may not be attacked by appeal but may be set aside only upon motion in the cause. *Collins v. Highway Comm.*, 277.

§ 26. Nature and Extent of Title and Rights Acquired.

Where plaintiff landowners demand permanent damage in their action against a municipality for trespass based upon the construction by the municipality of a storm sewer line over their lands, and defendant municipality prays for an easement for the purpose of maintaining such drainage system, *held* under the verdict and judgment awarding permanent damage the municipality, upon payment of the damages awarded, acquires a permanent easement to maintain its storm sewer line so long as it is kept in proper repair, and the court properly refuses to sign a judgment that defendant be restrained from maintaining the storm sewer line. *McLean v. Mooresville*, 498.

ESTATES.

§ 9g. Remaindermen—Action to Remove Cloud on Title or for Possession.

Ordinarily the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of the land until the expiration of the life estate, but the remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest. *Walston v. Applewhite & Co.*, 419.

ESTOPPEL.

§ 5. Nature and Essentials of Equitable Estoppel in General.

An equitable estoppel arises as the result of voluntary conduct of one party which would render it unconscionable for him to assert a right or remedy against another party who has relied in good faith upon such conduct and has been led thereby to change his position for the worse. *Washington v. McLawhorn*, 449.

ESTOPPEL—*Continued.*

As a general rule, a party cannot claim the benefit of the doctrine of estoppel *in pais* if his own failure to avail himself of information within his reach brings about the situation of which he complains. *Trust Co. v. Casualty Co.*, 591.

As a general rule, a party may not claim the benefit of an estoppel *in pais* unless he relies upon the truth of the alleged misrepresentations not only at the time they were made but also at the time he acts upon them. *Ibid.*

§ 10. Persons Estopped.

Municipality cannot be estopped in regard to governmental functions. *Board of Managers v. Wilmington*, 179.

A county is not subject to an estoppel to the same extent as an individual or a private corporation, and a county is subject to be estopped only in instances in which an estoppel will not impair the exercise of the governmental powers of the county. *Washington v. McLawhorn*, 449.

EVIDENCE.

§ 4. Judicial Notice of Federal Regulations.

Our courts take judicial notice of the regulations of the Interstate Commerce Commission. *Schroader v. Express Agency*, 456.

§ 5. Judicial Notice of Facts Within Common Knowledge.

Courts take judicial notice of subjects and facts of general knowledge. *Dowdy v. R. R.*, 519.

The courts will take judicial notice that the engineer's seat is on the right side of the locomotive and the fireman's on the left. *Ibid.*

It is a matter of common knowledge that kite strings are ordinarily made of material which is a nonconductor of electricity. *Pugh v. Power Co.*, 693.

§ 6. Presumptions and Prima Facie Case.

The General Assembly has the power to declare that certain related facts shall be regarded as *prima facie* evidence of the ultimate fact at issue, and hence constitute sufficient basis for the submission of the issue to the jury. *Travis v. Duckworth*, 471.

§ 18. Evidence Competent to Corroborate Witness.

An unsigned contract executed at the time is competent to corroborate one party's testimony as to what the oral agreement between them was. *Harris v. Burgess*, 430.

§ 26. Similar Facts and Transactions.

As a general rule, evidence of other accidents or occurrences is not competent and should not be admitted. *Karpf v. Adams*, 106.

Evidence of other accidents at the place in question *held* competent to show the dangerous condition or character of the place of injury. *Ibid.*

§ 29. Evidence at Former Trial or Proceedings.

Where plaintiff fails to show the identity of the issues in his case with those of a former criminal prosecution against the same defendant, transcript of the testimony in the criminal proceeding is properly excluded, the question of the identity of the issues being a preliminary question to be decided by the court before any evidence at a former trial is competent. *Parrish v. Bryant*, 256.

EVIDENCE—*Continued.*

§ 39. Parol or Extrinsic Evidence Affecting Writings.

Alleged parol promise of mortgagee to procure collision insurance *held* precluded by written instruments excluding any such agreement. *Wilkins v. Finance Co.*, 396.

§ 42d. Admissions or Declarations of Agents or Employees.

Plaintiff offered testimony that within five to seven minutes after his intestate was killed by defendant's train, the engineer stated, after he had stopped the train, that he thought he had hit a man who was down in the track and scrambling around like he was trying to get off. *Held:* The declaration was a mere narration of past occurrences and not competent as a part of the *res gestae*, and testimony thereof was properly excluded. *Lee v. R. R.*, 357.

§ 46d. Opinion Evidence as to Value.

The value of the use of property may be proved by expert opinion evidence of witnesses acquainted with the property and the facts bearing upon its use. *Perkins v. Langdon*, 159.

§ 51. Competency and Qualification of Experts.

Party offering expert witness should request court to find that witness is an expert. *Samet v. Ins. Co.*, 758.

§ 52. Form of Hypothetical Questions.

Form of hypothetical question to expert witnesses in this case *held* in substantial compliance with approved rules governing the reception of such evidence. *Perkins v. Langdon*, 159.

EXECUTION.

§ 23½. Attack of Execution Sale.

The failure of the sheriff to serve a copy of the advertisement of sale upon the judgment debtor ten days before the sale, G.S. 1-339.54, entitles the judgment debtor to set aside the sheriff's deed to the purchaser in a direct proceeding or by motion in the cause, provided the land is purchased at the execution sale by the judgment creditor or his attorney, or any other person affected with notice of the irregularity, although it is not ground to set aside the sale if the property is purchased at the sale by a stranger to the proceeding. *Walston v. Applewhite*, 419.

Evidence that title to the property was in one of plaintiffs, that it was sold under execution and bought in by the judgment creditor, together with her testimony that she was not served with copy of advertisement as required by G.S. 1-339.54, is sufficient to overrule nonsuit in her action against the creditor to set aside the sheriff's deed. *Ibid.*

While recitals in the sheriff's deed pursuant to execution sale are *prima facie* correct, they are secondary evidence only, and before being admitted in evidence for this purpose the loss or destruction of the original record or records involved in the controversy must be clearly proven. *Ibid.*

While gross inadequacy of the purchase price is not alone sufficient to upset an execution sale, when coupled with any other inequitable element, it may be considered by a court of equity upon the issue. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

§ 13a. Nature and Grounds of Remedy of Selling Property to Make Assets.

Personal property of a decedent must be applied to the payment of the debts of the decedent owing at the time of his death before resort can be had to his real property even to satisfy a specific lien. *Rouse v. Rouse*, 492.

§ 29. Commissions and Allowances to Personal Representative.

Where will merely states that trustee should receive 2½% on receipts and disbursements, clerk must still fix compensation and, in doing so, must interpret meaning of "receipts." *Trust Co. v. Waddell*, 342.

FOOD.

§ 16. Condition and Preservation of Food.

Where a cow is sold for immediate slaughter for human consumption there is an implied warranty that the animal is fit for this purpose, and when it is condemned by the health authorities immediately after slaughter because of a latent disease, the purchaser may recover on the implied warranty in the seller's action for the purchase price. *Draughon v. Maddox*, 742.

FRAUD.

§ 1. Nature and Essentials of Actionable Fraud in General.

The basis for an action for fraud is a definite and specific representation which is materially false, made with knowledge of its falsity or in culpable ignorance thereof, with intent that it be relied upon, and which is reasonably relied upon by the other party to his damage. *Knitting Mills Co. v. Earle*, 97.

§ 2. Misrepresentation and Deception.

A party may not assert he was misled by a parole representation when the subsequent written agreement between the parties negates such representation, since it will be conclusively presumed that the writing superseded the parole agreement, the validity of the writing not being attacked. *Wilkins v. Finance Co.*, 396.

§ 11. Competency and Relevancy of Evidence in Actions for Fraud.

Plaintiff alleged that defendants, corporate officers and directors, made false and fraudulent statements as to the financial worth of the corporation as an inducement to plaintiff to extend credit to the corporation, and that thereafter defendants had the property of the corporation conveyed to them without payment of consideration in furtherance of their scheme to defraud the corporation's creditors. *Held:* Defendants are entitled to bring out in evidence the fact that one of the pieces of property in question had been reconveyed by the grantee defendant to the corporation. *Knitting Mills Co. v. Earle*, 97.

§ 12. Sufficiency of Evidence and Nonsuit in Actions for Fraud.

Evidence of misrepresentations made by defendants to a third person, of which plaintiff had no knowledge at the time, and which, therefore, could not have been relied on by plaintiff, is without probative force upon the issue of fraud. *Knitting Mills Co. v. Earle*, 97.

FRAUDS, STATUTE OF.

§ 5. Contracts to Answer for Debt or Default of Another.

Testimony tending to show that plaintiff furnished goods to one person on the strength of another person's unconditional promise to pay for them and on the strength of such other person's credit, is sufficient to make such other person's liability to plaintiff for the unpaid portion of the sale price a question for the jury. *Rubber Corp. v. Bowen*, 426.

§ 10. Deeds and Contracts to Convey.

Where a description in a deed is patently ambiguous the deed is ineffective to convey land. *Linder v. Horne*, 129; *Cherry v. Warehouse Co.*, 362; *Powell v. Mills*, 582.

§ 11. Leases.

Conflicting evidence as to whether parol lease was for three year term, or for three year term with privilege of renewal for so as to make it invalid under statute of frauds, *held* for jury. *Perkins v. Langdon*, 159.

GRAND JURY.

§ 1. Qualification and Selection of Grand Jurors.

Evidence *held* to support finding that Negroes were not excluded from grand jury because of race. *Miller v. State*, 29.

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor Children.

Habeas corpus will not lie in contest for custody of minor between its father and maternal grandmother. *In re Melton*, 386.

HEALTH.

§ 1. Authority and Duty to Provide Health Programs.

The obligation to pay the costs for medical care of the indigent sick and afflicted poor rests upon the State, Art. XI, sec. 7, of the Constitution of N. C., and not upon a county of the State unless the General Assembly has delegated to it such duty. *Board of Managers v. Wilmington*, 179.

HIGHWAYS.

§ 4b. Injuries to Motorists or Pedestrians on Highway Under Construction.

Conflicting evidence as to whether defendant construction company erected reasonable warning signs at a particularly dangerous place along a highway under construction *held* to require the submission of the issue of negligence to the jury. *Karpf v. Adams*, 106.

Plaintiffs' evidence was to the effect that the car which struck them slowed to fifteen or twenty miles per hour before entering upon the part of the highway under construction that was covered with wet tar, that the car immediately went out of control and skidded to the side of the road where it struck both plaintiffs. *Held:* Evidence of similar accidents which occurred on the same morning under approximately the same circumstances at the same place was competent for the purpose of showing the dangerous condition or character of the place of injury. *Ibid.*

HIGHWAYS—*Continued.*

The evidence disclosed that plaintiffs were struck by a car driven by one defendant which, though being driven at not more than twenty miles per hour, went out of control and skidded immediately it was driven upon an oil binder placed upon the highway under construction by the other defendant. *Held:* If the driver of the car was guilty of negligence he was a joint tort-feasor, and the question of his liability was properly presented to the jury under the issue of concurring negligence of defendants, and the evidence did not require the submission of an issue as to primary and secondary liability. *Ibid.*

The evidence disclosed that plaintiffs were struck by a car driven by one defendant which, though being driven at not more than twenty miles per hour, went out of control and skidded immediately it was driven upon an oil binder placed upon the highway under construction by the other defendant. *Held:* Whether the negligence of the driver of the car insulated the negligence of the construction company is not an issue of fact but a question of fact directed to the question of proximate cause, which was properly submitted to the jury under the issue of concurring negligence of defendants, and the refusal of the court to submit an issue as to insulating negligence is not error. *Ibid.*

§ 8f. State Highway Commission—Allocation of Funds.

Chap. 217, Public Laws of 1941, as amended by Chap. 290, Session Laws of 1947, were repealed 15 March, 1951, by Sec. 4, Chap. 260, Session Laws of 1951, known as the Powell Act, and therefore from and after 15 March, 1951, until 30 June, 1951 (when allocations under the Powell Act became authorized) no unencumbered allotment to the credit of a city or town could be expended legally pursuant to the 1941 statute as amended. An expenditure for the widening and improving of a portion of a State highway within the limits of a municipality, pursuant to an agreement between the Commission and the municipality entered into the latter part of June, 1951, constitutes an expense of the Commission and not of the municipality. G.S. 136-18 (g). *Motor Co. v. Statesville*, 467.

Under the provisions of Chap. 217, Public Laws of 1941 as amended, the State Highway and Public Works Commission retained control of funds allotted to municipalities for the maintenance and improvement of State highways within their limits, and such funds at all times were highway and not city funds, and the fact that a municipality lets a contract for such improvements with the approval of the Commission is immaterial upon the question of whether highway or city funds are expended under such contract. *Ibid.*

HOMICIDE.

§ 8a. Involuntary Manslaughter.

Where defendant maintains that deceased's death was not the result of any act or neglect on defendant's part, but solely the result of accident from acts of deceased, involuntary manslaughter does not arise. *S. v. Rawley*, 233.

§ 11. Self-Defense.

Since the right of a defendant to kill in self-defense arises upon the necessity, real or apparent, to save himself from death or great bodily harm, the right of self-defense cannot arise when there is no evidence that defendant acted in apprehension of such danger, real or apparent. *S. v. Rawley*, 233.

§ 17. Relevancy and Competency of Evidence in General.

Where defendant does not contend she killed deceased in self-defense and the State does not rely upon circumstantial evidence, but to the contrary the

HOMICIDE—*Continued.*

evidence on both sides is direct, the exclusion of testimony as to the dangerous character of the deceased is without error. *S. v. Rawley*, 233.

§ 25. Sufficiency of Evidence and Nonsuit.

Where the State's evidence establishes that defendant's hand was on the trigger of the pistol when it was discharged, inflicting fatal injury to defendant's wife, the introduction by the State of testimony of a statement made by defendant that the pistol was accidentally discharged while he and his wife were scuffling does not justify nonsuit when there is also circumstantial evidence contradicting defendant's contention of death by misadventure, such as the absence of powder burns, the location and direction of the fatal wound, and the conduct of defendant after the fatal shooting. *S. v. Bright*, 475.

§ 27b. Instructions on Presumptions and Burden of Proof.

The failure of the court, in one instance, to charge that the presumption arising from a killing with a deadly weapon obtains only upon proof that the killing was intentional will not be held for prejudicial error when in other portions of the charge the correct rule is categorically stated and it is apparent from the entire charge that there could be no misapprehension on this point on the part of the jury. *S. v. Bright*, 475.

§ 27f. Instructions on Defenses.

Where defendant's evidence is to the effect that deceased's death was the result of his accidentally falling upon a knife defendant was holding in her hand while lying prone on the floor, and that she did not think she was in great enough danger to make it necessary for her to cut him, but to the contrary that she did not cut him at all, *held* the principle of self-defense does not arise, notwithstanding evidence of a fight between them, and an instruction of the court to that effect is not error. *S. v. Rawley*, 233.

§ 27h. Form and Sufficiency of Instructions Upon Elements and Degrees of Offense.

Since involuntary manslaughter is based upon negligence or culpability of defendant, where defendant's evidence is to the effect that the death was the result of deceased's accidentally falling on a knife which defendant was holding in her hand while lying prone on the floor, and not from any act or neglect on the part of defendant, *held* the question of involuntary manslaughter does not arise and an instruction of the court to this effect is not error. *S. v. Rawley*, 233.

Where there is no evidence of culpable negligence and defendant's defense is based upon death by misadventure, the question of involuntary manslaughter does not arise, and the court properly omits to charge thereon. *S. v. Bright*, 475.

HOSPITALS.

§ 6. Duties and Liabilities of Charitable Hospitals to Patients.

Charitable hospital using due care in selection and retention of employees is not liable for negligence of employee causing injury to paying patient. *Williams v. Hospital*, 387.

HUSBAND AND WIFE.

§ 3. Antenuptial Agreements.

An antenuptial agreement between the parties that they would separate immediately after the marriage and obtain a divorce is contrary to public policy and void. *McLean v. McLean*, 122.

HUSBAND AND WIFE—*Continued.*

§ 12c. Conveyances by Wife to Husband.

The limitation of Art. X, sec. 6, of the Constitution that the conveyance by a married woman of her separate estate must be with the written assent of her husband applies to conveyances executed by her to third parties, but does not apply to a conveyance executed by her to her husband. *Perry v. Stancil*, 442.

§ 12d. Deeds of Separation.

An essential requisite to a deed of separation is that it be reasonable, just and fair to the wife, having due regard to the circumstances of the parties at the time it was made. *Bowles v. Bowles*, 462.

A separation agreement is to be construed to ascertain and effectuate the intent of the parties as expressed in the language of the instrument, taking into consideration the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Ibid.*

INDEMNITY.

§ 1. Nature, Requisites and Validity.

The rule that there can be no indemnity among joint tort-feasors does not apply to a party seeking indemnity who did not participate in the negligent act, is not *in pari delicto*, but is liable only by reason of a duty or liability imposed by law as a matter of public policy. *Newsome v. Surratt*, 297.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

A warrant and the affidavit upon which it is based will be construed together and will be tested by rules less strict than those applicable to indictments, but nevertheless the warrant and the affidavit together must charge facts sufficient to constitute an offense under our criminal law. *Moser v. Fulk*, 302.

Warrant charging merely public drunkenness does not charge offense. *Ibid.*

The indictment charged defendant with assault upon "George Rogers" in one place and upon "George Sanders" in another. *Held:* The indictment on its face is void, and the judgment is arrested, vacating the verdict and sentence entered thereon. *S. v. Scott*, 432.

An indictment for a statutory offense which charges the offense in the language of the Act or specifically sets forth facts constituting the offense so that it appears upon its face to be framed upon the statute, is sufficient. *S. v. Loesch*, 611.

An indictment will not be quashed for mere informality or for minor defects which do not affect the merits of the case, but an indictment will be held sufficient if it charges the offense in a plain, intelligible and explicit manner and contains sufficient matter to enable the court to proceed to judgment. *Ibid.*

An indictment is sufficient if it expresses the charge against the defendant in a plain, intelligible, and explicit manner, and it will not be held insufficient for mere informality or minor defects which do not affect the merits of the case. *S. v. Brady*, 675.

Warrant *held* sufficient to charge defendant with unlawful possession of nontax-paid liquor. *S. v. Wilson*, 746.

§ 11½. Waiver of Defects.

Where a defendant charged with a felony pleads guilty to a misdemeanor, his motion in arrest of judgment for defect in the indictment charging the

INDICTMENT AND WARRANT—*Continued.*

felony cannot be sustained, since sentence in such case is based upon defendant's voluntary plea and not upon the indictment. *S. v. Brown*, 439.

§ 12. Time for Making Motions to Quash.

A motion to quash the indictment is the proper procedure to raise the contention that members of defendant's race were discriminated against in the selection of the grand jury, and such motion may be made as a matter of right only up to the time of arraignment and plea, with discretionary power of the presiding judge to permit the motion thereafter as a matter of grace until the petit jury is sworn and impaneled, with no authority to hear the motion thereafter, and failure to follow this procedure waives the right to object on such grounds. *Miller v. State*, 29.

§ 15. Amendment.

The Superior Court on appeal from an inferior court has no authority to permit an amendment of the original warrant so as to charge a different offense. *S. v. Wilson*, 746.

Where the warrant upon which defendant was tried in the inferior court is sufficient to charge defendant with the unlawful possession of nontax-paid liquor, the warrant, though inartfully drawn, is sufficiently definite, and may be amended in the Superior Court to charge the offense in proper language. *Ibid.*

INFANTS.

§ 7. Rights of Parties Upon Disaffirmance of Contract.

Upon infant's disaffirmance of contract for purchase of car, the mortgagee pleaded a counterclaim for the infant's independent tort in using the car for transportation of liquor and in failing to notify mortgagee of its seizure so that it could protect its rights. *Held:* Recovery on counterclaim was error in absence of finding that mortgagee had no notice of forfeiture from any other source and that it had no knowledge or notice that car was being used for transportation of liquor. *Williams v. Aldridge Motors*, 352.

INJUNCTIONS.

§ 4f. Enjoining Institution or Prosecution of Civil Action.

A resident of this State, injured in an accident occurring here in the course of his employment by a railroad company, instituted action under the Federal Employers' Liability Act in a circuit court in the State of Missouri. Thereafter the employee instituted an action in the county of his residence in this State to recover for the same injury. *Held:* Upon its petition, the railroad company is entitled to an order restraining plaintiff from prosecuting his action in Missouri so long as plaintiff invokes the jurisdiction of the courts of this State for the adjudication of his claim. *Amos v. R. R.*, 714.

§ 6a. Temporary Restraining Orders in General.

A temporary restraining order will lie for the purpose of preventing the commission or continuance of some act which during the litigation would produce injury to the plaintiff or which would tend to render judgment in his favor ineffectual, to the end that the *status quo* be preserved pending the action. G.S. 1-485. *R. R. v. R. R.*, 88.

INJUNCTIONS—*Continued.*

§ 6b. Preliminary Mandatory Injunctions.

A preliminary mandatory injunction may issue when it is made to appear with reasonable certainty that complainant is entitled to the equitable relief sought and that the issuance of the writ is reasonably necessary to restore to complainant that which was wrongfully taken from him or to restore a status formerly existing between the parties. *R. R. v. R. R.*, 88.

Issuance of preliminary mandatory injunction which in effect determined action on its merits *held* error. *Ibid.*

§ 7. Hearings on Temporary Orders.

On hearing of order to show cause, merits of action are not ordinarily before court, and judgment does not preclude subsequent hearing on the merits. *Chappell v. Stallings*, 213.

Upon return of an order to show cause why plaintiff should not be attached as for contempt, heard out of term and in another county, *held* the question of vacating the restraining order theretofore issued in the cause is not before the court, and there being no notice that a hearing relative to vacating the restraining order would then be heard, and no waiver of such notice, order dissolving the restraining order is erroneous and will be vacated and set aside on appeal. *Buchanan v. Vance*, 381.

INSURANCE.

§ 3. Regulation and Control—Rates.

Since G.S. 58-246 (b) provides that the N. C. Automobile Rate Administrative Office may encourage safety in the operation of taxicabs by offering reduced premium rates upon approval of the Commissioner of Insurance, the statute does not authorize, to accomplish this purpose, the imposition of increased premium rates on companies having a higher loss experience than the average. *In re Taxi Co.*, 373.

§ 13a. Construction and Operation of Insurance Contracts in General.

The statutory provisions governing a policy of insurance control, and insurer may not escape liability by omitting from the policy a statutory provision favorable to insured, but if the limits of coverage are consistent with the statute, insurer may not be held liable beyond the coverage specified in the policy. *Howell v. Indemnity Co.*, 227.

Where a statute prescribes in plain terms the coverage of policies of insurance issued thereunder, additional coverage beyond such specifications may not be implied. *Expressum facit cessare tacitum. Ibid.*

§ 43b. Auto Liability Insurance—Risks Covered.

Owner's liability policy does not cover liability arising out of operation by him of car other than that described in the policy. *Howell v. Indemnity Co.*, 227. Operator's policy does not cover insured's liability arising out of collision of vehicle owned by him but operated by another. *Russell v. Casualty Co.*, 220.

Under terms of contracts in suit, lessor's liability insurance covered lessor's buses while being operated on lessee's route, and not any vehicle of lessee. *Coach Co. v. Coach Co.*, 697.

§ 51. Auto Insurance—Payment by Insurer and Subrogation.

An insurance company paying damages sustained to the vehicle resulting from a crossing accident cannot acquire by subrogation any better right as against

INSURANCE—*Continued.*

the railroad company than that of insured, and where the driver's contributory negligence bars insured it also bars insurer. *Dowdy v. R. R.*, 519.

Where insurer has paid all but $50.00 of the damage sustained by plaintiff's car in the collision in suit, insurer is a proper party in plaintiff's action against the tort-feasor, and may be joined as an additional party plaintiff or defendant, at the instance of the original defendant or the insured, in the discretion of the lower court, but the refusal as a matter of law of defendant's motion that insurer be joined as an additional party defendant is erroneous. *Jackson v. Baggett*, 554.

§ 54. Lightning and Windstorm Insurance.

In this action to recover on a policy of insurance for loss alleged to have been caused by lightning, the evidence tended to show that the building was damaged by the falling in of part of the roof, that the damage was discovered the morning after a violent storm accompanied by lightning and high winds, but whether the building was struck by lightning or whether the damage resulted from high winds and the vibration of the thunder, was left in speculation and conjecture. *Held:* Defendant insurers' motion to nonsuit was properly allowed. *Samet v. Ins. Co.*, 758.

Where, in an action on an insurance policy, the complaint alleges that the loss resulted from the insured building being struck by lightning, recovery may not be had on the theory not alleged in the complaint that the damage resulted from windstorm within the purview of the extended coverage provision of the policy. *Ibid.*

INTOXICATING LIQUOR.

§ 8. Forfeitures.

In a proceeding for forfeiture of a vehicle because used in the illegal transportation of intoxicating liquor, the owner may intervene and obtain possession by showing that the vehicle was used in transporting liquor without his knowledge and consent, and a lienholder may intervene and have the proceeds of sale applied to the satisfaction of the lien by showing that the lien was created without the lienor having any notice that the vehicle was being used for the illegal transportation of liquor. *Williams v. Aldridge Motors*, 352.

§ 9a. Indictment and Warrant.

A warrant which, deleted of surplus words, charges that defendant did unlawfully and willfully possess alcoholic liquors on his licensed premises, the possession of which liquors was not authorized under license which authorized the sale at retail of beverages as defined in G.S. 18-64 (a) (b), *is held* sufficient to charge the unlawful possession of liquor, and permits the inference that the liquor was nontax-paid. *S. v. Wilson*, 746.

JUDGMENTS.

§ 9. Judgments by Default.

Where defendants are served by publication, judgment by default entered less than twenty days after defendants were served in legal contemplation is irregular. *Chappell v. Stallings*, 213.

§ 17b. Conformity to Verdict, Proof and Pleadings.

A judgment must be interpreted in the light of the pleadings, the issues, findings of fact, and conclusions of law. *Coach Co. v. Coach Co.*, 697.

JUDGMENTS—*Continued.*

An adjudication of the merits of the cause cannot be had until issues of law or of fact have been joined on the pleadings of the parties and the issues thus joined tried in the manner appointed by law, G.S. 1-171, G.S. 1-172, and an adjudication of the merits in favor of a defendant who has raised no issue is a nullity. *Flynt v. Flynt*, 754.

§ 18. Jurisdiction.

A court may not render a judgment which transcends the territorial limits of its authority. *Howle v. Express, Inc.*, 667.

The regular printed form of summons was issued signed by the deputy clerk of the county. *Held:* Although the summons should have been issued in the name of the clerk, the defect was a nonjurisdictional irregularity, and proper service of the summons was sufficient to give the court jurisdiction so that its judgment rendered in the action is not void, and will not be disturbed for such irregularity in the absence of a showing of prejudice. *Beck v. Voncannon*, 707.

§ 19. Time and Place of Rendition.

Where it appears that a motion to show cause was heard out of the county without the consent of the parties, the determination of the motion is a nullity and does not preclude another Superior Court judge from entering a subsequent order in the cause at variance therewith. *Chappell v. Stallings*, 213.

Where it appears that plaintiff joined issue with defendant, asked for affirmative relief and appeared at the hearing of the show cause order outside the county in which the action was pending, and thus submitted to the jurisdiction of the court, plaintiff may not attack the order entered on the ground that the court was without jurisdiction, since it appears upon the face of the record that plaintiff consented to the hearing outside the county. *Griffin v. Griffin*, 404.

Where one of the parties files no pleading, does not consent to the agreed statement of facts or to the hearing by the judge in chambers in another county, the court has no jurisdiction to sign judgment against him. *Ellison v. Hunsinger*, 619.

§ 25. Procedure to Attack Judgments.

The proper procedure to set aside an irregular judgment is by motion in the cause, which, while not limited to one year after the judgment is rendered, must be made within a reasonable time, and movant must show that his rights had been injuriously affected by the judgment. *Collins v. Highway Comm.*, 277.

Irregular judgment may not be attacked by appeal. *Ibid.*

A void judgment is no judgment, and may always be treated as a nullity. *Washington v. McLawhorn*, 449.

An irregular judgment is not subject to collateral attack but may be assailed only by a motion in the cause. *Ibid.*

The proper remedy to attack a judgment for nonjurisdictional irregularities is by motion in the cause and not by independent action, but the summons and complaint in such independent action may be treated as a petition and motion in the cause when instituted in the same county. *Beck v. Voncannon*, 707.

§ 27d. Irregular Judgments.

An irregular judgment is not void but stands until set aside. *Collins v. Highway Comm.*, 277.

JUDGMENTS—*Continued.*

§ 30. Matters Concluded.

On hearing of order to show cause why temporary order should not be continued to hearing on merits, the merits of the cause are not presented for decision and the adjudication cannot preclude subsequent hearing on the merits. *Chappell v. Stallings*, 213.

§ 32. Operation of Judgment as Bar to Subsequent Action.

Ordinarily, in order for a judgment to constitute an estoppel there must be identity of parties, of subject matter and of issues, and it is required further that the estoppel be mutual. *Stancil v. McIntyre*, 148.

Judgment constitutes estoppel whenever question litigated is at issue between same parties in subsequent action regardless of how the subsequent action is constituted. *Ibid.*

Thus, judgment between drivers of vehicles in action in which negligence of each was at issue determines such issues as between them in subsequent action by guest in one vehicle against driver of other in which such driver seeks joinder of other driver as joint tort-feasor. *Ibid.*

Judgment denying parents' motion to recover possession of children from Department of Public Welfare does not preclude later motion upon changed conditions. *In re De Febio*, 269.

A voluntary nonsuit is not *res judicata* in a subsequent action brought on the same cause of action. *Howle v. Express, Inc.*, 667.

Judgment of nonsuit entered in another state with prejudice limiting plaintiff's right to institute new action to same county in that state cannot bar plaintiff's right to institute action here on the transitory cause. *Ibid.*

A judgment operates as an estoppel only as to the facts in issue as they existed at the time of its rendition, and does not prevent a re-examination of the same questions between the same parties upon a subsequent date when the facts have changed or new facts have occurred which alter the legal rights or relations of the parties. *Flynt v. Flynt*, 754.

JURY.

§ 1. Competency, Qualification and Selection of Jurors.

Evidence *held* to support finding that Negroes were not excluded from jury because of race; defendant *held* to have waived right to object on this ground. *Miller v. State*, 29.

Each board of county commissioners should carefully observe the statutory procedure for the selection of the jury rolls or lists from residents of the county who are of good moral character and of sufficient intelligence to serve on juries. *S. v. Ingram*, 197.

The fact that a person whose citizenship has been forfeited by service of a term in prison serves as a juror does not *ipso facto* vitiate the verdict, and motion made after verdict to set the verdict aside for such disqualification is addressed to the discretion of the trial court, even though movant had no knowledge of the disqualification, provided the facts were not concealed, and denial of the motion will not be disturbed in the absence of a showing of prejudice or abuse of discretion. *Young v. Mica Co.*, 644.

§ 4. Examination of Prospective Jurors.

In examining prospective jurors, counsel have the right to ask questions seeking to elicit information which would show bias or prompt counsel to

exercise their right of challenge, but the court should carefully supervise such interrogation in the exercise of a sound discretion. *Karpf v. Adams*, 106.

Counsel, in interrogating prospective jurors, stated that the accident in suit was one of a series of eleven accidents at the place in question. The trial court, upon objection and motion for new trial by opposing counsel, immediately cautioned the prospective jurors not to consider any reference to any accident other than the one in suit. *Held:* The court removed the prejudicial effect of any impropriety, and the denial of motion for new trial was proper. *Ibid.*

LANDLORD AND TENANT.

§ 16½. Termination of Lease by Landlord's Sale of Reversion.

Sale of property by lessor to *bona fide* purchaser without notice during term of three year parol lease terminates lease and entitles lessee to damages for wrongful termination, including loss of prospective profits. *Perkins v. Langdon*, 159.

§ 17. Termination of Lease Under Terms of the Instrument.

Lease *held* not subject to cancellation under its terms if quarrying operation were pursued on any one of the tracts of land. *Alexander v. Sand Co.*, 251.

§ 24. Liability of Lessee for Damage to Premises.

Under terms of mining lease, lessee *held* liable for dumping of waste material on other lands of lessors. *Young v. Mica Co.*, 644.

LARCENY.

§ 3. Parties and Offenses.

In North Carolina all simple larceny, whether felonious or nonfelonious, is made petit larceny by statute, G.S. 14-70, and therefore evidence that defendant procured another to steal doors of a value greatly in excess of one hundred dollars and deliver them to defendant's premises, is sufficient to overrule nonsuit in a prosecution of defendant for larceny, since his participation in petit larceny, even though a felony, constitutes defendant a principal. *S. v. Bennett*, 749.

LIBEL AND SLANDER.

§ 1. Nature and Essentials of Cause of Action.

Libel is a tort. *Taylor v. Press Co.*, 551.

§ 9. Parties to Action.

Where plaintiff sues a newspaper alone for alleged libel, the newspaper upon allegations that an individual composed the libelous matter and had it published as a paid advertisement, is entitled to have such individual joined as a joint tort-feasor for the purpose of contribution under G.S. 1-240, and such individual's demurrer to the cross-action of the newspaper against him is properly overruled. *Taylor v. Press Co.*, 551.

LIMITATION OF ACTIONS.

§ 6d. Accrual of Right of Action—Action on Contract.

Where plaintiffs' complaint alleges a breach of a provision of the contract between the parties by defendant but further alleges matter disclosing a waiver of such breach by plaintiffs, and that plaintiffs' continued performance on their

LIMITATION OF ACTIONS—*Continued.*

part thereafter until a subsequent breach by defendant of the entire contract less than three years prior to the institution of the action, *held* the complaint does not permit the inference, as a matter of law, that action on the contract is barred by the three-year statute of limitations, and this result is not affected by a self-serving declaration by defendant that the contract was breached at the earlier date. *Towery v. Dairy*, 544.

MALICIOUS PROSECUTION.

§ 2. Right of Action—Valid Process.

An action for malicious prosecution must be based upon a valid warrant or indictment, and if the warrant or indictment is void on its face, malicious prosecution will not lie. *Moser v. Fulk*, 302.

Warrant charging public drunkenness, but not circumstances constituting it public nuisance, or that defendant was drunk in place specified by statute constituting mere drunkenness an offense, fails to charge criminal offense and will not support action for malicious prosecution. *Ibid.*

MASTER AND SERVANT.

§ 4a. Distinction Between Employees and Independent Contractors.

A firm contracting to erect a sign in accordance with specifications on a lump-sum basis, with exclusive right to direct the manner and method of doing the work and having the obligation of furnishing material and labor, is an independent contractor. *Brown v. Texas Co.*, 738.

§ 12. Contractee's Liability to Employees of Independent Contractor.

It is the duty of the independent contractor and not the contractee to furnish the contractor's employees a safe place in which to work and proper safeguards against such dangers as may be incident to the work. *Brown v. Texas Co.*, 738.

Ordinarily the contractee is not liable for injuries sustained by employees of an independent contractor unless the work is inherently dangerous. *Ibid.*

Contributory negligence of employee of independent contractor in electing to do work in dangerous manner *held* to preclude recovery against contractee. *Ibid.*

§ 13. Contractee's Liability to Third Persons Injured by Contractor or His Employees.

Where contractee is liable to third person injured by negligence of independent contractor's employee because of public policy, contractee may recover of contractor when the contract between them provides for such indemnity. *Newsome v. Surratt*, 297.

§ 29½. Federal Employers' Liability Act—Venue and Jurisdiction.

Plaintiff invoking jurisdiction of court of this State in action under Federal Employers' Liability Act may be enjoined from prosecuting same action in another state. *Amos v. R. R.*, 714.

§ 37. Nature and Construction of Compensation Act in General.

Under the provisions of the North Carolina Workmen's Compensation Act the liability of the employer to his employee for compensable injury is limited

to the compensation provided in the Act, and the Act relieves the employer of any liability as a tort-feasor to his employee. *Hunsucker v. Chair Co.*, 559.

§ 40a. Injuries Compensable Under Compensation Act in General.

When an employee who has accepted and is bound by the provisions of the North Carolina Workmen's Compensation Act suffers an injury by accident arising out of and in the course of his employment as the proximate consequence of the active negligence of his employer and the passive negligence of a third party, he can claim the compensation allowed by the Workmen's Compensation Act from his employer and the insurance carrier. *Hunsucker v. Chair Co.*, 559.

The phrases "arising out of" and "in the course of" are not synonymous, but involve two ideas and impose a double condition, both of which must be satisfied in order to render an injury or death compensable. *Sweatt v. Board of Education*, 653.

§ 40c. Whether Accident Arises "Out of Employment."

The words "arising out of" as used in the Workmen's Compensation Act refer to the cause or origin of the accident, and require that the injury must spring from or have its origin in the employment. *Sweatt v. Board of Education*, 653.

Proof that an employee was at his place of employment and doing his work at the time of the injury, without more, is insufficient to support an award of compensation, since an accident which occurs in the course of the employment does not necessarily or inevitably arise out of it. *Ibid.*

Evidence *held* insufficient to support finding that murder of high school principal by student arose out of school employment. *Ibid.*

§ 40d. Whether Accident Arises "in Course of Employment."

The words "in the course of" as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which the injury occurs. *Sweatt v. Board of Education*, 653.

§ 41. Compensation Act—Action Against Third Person Tort-Feasor.

In employee's action against third person tort-feasor, defendant is not entitled to joinder of employer or its insurance carrier even upon allegations of primary and secondary negligence. *Hunsucker v. Chair Co.*, 559.

§ 43. Notice and Filing of Claim.

The Compensation Act requires or permits an employer to pay bills for medical and other treatment of an employee, and the payment of such bills, approved by the Commission, G.S. 97-26, even without a formal denial of liability, cannot have the effect of an admission of liability by the employer or constitute a waiver of the requirement of filing timely claim by the employee, G.S. 97-24. Such facts are insufficient to invoke the doctrine of estoppel which applies in compensation proceedings upon a proper showing as in all other cases. *Biddix v. Rex Mills*, 660.

Chap. 823, sec. 1 (6), Session Laws of 1947, amends G.S. 97-47 relating exclusively to the time within which an employee may file a petition for a review of an award for changed conditions, and the amendatory act does not affect G.S. 97-24, and therefore where the employee fails to file claim within one year of the date of the accident, the claim is barred notwithstanding that the employer

may have paid bills for medical treatment approved by the Commission less than a year prior to the filing of claim. *Ibid.*

§ 45. Nature, Functions and Jurisdiction of Industrial Commission.

The Industrial Commission is primarily an administrative agency of the State, and while it is also a special judicial agency, its judicial authority is limited, and its administrative and judicial functions are separate and distinct. *Biddix v. Rex Mills*, 660.

The judicial authority of the Industrial Commission must be invoked either by the filing of a claim, G.S. 97-24, or by the submission of a voluntary settlement for approval by the Commission, G.S. 97-87, and the Commission has no authority to make an award of any type until its jurisdiction as a judicial tribunal has been invoked in some manner prescribed in the Act. *Ibid.*

§ 51. Hearings and Proceedings Before Industrial Commission.

The Industrial Commission must base its award upon admissions, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court after all parties have been given full opportunity to be heard, and it may not consider records, files, evidence or data not presented in court for consideration. *Biddix v. Rex Mills*, 660.

§ 55i. Compensation Act—Proceedings Subsequent to Decision on Appeal.

Where it is apparent from an inspection of the record on appeal from judgment of Superior Court affirming an award of the Industrial Commission that the purport and meaning of a former decision by the Supreme Court upon a former appeal was misconstrued and therefore the law incorrectly applied, the cause must be again remanded to the Industrial Commission for sufficient findings and proper conclusions and award thereon. *Hill v. DuBose*, 501.

§ 60. Right to Unemployment Compensation.

The evidence in this case *is held* to support the findings of the Employment Security Commission to the effect that the unemployment of claimants after the termination of the strike in which claimants participated was due to the time reasonably required physically to resume normal operations in the chain process method used in the plant, and therefore was due to stoppage of work attributable to a labor dispute, and that claimants were not entitled to unemployment compensation by reason of the provisions of G.S. 96-14 (d). *In re Stevenson*, 528.

§ 61. Hearings Before Employment Security Commission.

Where the employer resists recovery of unemployment compensation on the ground that claimants' unemployment was due to a work stoppage resulting from a labor dispute, the burden is on claimants to show to the satisfaction of the Commission that their claims are not disqualified for benefits under G.S. 96-14 (d). *In re Stevenson*, 528.

§ 62. Appeals From Employment Security Commission.

On appeal to the Superior Court from any final decision of the Employment Security Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, and the jurisdiction of the Superior Court is confined to questions of law. *In re Stevenson*, 528.

MORTGAGES AND DEEDS OF TRUST.

§ 32c. Foreclosure—Advertisement and Notice.

G.S. 1-597 requires that notice of foreclosure under a mortgage or deed of trust must be published in a newspaper published in the county having a general circulation of paid subscribers, and therefore an instruction to the effect that in order to constitute due advertisement the newspaper in which the advertisement appeared must have been published and distributed generally in the county, but omitting the requirement of paid subscribers, must be held for error. *Jones v. Percy*, 239.

§ 39e (3). Suits to Set Aside Foreclosure—Burden of Proof.

Where defendant in ejectment attacks the validity of a deed of foreclosure under which plaintiff asserts title, the attack is in the nature of an affirmative defense, and the burden of proof rests upon defendant to show the want of due advertisement asserted by him to overcome the presumption of regularity in the foreclosure which arises when the deed of trust is regular upon its face, was duly executed, and contains recitals which show compliance with the statutory requirements of foreclosure. *Insurance Co. v. Boogher*, 224 N.C. 563, overruled. *Jones v. Percy*, 239.

§ 43. Right to Possession After Sale.

Technically, a foreclosure deed is sufficient to convey the legal title even though the sale was not advertised as required by law, and the purchaser is entitled to possession. *Jones v. Percy*, 239.

MUNICIPAL CORPORATIONS.

§ 1. Definition, Nature and Creation of Municipal Corporations.

While a municipal corporation is ordinarily an agency of the State for self-government of a particular territory, in its broader sense it includes any corporation formed for purely governmental purposes which is an agency of the State. *Coastal Highway v. Turnpike Authority*, 52.

The creation of a municipal corporation or the enlargement or diminution of its powers, or its dissolution, is a political function which rests solely in the Legislature, and while the General Assembly may delegate by general law the power to a court or other agency to ascertain the existence of facts upon which such questions are to be determined in accordance with standards set up in the act, it may not delegate the authority to determine questions of public policy or the exercise of any unguided discretion in regard thereto. *Ibid.*

The provisions of G.S. 136-89.1 *et seq.*, delegating to the Municipal Board of Control the power to determine not only whether the requirements of the act for the creation of a municipal corporation for the purpose of constructing and operating toll roads had been complied with, but also the power to determine whether the proposed toll road is in the public interest and therefore whether or not the corporation should be created, *is held* unconstitutional as an attempted delegation of the naked and arbitrary power to determine a question of public policy without standards of legislative guidance of any kind. Constitution of North Carolina, Article II, section 1. *Ibid.*

§ 7½. Joint City and County Undertakings.

A county and a city within the county join in providing funds for the medical care of the indigent sick and afflicted poor of the city and county. *Held:* A contention of the city that its taxpayers had discharged its obligation when

MUNICIPAL CORPORATIONS—*Continued.*

a county-wide tax was levied for this purpose, is untenable. *Board of Managers v. Wilmington*, 179.

§ 7a. Governmental Powers in General.

A municipality cannot be estopped from challenging the constitutionality of laws affecting it in its governmental capacity, nor may it by its acts waive its right to attack such statutes as unconstitutional. *Board of Managers v. Wilmington*, 179.

§ 11f. Discharge of Municipal Employees.

Under the provisions of Chap. 1000, secs. 10a and 11, Session Laws of 1951, where the employee's appeal from order of the Civil Service Commission contains no statement of the grounds for appeal or any specific exception to the findings of fact, the appeal to the Superior Court presents the single question whether the facts found by the Commission support its decision. *In re Appeal of Caldwell*, 600.

Order of the Civil Service Commission of Asheville and judgment of the Superior Court affirming such order *held* supported by findings of fact that petitioner was discharged for insubordination, and therefore the order and judgment are upheld under the provisions of Chap. 1000, Session Laws of 1951. *Ibid.*

§ 15b. Injuries to Property From Sewer Lines.

Upon payment of permanent damages caused by storm sewer line, city is entitled to easement. *McLean v. Mooresville*, 498.

§ 24. Sale of Land by Municipality.

G.S. 160-59 requiring public notice of the sale of real estate belonging to a municipality has no application to actual partition of land in which a municipality owns an interest, since actual partition between tenants in common involves no sale or disposal of land or any interest therein, but merely severs the unity of possession. *Craven County v. Trust Co.*, 502.

§ 30. Power to Make Public Improvements and Levy Assessments.

A municipality may not levy an assessment against abutting property owners to pay any cost of an expense for widening and improving a street constituting a part of a State highway when the funds expended therefor are highway funds and not municipal funds. The fact that the city lets the contract for such improvements after authorization and approval by the State Highway and Public Works Commission and pays for such improvements out of general funds is immaterial when the city is reimbursed for such expenditure by the Commission. *Motor Co. v. Statesville*, 467.

§ 36. Municipal Police Power in General.

Municipal corporation has only such police power as is delegated to it by General Assembly. *S. v. McGee*, 633.

§ 37. Zoning Ordinances and Building Permits.

The power of a municipality to enact zoning regulations is based upon the power to protect and promote the public health, safety and general welfare. *McKinney v. High Point*, 66.

The erection by a municipality of a water storage tank in connection with its waterworks system is done by it in its governmental capacity and the city's zoning ordinances do not apply thereto. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

City may not be held liable for negligence solely on ground that water tank was maintained in section zoned for residences. *Ibid.*

City may not be held liable for erection of water storage tank in section zoned for residences on theory of trespass or nuisance, but may be held liable for depreciation in value of contiguous property as for a "taking." *Ibid.* But speculative damage from anticipated negligence in operation or from storms may not be recovered. *Ibid.*

Under the proviso of G.S. 160-173, when two or more corners at an intersection of streets in a municipality have been zoned for business, the owner of another corner at the intersection is entitled to have it zoned for business. *Marren v. Gamble*, 680.

The proviso does not delegate legislative power to owner of third corner, and is not discriminatory and therefore any decrease in value of other property comes within police power. *Ibid.*

Hearing to determine the facts is sufficient "hearing" even though result is decreed by the statute when facts are established. *Ibid.*

§ 38. Regulations Relating to Public Morals.

The City of Charlotte has been delegated the power to enact ordinances requiring the observance of Sunday by general law, G.S. 160-52, G.S. 160-200 (6) (7) (10), and by its charter, Chap. 336, sec. 32, Public-Local Laws of 1939. *S. v. McGee*, 633.

In enacting ordinances requiring the observance of Sunday, a municipality is vested with discretion in determining and classifying the kinds of pursuits, occupations or businesses to be included or excluded, and such ordinances will not be declared invalid as arbitrary or discriminatory if the classifications are based upon reasonable distinctions and have some reasonable relationship to the public peace and welfare, and affect equally all persons within a class. *Ibid.*

A municipal ordinance prohibiting the operation of any place of amusement or the conduction of any show, game or sport where a fee is charged spectators or participants, during the hours from 6:30 p.m. to 9:00 p.m. on Sunday, is not discriminatory as applied to a motion picture theatre or drive-in theatre because radio and television stations are permitted to operate during such hours, since no fee is involved in regard to the latter pursuits and the classification is reasonable. *Ibid.*

A municipal ordinance prohibiting on Sunday the operation of any place of amusement or the conduction of any show, game or sport where a fee is charged spectators or participants except between the hours of 1:30 p.m. and 6:30 p.m. and after 9:00 p.m. *is held* not arbitrary or unreasonable with respect to the hours of regulation, since the determination of the local governing authorities with personal knowledge of the local conditions will not be interfered with by the courts unless palpably unreasonable and oppressive. *Ibid.*

A municipal ordinance proscribing on Sunday the operation of places of amusement except between the hours of 1:30 p.m. and 6:30 p.m. and after 9:00 p.m. will not be held invalid in its application to a drive-in theatre on the ground of deprivation of constitutional rights because it limits such theatre to one show on Sunday. *Ibid.*

Such ordinance does not impinge freedom of conscience. *Ibid.*

NARCOTICS.

§ 2. Prosecution and Punishment.

Where, in a prosecution for violation of G.S. 90-88 and G.S. 90-108 the indictment does not allege that either of the offenses charged was a second or subsequent offense, the court is without power to impose a punishment in excess of that prescribed by G.S. 90-111 for a first offense, and sentence in excess thereof upon the court's finding that defendant had theretofore been repeatedly convicted of violations of the Uniform Narcotics Drug Act, must be vacated. *S. v. Miller*, 427.

Punishment for violation of the Uniform Narcotics Drug Act is for a misdemeanor rather than a felony. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

In an action for negligence, plaintiff must show that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of the injury or damage, which is a cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was likely under all the facts as they existed. *Garner v. Pittman*, 328.

Negligence is a want of due care, which must be determined with reference to the facts and circumstances surrounding the parties at the time, judged by the conduct of an ordinarily prudent person similarly situated. *Mikeal v. Pendleton*, 690.

§ 4f. Injury to Invitees on Premises.

An employee of a wholesaler while delivering merchandise to a retailer's warehouse is an invitee of the retailer. *Blake v. Tea Co.*, 730.

An employee of a wholesaler in delivering merchandise to the warehouse of a retailer, backed his truck to the warehouse platform, loaded the bags of merchandise on a hand truck, and then pulled the heavily loaded hand truck over the doorsill, and while backing into the warehouse, slipped and fell to his injury on a watery or wet place on the warehouse floor. *Held:* In backing into the warehouse without looking where he was going or giving any attention whatsoever to the condition of the floor, the employee failed to exercise ordinary care for his own safety and his contributory negligence in so doing bars his recovery against the retailer as a matter of law. *Ibid.*

§ 7. Intervening Negligence.

Whether negligence of one defendant insulated negligence of other defendant *held* question of fact and not issue of fact in this case, and was properly submitted to jury under issue of concurring negligence. *Karpf v. Adams*, 106.

Foreseeability is the test of whether the intervening act of a third person is such new and independent cause as to insulate the negligence of the original wrongdoer, since if the original wrongdoer could reasonably foresee the intervening act and resultant injury, the sequence of events is not broken by a new and independent cause. *Garner v. Pittman*, 328.

§ 8. Primary and Secondary Liability.

If appealing defendant's negligence was proximate cause of injury he was joint tort-feasor under facts of this case, and evidence did not require submission of question of primary and secondary liability. *Karpf v. Adams*, 106.

NEGLIGENCE—*Continued.*

As an exception to the common law rule that there is no right to indemnity as between joint tort-feasors, a tort-feasor who has paid the injured person for the injury, and whose negligence is secondary, is entitled to indemnity against the tort-feasor whose negligence was primary, such indemnity being based upon the fiction of a *quasi*-contract implied from the circumstance that he has discharged an obligation for which the actively negligent tort-feasor was primarily liable. *Hunsucker v. Chair Co.*, 559.

But this principle is not applicable to action by employee against third person tort-feasor. *Ibid.*

§ 9½. Duty to Anticipate Negligence of Others.

A person is not under 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, is entitled to assume, and act on the assumption, that others will obey the law and exercise ordinary care. *Bennett v. Stephenson*, 377.

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance does not arise unless it appears that the injured party has been guilty of contributory negligence, and does not apply when the injured party is guilty of contributory negligence as a matter of law. *Dowdy v. R. R.*, 519.

§ 11. Contributory Negligence.

In order to bar recovery, plaintiff's negligence need not be the sole proximate cause of his injury, but it is sufficient for this purpose if it be a contributing cause. *Stevens v. R. R.*, 412.

§ 17. Presumptions and Burden of Proof.

No presumption of negligence from fact of injury. *Adams v. Service Co.*, 136.

§ 18. Competency and Relevancy of Evidence of Negligence.

As a general rule, evidence of other accidents or occurrences is not competent, but in this case evidence of other accidents at highway under construction *held* competent to show dangerous character of the place. *Karpf v. Adams*, 106.

§ 19a. Questions of Law and of Fact.

What is negligence is a question of law, and when the facts are admitted or established, it is for the court to determine whether defendant was negligent and, if so, whether such negligence was the proximate cause or one of the proximate causes of the injury. *Garner v. Pittman*, 328.

What is the proximate cause of the injury is ordinarily a question for the jury, and it is only when all of the facts are admitted or established and only one inference may be drawn therefrom that the court may declare whether an act was a proximate cause of the injury in suit. *Lyerly v. Griffin*, 686.

§ 19b (1). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Nonsuit on the issue of negligence should not be allowed unless the evidence is free from material conflict and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of the defendant, or that his negligence was not the proximate cause of the injury. *Goodson v. Williams*, 291; *Garner v. Pittman*, 328.

NEGLIGENCE—*Continued.*

§ 19c. Nonsuit on Issue of Contributory Negligence.

Ordinarily, contributory negligence is an affirmative defense which defendant must plead and prove, and nonsuit on the ground of contributory negligence should not be granted unless the plea of such negligence has been so clearly established by plaintiff's own evidence that no other conclusion can reasonably be drawn therefrom. *Goodson v. Williams*, 291.

When plaintiff's own evidence discloses negligence on his part constituting the proximate cause, or one of the proximate causes, of his injury, nonsuit is properly entered. *Stevens v. R. R.*, 412.

While the burden of proof on the issue of contributory negligence is on defendant, nonsuit on the ground of contributory negligence may properly be rendered when plaintiff's own evidence discloses as the sole inference logically deducible therefrom that plaintiff was guilty of contributory negligence constituting one of the proximate causes of the injury. *Lyerly v. Griffin*, 686.

A motion for nonsuit on the ground of contributory negligence shown by plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom. *Mikeal v. Pendleton*, 690.

§ 19d. Nonsuit for Intervening Negligence.

A demurrer to the evidence is properly sustained in negligence cases when all the evidence taken in the light most favorable to plaintiff fails to show any actionable negligence on the part of defendant, or when it clearly appears that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person. *Garner v. Pittman*, 328.

§ 20. Instructions.

An instruction that negligence is the failure to perform some duty imposed by law or a want of due care, without any instruction in regard to the rule of the reasonably prudent man, must be held for prejudicial error. *Mikeal v. Pendleton*, 690.

§ 21. Issues.

Evidence *held* not to require submission of issue of primary and secondary liability. *Karpf v. Adams*, 106.

Evidence *held* not to require submission of issue of insulating negligence. *Garner v. Pittman*, 328.

NOTICE.

§ 2. Constructive Notice.

While ordinarily a party who has information which is reasonably calculated to put him upon inquiry is charged with constructive notice of all that a reasonable inquiry would have disclosed, the rule of constructive notice does not apply if the matters of which he has notice are not reasonably sufficient to excite inquiry, or are insufficient to impose upon him the duty to make such inquiry. *Perkins v. Langdon*, 159.

§ 3. Necessity for Notice.

The constitutional right of a party to notice of judicial proceedings affecting his rights relates to original process whereby the court acquires jurisdiction, and not to procedural matters after the court has acquired jurisdiction. Constitution of North Carolina, Art. I, sec. 17. XIVth Amendment to the Federal Constitution. *Collins v. Highway Comm.*, 277.

NOTICE—*Continued.*

Where a cause is regularly docketed for hearing at a term of court, no notice of any motion in the cause is necessary unless required by statute. *Ibid.*

Notice must be given of all motions made before the clerk, since they are perforce made out of term, except those grantable as a matter of course. *Ibid.*

A party entitled to notice of a motion may waive notice, and attendance at the hearing of a motion and participation in it constitutes waiver. *Ibid.*

§ 4. Form and Sufficiency of Notice.

When notice of a motion is necessary, such notice must be in writing, disclose the nature of the motion, and the time and place set for hearing, and such notice must be served on the adverse party ten days before the time appointed for the hearing unless the court prescribes a shorter time by an order made without notice, and must be served by an officer unless some other mode of service is particularly prescribed or service is accepted by the adverse party or his attorney, subject to the exception that notice may be served by publication when the adverse party cannot be found after due diligence or is a nonresident. *Collins v. Highway Comm.*, 277.

Notice of hearing of order to show cause why plaintiff should not be attached for contempt is not notice that hearing would be had on dissolution of the restraining order, and order at such hearing dissolving the restraining order is error. *Johnson v. Johnson*, 383.

NUISANCES.

§ 3a. Acts Constituting Nuisance.

The maintenance of a water storage tank by a municipality in a section zoned for residences exclusively cannot give rise to a cause of action for a nuisance in behalf of the owners of contiguous property, since such tank is not a nuisance *per se* and the municipality has the right to maintain it at the place in question in the exercise of a legitimate and necessary governmental function, notwithstanding its zoning regulations. *McKinney v. High Point*, 66.

§ 6e. Public Disturbance.

Drunkenness itself is not a crime at common law, but must be attended with such circumstances as to constitute it a public nuisance in order to be a criminal offense. *S. v. Fulk*, 302.

§ 8a. Indictment and Warrant for Public Nuisance.

The warrant and affidavit upon which plaintiff was prosecuted charged plaintiff with public drunkenness, but failed to allege any circumstances constituting plaintiff's conduct a public nuisance, and failed to allege that plaintiff's drunkenness was within a township of the county stipulated by G.S. 14-335 (8) prescribing that public drunkenness in the stipulated territory should be a criminal offense. *Held:* The warrant and affidavit failed to charge a criminal offense. *S. v. Fulk*, 302.

PARTIES.

§ 10a. Joinder of Additional Parties.

Where insurer has paid all but $50.00 of the damage sustained by plaintiff's car in the collision in suit, insurer is a proper party in plaintiff's action against the tort-feasor, and may be joined as an additional party plaintiff or defendant, at the instance of the original defendant or the insured, in the discretion of

PARTIES—*Continued.*

the lower court, but the refusal as a matter of law of defendant's motion that insurer be joined as an additional party defendant is erroneous. *Jackson v. Baggett*, 554.

The North Carolina Workmen's Compensation Act abrogates both the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault, and the common law right of a passively negligent third party to demand indemnity from an actively negligent employer, and therefore in the employee's action against the third party tort-feasor, order joining the employer and its insurance carrier as additional parties defendant is properly vacated. *Hunsucker v. Chair Co.*, 559.

PAYMENT.

§ 2. Payment by Check.

A check is conditional payment only, and when check is given for cash sale and check is dishonored, title does not pass. *Motor Co. v. Wood*, 313; *Weddington v. Boshamer*, 557.

PHYSICIANS AND SURGEONS.

§ 8. Prosecutions for Unauthorized Practice.

In a prosecution for the unauthorized practice of medicine, an indictment following the language of G.S. 90-18 is sufficient, and is not subject to quashal for failure to show on its face a compliance with G.S. 90-21, since G.S. 90-21 merely establishes a method whereby the Board of Medical Examiners may procure an investigation by the Attorney-General with respect to alleged violations of sections G.S. 90-18 to G.S. 90-20, but does not require any such action before a criminal prosecution may be instituted for a violation of these statutes. *S. v. Loesch*, 611.

PLEADINGS.

§ 3a. Statement of Cause of Action in General.

The complaint should allege the ultimate facts upon which plaintiff's claim for relief is founded and not the evidential facts required to prove the existence of the ultimate facts. *Foster v. Holt*, 495.

The complaint should contain a concise statement of the ultimate facts constituting the cause of action, G.S. 1-122 (2), together with a demand for relief to which plaintiff supposes himself to be entitled, G.S. 1-122 (3), but should not contain a narration of the evidential facts. *Parker v. White*, 607.

If plaintiff seeks to recover in one action on two or more causes of action, each cause must be separately stated. Rule of Practice in the Supreme Court 20 (2). *Ibid.*

The complaint should not leave defendant in doubt as to the cause of action alleged against him but must sufficiently advise him so that he may know how to answer and what defense to make. *Ibid.*

§ 15. Office and Effect of Demurrer.

A demurrer tests the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences as may be deduced therefrom, but not inferences or conclusions of law. *McKinney v. High Point*, 66.

A pleading will be liberally construed upon demurrer with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. G.S. 1-151. *Ibid.; Buchanan v. Vance*, 381.

PLEADINGS—*Continued.*

The rule that the complaint must be liberally construed upon demurrer does not mean that plaintiff may dispense with the certainty, regularity and uniformity essential to an orderly administration of justice. *Parker v. White*, 607.

A demurrer admits the truth of the facts properly alleged in the pleading. *Stansel v. McIntyre*, 148.

A demurrer does not admit any legal inferences or conclusions of law asserted by the pleader. *Washington v. McLawhorn*, 449.

Upon demurrer to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action, the facts alleged in the complaint will be taken as true, together with relevant inferences of fact necessarily deducible therefrom, and the pleading will be liberally construed with a view to substantial justice between the parties, and the demurrer overruled unless the complaint be fatally defective. *Hollifield v. Everhart*, 313.

§ 16. Time of Filing Demurrer or Demurring Ore Tenus.

On appeal from the denial of one defendant's demurrer to the cross-action of his codefendant, the plaintiff is not a party to the appeal, and the complaint is not subject to demurrer *ore tenus* in the Supreme Court. *Taylor v. Press Co.*, 551.

§ 17a. Demurrer—Statement of Grounds, Form and Requisites.

A demurrer to a pleading for its failure to state a cause of action must specify wherein the pleading is deficient. *Williams v. Aldridge Motors*, 352.

§ 17c. Defects Appearing on Face of Pleading and "Speaking Demurrers."

Extraneous matters *dehors* the pleadings may not be considered either on demurrer or on motion for judgment on the pleadings. *Towery v. Dairy*, 544.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Since the statute requires that petition for betterments be filed in the action in which judgment for the land has been rendered, the filing of such petition by several claimants cannot result in a misjoinder of parties and causes, although the better practice would be for each claimant to file his claim separately. *Comrs. of Roxboro v. Bumpass*, 143.

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

If a complaint is good in any respect or to any extent, it cannot be overthrown by demurrer. *McKinney v. High Point*, 66.

Upon demurrer for failure of the complaint to state facts sufficient to constitute a cause of action, the complaint will be liberally construed in favor of the pleader, and the demurrer overruled if the complaint, so construed, is sufficient. *Buchanan v. Vance*, 381.

It being impossible to determine with any degree of certainty from the complaint, together with the prayer for judgment, the nature of the cause of action upon which plaintiff relies or whether more than one cause of action is sought to be set up therein, the judgment overruling defendants' demurrer is reversed and the cause remanded with direction that plaintiff be granted a reasonable time in which to reform and redraft his complaint. *Parker v. White*, 607.

§ 24a. Variance Between Allegation and Proof.

In order to prevail, plaintiff's proof must correspond substantially with the allegations of his complaint, since proof without allegation is as unavailing as allegation without proof. *Wilkins v. Finance Co.*, 396.

PLEADINGS—*Continued.*

Plaintiff must recover, if at all, upon cause of action as set forth in the complaint. *Cook v. Hobbs*, 490; *Samet v. Ins. Co.*, 758.

§ 25. Questions and Issues Raised by Pleadings.

Defendant may raise an issue relating to the merits of the cause only by demurrer or answer. *Flynt v. Flynt*, 754.

§ 28. Judgment on the Pleadings.

Extraneous matter *dehors* the pleadings may not be considered either on demurrer or on motion for judgment on the pleadings. *Towery v. Dairy*, 544.

§ 31. Motions to Strike.

Judgment in action between drivers of vehicles in which negligence of each was at issue *held* properly pleaded by one of drivers seeking to hold other driver for contribution as joint tort-feasor. *Stansel v. McIntyre*, 148.

Denial of motion to strike will not be disturbed when appellant is not prejudiced thereby. *Ledford v. Transportation Co.*, 317.

Motion by a defendant in an automobile accident case to strike all reference in plaintiff's pleading to collision and liability insurance on the car is properly allowed. *Foster v. Holt*, 495; *Jackson v. Baggett*, 554.

Allegations of strangers to deed attacking it for fraud, undue influence and want of consideration *held* properly stricken, since plaintiffs were not parties who could assert such matter. *Bizzell v. Bizzell*, 535.

In employee's action against third person tort-feasor, portion of original defendant's answer setting up cross-action against the employer and its insurance carrier for contribution and indemnity on ground of primary negligence, *held* properly stricken. *Hunsucker v. Chair Co.*, 559.

PRINCIPAL AND AGENT.

§ 7d. Ratification and Estoppel of Principal.

Mere fact that owner has entrusted possession of personalty to another is alone insufficient to estop owner from asserting title against purchaser from possessor. *Motor Co. v. Wood*, 318.

A fortiori, when possession is obtained from owner by false pretense. *Ellison v. Hunsinger*, 619.

PRINCIPAL AND SURETY.

§ 8. Bonds for Private Construction.

A person lending money to the owner of land for the construction of houses thereon may not sue the surety on the bond executed by such owner as "principal" to a third person as "owner," since the lender is not a party to such contract. *Trust Co. v. Casualty Co.*, 591.

Complaint *held* insufficient to invoke estoppel *in pais* to preclude surety from denying liability on bond. *Ibid.*

PROCESS.

§ 1. Form and Requisites.

While summons must be signed by the clerk, it may be issued by a deputy clerk as a ministerial act, but in such instance the deputy should sign the name of the clerk by her as deputy. *Beck v. Voncannon*, 707.

PROCESS—*Continued.*

§ 10. Service on Nonresident Auto Owners.

Service of process under G.S. 1-105 and G.S. 1-106 is ineffective to obtain service on a citizen and resident of this State while such citizen is residing temporarily outside this State, or is in the armed services of the United States and stationed in another state or foreign country. *Foster v. Holt*, 495.

§ 14. Correction, Amendment and Waiver of Defects.

If the summons shows upon its face that it emanated from the office of the clerk as an official paper and was intended to bring the defendant into court to answer the complaint of plaintiff, it is sufficient to confer jurisdiction on the court, and formal defects appearing thereon will be treated as nonjurisdictional irregularities and subject to amendment. *Beck v. Voncannon*, 707.

PUBLIC OFFICERS.

§ 9. Attack and Validity of Official Acts.

In the absence of evidence to the contrary, it is presumed that the acts of a public officer are in all respects regular. *S. v. Honeycutt*, 595.

RAILROADS.

§ 4. Accidents at Grade Crossings.

The fact that a railroad crossing is unmarked by warning signs or signals and that the motorist is unfamiliar with the surroundings, does not relieve the motorist of the duty to keep a proper lookout and to see indications that he is approaching a crossing which are obvious to anyone reasonably using his ordinary powers of observation. *Stevens v. R. R.*, 412.

Evidence *held* to disclose contributory negligence on part of motorist barring recovery for crossing accident. *Ibid.; Dowdy v. R. R.*, 519.

Evidence *held* insufficient to support doctrine of last clear chance on part of railroad. *Dowdy v. R. R.*, 519.

§ 5. Injuries to Persons on or Near Track.

In this action to recover for death of intestate struck by train while down on track, the evidence *held* insufficient to invoke doctrine of last clear chance, and railroad's motion to nonsuit was properly allowed. *Lee v. R. R.*, 356.

RECEIVERS.

§ 11. Sales and Conveyances by Receiver.

A receiver is without authority to impose restrictive covenants upon the land of the insolvent sold by him under order of court when the land was under no such restrictions in the hands of the insolvent and the order of court does not authorize the imposition of such restrictions. *Craven County v. Trust Co.*, 502.

RECEIVING STOLEN GOODS.

§ 1a. Elements of the Offense.

The crime of receiving stolen goods, though it presupposes larceny, does not include larceny, and the two offenses are separate and distinct. *S. v. Brady*, 675.

The elements of the offense of receiving stolen goods are the receiving or aid in concealing goods which had been stolen by some person other than the

accused, with knowledge by the accused that they had been stolen, and retention of possession or concealment by him of such goods with a dishonest purpose. *Ibid.*

§ 3. Indictment.

In a prosecution for receiving stolen goods, the only purpose of requiring the ownership of the goods to be stated in the indictment is to negative ownership in the accused, and it is not necessary that the indictment state the names of those from whom the goods were stolen. *S. v. Brady*, 675.

§ 6. Sufficiency of Evidence and Nonsuit.

The bill of indictment charged defendant with feloniously receiving described merchandise, the goods of "Tom Harris and other persons," knowing them to have been feloniously stolen. The proof tended to show that defendant received with guilty knowledge the items of merchandise enumerated in the indictment which had been stolen from certain identified stores, but there was no proof that any of the merchandise had been owned by Tom Harris. *Held:* Defendant's motion to nonsuit for variance was properly overruled, since proof that the articles had been stolen from the named stores supports the allegation of the indictment that the goods had been stolen from "other persons," and the prosecution would be a bar to any subsequent prosecution for receiving these particular goods. *S. v. Brady*, 675.

§ 7. Instructions.

In a prosecution for receiving stolen goods, an instruction which fails to charge the jury that it must find that the receiving was with felonious intent must be held for reversible error notwithstanding that the inadvertence was a mere *lapsus linguae*. *S. v. Brady*, 675.

§ 8. Verdict and Judgment.

In a prosecution for feloniously receiving stolen goods, the jury is not required to fix the value of the goods in its verdict. *S. v. Hill*, 764.

REFERENCE.

§ 3. Compulsory Reference.

Doubt as to whether a processioning proceeding involved a complicated question of boundary or required a personal view of the premises within the purview of G.S. 1-189 (3), will be resolved in favor of the validity of the order for compulsory reference. *White v. Price*, 347.

§ 14a. Exceptions to Report and Preservation of Right to Jury Trial.

Exceptions to the referee's report *held* sufficient in form to entitle plaintiffs to trial by jury on the issue tendered. *White v. Price*, 347.

REGISTRATION.

§ 5c. Rights of Parties Under Unregistered Instrument.

Grantee takes free of parol lease of which he had no notice. *Perkins v. Langdon*, 159.

SALES.

§ 11. Transfer of Title Between Parties.

Upon payment by check for cash sale, title does not pass if check is dishonored. *Motor Co. v. Wood*, 318; *Weddington v. Boshamer*, 557.

§ 12½. Transfer by Thief or Person Obtaining Possession by Tort.

Where payment of cash sale is made by check which is dishonored, purchaser does not acquire title, and seller may recover property from purchaser's transferee, even though he is innocent purchaser for value. *Motor Co. v. Wood*, 318.

Under the law of South Carolina, which is in accord with the general rule, a person who obtains possession of personalty from the true owner by false pretense has no title and cannot transfer title even to a *bona fide* purchaser for value without notice, unless some principle of estoppel intervenes. This rule of law will be applied in this State under the doctrine of comity, since it is not contrary to public policy of this State. *Ellison v. Hunsinger*, 619.

SCHOOLS.

§ 3a. Establishment, Enlargement and Consolidation of Schools and Districts.

The county board of education and not the board of county commissioners is vested with authority to decide the number and location of high schools necessary within the county and to consolidate high schools within the county. *Parker v. Anson County*, 78.

§ 5½. Transportation of Pupils.

The duty of a motorist to exercise a high degree of caution when he sees, or by the exercise of ordinary care should see, children on or near the highway applies with particular emphasis to the operator of a school bus transporting children to their homes after school, and such driver is required by the rule of the N. C. Board of Education to supervise their activities from their discharge from the bus until they have crossed the highway in safety or are otherwise out of danger, and not to start the bus until he sees them to be out of danger. *Greene v. Board of Education*, 336.

§ 7f. Maintenance and Construction of Schools.

While the board of county commissioners is authorized to determine what expenditures shall be made for school building purposes in the county, G.S. 115-83, this right arises only when proposals for such expenditures are submitted to it by the board of education, and the board of county commissioners has no authority to initiate such project or submit same in a school bond election. *Parker v. Anson County*, 78.

§ 8e. Teachers and Employees—Compensation for Injuries.

The liability of the State for compensation for injuries or death caused by accident suffered by employees paid from State school funds is limited to those arising out of and in the course of their employment in connection with the State operated nine months school term in accordance with G.S. 115-370, which must be given the same interpretation as G.S. 97-2 (f). *Sweatt v. Board of Education*, 653.

§ 10b. Requisites and Validity of Bond Elections and Bonds.

Resolution of county administrative units and board of education, as well as form of ballots *held* sufficient. *Parker v. Anson County*, 78.

SCHOOLS—*Continued.*

Where a county has assumed the indebtedness of all its school administrative units, all the electors of the county have a right to vote in a school bond election for improvements in any school administrative unit in the county. *Ibid.*

The fact that in a school bond election for projects presented by the school authorities and approved by the board of county commissioners, the board of county commissioners also submits without warrant of law a proposal initiated by it in regard to the schools *is held* not to so complicate the election as to render it void. *Ibid.*

§ 10h. Allocation and Expenditure of Proceeds of Bonds.

While plans for the expenditure of the proceeds of bonds authorized by a school bond election are subject to change within proper limitations, such a change must be initiated by the county board of education. *Parker v. Anson County*, 78.

And proceeds of bonds may not be used in accordance with proposition initiated by board of county commissioners and submitted to vote, but must be used in accordance with propositions of county board of education approved by voters. *Ibid.*

SEARCHES AND SEIZURES.

§ 2. Requisites and Validity of Warrant.

Question not presented by motion in arrest of judgment when there is no case on appeal. *S. v. Bryant*, 437.

SOLICITORS.

§ 3. Duties and Authority.

A solicitor is a constitutional officer charged with the duty of prosecuting all criminal actions in the Superior Courts, Constitution of North Carolina, Art. IV, sec. 23; G.S. 7-43, and the Attorney-General has no constitutional authority to issue a directive to a solicitor concerning his legal duties, but may advise him in regard thereto. *S. v. Loesch*, 611.

STATE.

§ 1a. Attorney-General.

Attorney-General has no authority to issue directive to solicitor concerning legal duties, but may advise him. *S. v. Loesch*, 611.

§ 3a. Tort Claims Act—Nature, Scope and Jurisdiction.

The Industrial Commission is vested with jurisdiction under the State Tort Claims Act to hear claims against the State for personal injuries sustained by any person as a result of negligence of a State employee while acting within the scope of his employment. *Greene v. Board of Education*, 336.

§ 3b. Tort Claims Act—Negligence of State Employee.

Evidence *held* to sustain finding of Industrial Commission that school bus driver was guilty of negligence proximately causing death of child who had alighted from bus. *Greene v. Board of Education*, 336.

§ 3e. Tort Claims Act—Appeals.

Where an appeal from an award made by the Industrial Commission under the State Tort Claims Act is not supported by any exception, the appeal presents the single question whether the facts found by the Commission support

the award, and does not challenge the sufficiency of the evidence to support the findings of fact or any one of them. *Greene v. Board of Education*, 336.

The findings of fact of the Industrial Commission in a proceeding under the State Tort Claims Act are binding upon appeal when supported by competent evidence. *Ibid.*

Where in a proceeding under the State Tort Claims Act, the Industrial Commission has found all essential facts necessary to support its award, appellant's motion to remand for additional facts is untenable. *Ibid.*

On appeal to the Superior Court from award of the Industrial Commission under the State Tort Claims Act, whether the court should interrupt the hearing and call in the court reporter so that appellants might make specific exceptions to certain findings of fact and conclusions of law of the Commission, rests in his sound discretion, it being the duty of appellants to enter exceptions to the findings of the Commission prior to the hearing in the Superior Court. *Ibid.*

STATUTES.

§ 2. Constitutional Proscription Against Passage of Local or Special Acts.

Chap. 993, Session Laws of 1951, amending the provisions of Chap. 1024, Session Laws of 1949, by limiting the territory for the creation of a corporation for the construction and operation of toll bridges to five counties of the State transforms the statute into a "local act" relating to ferries or bridges within the meaning of Article II, section 29, of the State Constitution, and is void. *Coastal Highway v. Turnpike Authority*, 52.

Chap. 906 Session Laws 1951, Chap. 470 Public-Local and Private Laws 1939, Chap. 8 Public-Local Laws 1937, which authorize the City of Wilmington and the County of New Hanover to make provision for the hospitalization and medical care of the indigent sick and afflicted poor of the city and county, are all local acts relating to health and are void as being in direct conflict with Art. II, sec. 29, of the Constitution of N. C. *Board of Managers v. Wilmington*, 179.

Court inferior to Superior Court may not be created by local act, but its jurisdiction may be changed by such act. *S. v. Norman*, 205.

§ 5. General Rules of Construction.

Where a statute prescribes in plain terms the coverage of policies of insurance issued thereunder, additional coverage beyond such specifications may not be implied. *Expressum facit cessare tacitum. Howell v. Indemnity Co.*, 227.

Where a statute expressly provides one method for accomplishing a stated objective, it necessarily excludes other methods for accomplishing such objective under the maxim *expressio unius est exclusio alterius. In re Taxi Co.*, 373.

§ 12. Repeal by Enactment.

A statute which is unconstitutional is void and cannot have any effect. Therefore provision in such unconstitutional act for the repeal of prior statutes can have no effect, and such prior statutes remain in force. *Board of Managers v. Wilmington*, 179.

General Assembly may not provide that no local act shall repeal any general law unless caption of local act refers to general law, since one General Assembly cannot restrict powers of succeeding General Assembly. *S. v. Norman*, 205.

STATUTES—*Continued.*

§ 13. Repeal by Implication and Construction.

The provision of the County Finance Act (G.S. 153-96) and the provision of the Election Law Act (G.S. 163-150) relating to form of ballots, were both brought forward and re-enacted in the General Statutes, and since there is no material conflict between them, both are in full force and effect and must be construed *in pari materia* as relating to the same subject matter. *Parker v. Anson County*, 78.

SUBROGATION.

§ 1. Nature and Grounds of Remedy.

Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right, and the party claiming subrogation cannot acquire any better right than such other person had. *Dowdy v. Burns*, 519.

The party paying certain obligations cannot obtain a right of subrogation against a party not liable for such obligations. *Trust Co. v. Casualty Co.*, 591.

TAXATION.

§ 2. Limitation on Tax Rate.

Where a county has assumed all bonds and other indebtedness of all its school districts, the limitation on its debt is to be ascertained on the basis of the assessed valuation of property for the entire county and not that of the school administrative units in which the projects lie. G.S. 153-83, G.S. 153-87. *Parker v. Anson County*, 78.

§ 4. Necessary Expense and Necessity for Vote.

Providing medical care for indigent sick is not necessary expense of city or county unless authority is delegated. *Board of Managers v. Wilmington*, 179.

§ 19½. Exemption of Property of Municipal Corporations From Taxation.

A corporation created under the provisions of G.S. 136-89-1 *et seq.* for the purpose of constructing and operating toll roads and bridges is not a municipal corporation within the meaning of Article V, section 5, of the Constitution of North Carolina, and its property may not be exempt from taxation, since the exclusive direction and control of such corporation and its power to fix charges and collect toll fees is vested in a self-perpetuating body created at its inception without governmental control of any kind, and therefore it is not a governmental agency but a private corporation. *Coastal Highway v. Turnpike Authority*, 52.

§ 40c. Foreclosure of Tax Liens.

A suit for the foreclosure of tax liens is a civil action and not a special proceeding. G.S. 105-391. *Chappell v. Stallings*, 213.

§ 40g. Validity and Attack of Foreclosure.

The provisions of G.S. 105-391 (p) (q) (r) requiring the filing of exceptions to the report of sale in the foreclosure of a tax lien relate to exceptions addressed to the validity and regularity of the particular sale, and therefore the failure to file such exceptions does not preclude the prosecution of a motion in the cause attacking the validity of the judgment of sale. *Chappell v. Stallings*, 213.

The clerk should not undertake to confirm commissioner's sale of land under foreclosure of a tax lien before determining a motion in the cause challenging

TAXATION—*Continued.*

the validity of the judgment of sale, since such motion puts in issue the validity not only of the judgment of sale but of all proceedings subsequently had thereunder. *Ibid.*

Judgment of sale entered by default less than twenty days after service by publication was completed in legal contemplation is irregular and may be set aside on motion in the cause. *Ibid.*

Where the complaint alleges that land was sold by a commissioner pursuant to a tax foreclosure in which all the heirs at law of the deceased tax debtor were made parties, *held* the allegations disclose that the court had jurisdiction, and the tax foreclosure cannot be collaterally attacked. *Washington v. McLawhorn*, 449.

Allegations to the effect that a county, after receiving tax deed to certain property, did not claim ownership of the land, that it reconveyed to other tax debtors, upon the payment of the taxes, other lands purchased by it at other tax foreclosures at about the same time, and did not assert ownership of the land in controversy in a subsequent suit involving title, although it was a party in such suit, without allegation of the tax debtors that they had offered to pay the taxes or that they had been led to believe the county would waive the taxes, *is held* insufficient to state an estoppel against the county. *Ibid.*

The sale of land for taxes pursuant to judgment of foreclosure will not be disturbed on the ground that the judgment directed the commissioner to sell two tracts of land belonging to the judgment debtors while sale and confirmation was had only as to one tract because of the payment of the taxes on the other tract pending the proceedings, since such irregularity could not have prejudiced tax debtors. *Beck v. Voncannon*, 707.

Where it is admitted that the tax sale was conducted fairly and openly without suppression of bidding or any element of fraud, the record supports the court's finding that the sale price was adequate, and tax debtors may not successfully attack the sale for inadequacy of the sale price. *Ibid.*

Where judgment of tax foreclosure directs that the land be sold free and clear of all encumbrances, the fact that the sale is made subject to all outstanding city and county taxes is insufficient to set the sale aside in the absence of a showing of prejudice. *Ibid.*

§ 41. Redemption.

The owner of land has the right to redeem same from the lien of unpaid taxes by paying the taxes with accrued interest, penalties, costs, and court costs, at any time before the entry of a valid judgment in a tax foreclosure action confirming judicial sale of the land. *Chappell v. Stallings*, 213.

TORTS.

§ 6. Contribution and Indemnity Among Joint Tort-Feasors.

In guest's action against driver of other vehicle involved in the collision, such defendant may have driver of guest's car joined for contribution. *Stansel v. McIntyre*, 148.

And may plead against such defendant prior judgment in action between them in which the negligence of each was at issue. *Ibid.*

Rule that there can be no indemnity among joint tort-feasors does not apply to party who does not participate in negligent act and is not *in pari delicto*. *Newsome v. Surratt*, 297.

TORTS—*Continued.*

Newspaper sued for libel is entitled to joinder for contribution of individual composing libel and having it published as advertisement. *Taylor v. Press Co.*, 551.

Third person tort-feasor sued by employee is not entitled to joinder of employer or its insurance carrier. *Hunsucker v. Chair Co.*, 559.

TRESPASS TO TRY TITLE.

§ 1. Nature and Essentials of Cause of Action.

Where the parties admit that each is the owner of the land covered by his respective deed, and the only controversy is as to the dividing line between the two adjoining tracts, the action in so far as it relates to the location of the dividing line is in effect a processioning proceeding notwithstanding plaintiff's claim for damages on the theory of trespass. *Goodwin v. Greene*, 244.

Plaintiff in an action for the recovery of land and for trespass thereon must rely upon the strength of his own title which he must establish by some recognized legal method and, nothing else appearing, has the burden of proving title in himself and defendant's trespass. *Powell v. Mills*, 582.

In all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but there is no presumption in favor of either party to the action. *Ibid.*

§ 3. Sufficiency of Evidence and Nonsuit.

Where, in an action to recover possession of land and for trespass, plaintiffs fail to show title to any part of the land claimed by defendants, defendants' motion to nonsuit should be allowed. *Powell v. Mills*, 582.

TRIAL.

§ 4. Time of Trial and Continuance.

The continuance of a cause rests in the discretion of the court. *White v. Price*, 347.

§ 14. Objections and Exceptions to Evidence.

An objection "to the above line of questions" without request that any of the questions or answers, which had been admitted without objection, be stricken, cannot be sustained. *Harris v. Burgess*, 430.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Where evidence is competent for a restricted purpose, its general admission will not be held for error in the absence of a request by the adverse party that its admission be restricted. *Harris v. Burgess*, 430.

§ 22a. Consideration of Evidence on Motion to Nonsuit.

On a motion for judgment as of nonsuit, the plaintiff is entitled to have the evidence considered in the light most favorable to him and to the benefit of every reasonable inference to be drawn therefrom. *Goodson v. Williams*, 292; *Bennett v. Stephenson*, 377.

On the motion to nonsuit, the court does not pass upon the credibility of the witnesses or the weight of the testimony, but determines only whether the evidence tending to sustain plaintiff's claim is sufficient to raise an issue for the jury, admitting for the purpose all facts in evidence favorable to plaintiff and

giving plaintiff the benefit of every reasonable inference therefrom. *Sessoms v. McDonald*, 720.

§ 22c. Contradictions and Discrepancies in Evidence.

Conflicts in the testimony are for the jury and not for the court. *Karpf v. Adams*, 106.

Contradictions in plaintiff's evidence do not justify nonsuit. *Sessoms v. McDonald*, 720.

§ 22½. Nonsuit in Favor of Party Having Burden of Proof.

Nonsuit may not be entered on an issue in favor of the party upon whom rests the burden of proof. *McLean v. McLean*, 122.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

The rule that the evidence will be considered in the light most favorable to plaintiff on motion to nonsuit does not relieve plaintiff of the duty of offering some substantial evidence in support of each essential element of his cause of action. *Samet v. Ins. Co.*, 758.

§ 23b. Sufficiency of Evidence to Overrule Nonsuit—Prima Facie Case.

Prima facie evidence simply carries the case to the jury for its determination, and justifies but does not compel a finding by the jury in accordance therewith. *Finance Co. v. O'Daniel*, 286.

Indeed, court may give peremptory instructions against the *prima facie* case when authorized by evidence. *Travis v. Duckworth*, 471.

§ 23f. Nonsuit for Variance.

Objection that there is material variance between the allegations of the complaint and the evidence of plaintiff is properly raised by a motion for a compulsory nonsuit, since in such event there is a failure of proof on the cause of action alleged. *Wilkins v. Finance Co.*, 396.

§ 29. Peremptory Instructions for Plaintiff.

A peremptory instruction in favor of plaintiff is proper only when the facts, admitted and established, are susceptible only to one inference, and when different inferences can be drawn therefrom a peremptory instruction is error. *Finance Co. v. O'Daniel*, 286.

§ 31b. Statement of Evidence and Application of Law Thereto.

Failure of the court to explain the law arising on the evidence in the case, as required by G.S. 1-180, constitutes prejudicial error. *Adams v. Service Co.*, 136.

A declaration of the law in general terms, together with a statement of the contentions of the parties, is insufficient, but the court should also declare and apply the law to every substantial and essential feature of the case arising on the evidence, even without a prayer for special instructions. *Ibid.*

Charge on aspect of case not presented by allegations of complaint must be held for error. *Cook v. Hobbs*, 490.

§ 39. Form and Sufficiency of Answers to Issues.

A verdict of the jury may be interpreted and given significance by reference to the pleadings, evidence and charge of the court. *White v. Price*, 347; *Harris v. Burgess*, 430.

TRIAL—*Continued.*

§ 48. New Trial for Disqualification of, or Misconduct of or Affecting Jury.

Held: Court removed any prejudicial effect of improper question to prospective jurors, and denial of motion for new trial is upheld. *Karpf v. Adams*, 106.

The fact that a person whose citizenship has been forfeited by service of a term in prison serves as a juror does not *ipso facto* vitiate the verdict, and motion made after verdict to set the verdict aside for such disqualification is addressed to the discretion of the trial court, even though movant had no knowledge of the disqualification, provided the facts were not concealed, and denial of the motion will not be disturbed in the absence of a showing of prejudice or abuse of discretion. *Young v. Mica Co.*, 644.

§ 54. Hearings and Evidence in Trial by Court.

In a trial by the court under agreement of the parties, the rules as to the admission and exclusion of evidence are not so strictly enforced, since the court is to determine what he will consider and his rulings are subject to review. *Board of Managers v. Wilmington*, 179.

TRUSTS.

§ 13. Merger of Legal and Equitable Titles.

Where the instrument confers no duty as such upon the trustee, the deed creates a passive trust, and by operation of law the legal as well as the equitable title vests in the beneficiary. *Craven County v. Trust Co.*, 502.

§ 14a. Power of Trustee to Sell Under Terms of Instrument.

Where a trust deed authorizing the trustee to sell certain lands does not authorize the trustee to impose restrictive covenants in the deeds to the grantees, the trustee is without authority to impose such restrictive covenants. *Craven County v. Trust Co.*, 502.

USURY.

§ 1. Effect of Usury in General.

Usury does not invalidate a contract, but simply works a forfeiture of the entire interest and subjects the lender to liability to the borrower for twice the interest paid. *Wilkins v. Finance Co.*, 396.

UTILITIES COMMISSION.

§ 2. Jurisdiction.

The Utilities Commission has the power and duty to regulate intrastate transportation of passengers by carrier for compensation over the public highways of this State, and only a holder of a certificate or permit from the Utilities Commission may legally engage in such business unless such party is exempt from regulation by the express terms of the Bus Act. G.S. 62-121.52. *Bryant v. Barber*, 480.

G.S. 62-121.47 exempts from the regulations of the Utilities Commission carriers in intrastate commerce transporting passengers for hire to and from Federal military reservations or bases only if such carriers have been procured by the U. S. Government to carry passengers for it, or the transportation of such passengers is under the control of the United States. *Ibid.*

VENDOR AND PURCHASER.

§ 26. Actions for Shortage in Acreage.

In the grantee's action for breach of covenant of seizin for partial failure of title to the land described in the deed, the burden of proof is on grantee to show failure of title to a part of the land described, and the mere introduction of a deed to a third party is insufficient for this purpose, but he must also fit the description in the deed to such third party to the land it covers in accordance with appropriate rules of law and evidence, and show that deed to such third party conveyed valid title to a part of the *locus* described in plaintiff grantee's deed, and without such proof an instruction to the effect that the deed to the third party conveyed title to a part of the land described in plaintiff grantee's deed is error. *Cherry v. Warehouse Co.*, 362.

§ 31. Right Under Lease Executed by Vendor.

Grantee takes free of parol lease executed by grantor when he takes without notice, actual or constructive, of the leasehold estate. *Perkins v. Langdon*, 159.

VENUE.

§ ½. Nature of Venue.

Venue means the place of trial. *Lovegrove v. Lovegrove*, 307.

§ 1e. Corporations.

An action to recover for personal injuries resulting from an accident occurring in another state between plaintiff's car and the truck of a motor freight carrier is a transitory cause which may be instituted here in the county in which the motor carrier maintains its principal place of business, G.S. 1-97. *Howle v. Express, Inc.*, 667.

§ 4a. Change of Venue.

The right to demand change of venue is purely statutory, and a change of venue changes the place of trial but not the court of trial. *Lovegrove v. Lovegrove*, 307.

Recorder's court of one county may not change venue to recorder's court of another county. *Ibid.*

WAIVER.

§ 1. Matters Which May Be Waived.

Municipality may not waive matters relating to governmental function. *Board of Managers v. Wilmington*, 179.

WAREHOUSEMEN.

§ 3d. Rights of Parties Upon Wrongful Issue or Transfer of Warehouse Receipts.

Where true owner is deprived of title to his cotton by operation of G.S. 106-442, he must be compensated therefor under due process of law. *Ellison v. Hunsinger*, 619.

WILLS.

§ 31. General Rules of Construction.

When the meaning of any part of a will is a subject of controversy, it is the prerogative of the court to construe the contested provision and declare the true meaning thereof to effectuate the intent of the testator as expressed in the instrument. *Trust Co. v. Waddell*, 342.

In ascertaining the intent of testator, the will is to be considered in the light of the conditions and circumstances existing at the time the will was made. *Ibid.*

Ordinarily, words used in a will are to be construed as having the ordinary, natural, and customary meaning given them at the time of their use, unless it clearly appears that they were used in some other sense. *Ibid.*

If words at the time of their use in a will had a well known legal or technical meaning, they are to be so construed unless the will itself discloses that another meaning was intended. *Ibid.*

In ascertaining the intent of testator it is permissible, when necessary to ascertain such intent, for the will to be considered in the light of the testator's knowledge of certain facts and circumstances existing at the time of or after the execution of the will. *Bradford v. Johnson*, 573.

§ 33g. Life Estates and Remainders.

A devise to testator's widow "in fee simple so long as she remains my widow" creates at most a life estate in the widow. *Blackwood v. Blackwood*, 726.

§ 33k. Renunciation and Acceleration of Remainders and Reversions.

Where the widow takes a life estate, her dissent will accelerate the vesting of the remainder even though the remainder be contingent, but if she takes a defeasible fee so that there is an executory devise upon the happening of the event, her dissent cannot have the effect of defeating the executory devise and the will will be construed in the same way as if there had been no renunciation. *Blackwood v. Blackwood*, 726.

§ 34c. Devises to a Class—Adopted Children.

Under provision for distribution of personalty to children of named person, adopted child of such person takes, but adopted child does not take under devise to issue of adoptive parent. *Bradford v. Johnson*, 572.

Under a testamentary provision for distribution of personalty among the children of a named person, a child adopted by such person after the testator's death does not take. *Ibid.*

§ 39. Actions to Construe Wills.

Plaintiffs sought construction of a will, contending that plaintiff grantors acquired fee simple title to the lands in question under the will and that defendants' claims constituted a cloud on their title. Original defendants claimed that plaintiff grantors took only a life estate, and that they had an estate in remainder, and had the trustees in deeds of trust executed by plaintiffs joined as additional parties defendant and attacked the deed from plaintiff grantors to plaintiff grantees and the deeds of trust executed by plaintiffs as constituting a cloud on their remainder. *Held:* All parties having an interest in the land affected by the construction of the will are entitled to an opportunity to be heard, which includes the right to allege their claim, and therefore plaintiffs' demurrer to the original defendants' defense setting up that plaintiff grantors had only a life estate and attacking the deeds and deeds of trust as constituting a cloud on their remainder was properly overruled. *Bizzell v. Bizzell*, 535.

Where the court below has made no adjudication construing the will in question, the Supreme Court may not construe the will on appeal, since the Supreme Court's jurisdiction is limited to questions of law and legal inference raised by exceptions to rulings made and judgments entered in the Superior Court. *Ibid.*

WILLS—*Continued.*

§ 40. Right of Widow to Dissent and Effect Thereof.

Where widow takes life estate, her dissent accelerates vesting of remainder; but where she takes defeasible fee, her dissent does not affect executory devise. *Blackwood v. Blackwood*, 726.

§ 44. Doctrine of Election.

Under the doctrine of election a person will not be allowed to receive the benefits accruing to him under an instrument and at the same time assert paramount title to other property disposed of by the instrument to another, since he may not accept and reject the same writing. *Rouse v. Rouse*, 492.

Testator devised to his wife a life estate in certain realty and bequeathed her his personalty. His wife asserted a claim against the estate for money constituting a part of her separate estate which he had received and not accounted for. It was not made to appear that the personalty was insufficient to pay the wife's claim. *Held:* By accepting the rents and profits from the realty, the wife elected to take under the will and is not entitled to have the realty sold to pay her claim as a specific lien. *Ibid.*

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G.S.

1-36. When State is not a party, title is conclusively presumed out of the State. *Sessoms v. McDonald*, 720; *Powell v. Mills*, 582.

1-40. Evidence of continuous possession by using land for purposes for which it was susceptible *held* sufficient. *Sessoms v. McDonald*, 720. A deed inoperative because of vagueness of description is inoperative as color of title. *Powell v. Mills*, 582.

1-57; 1-64. Stranger to deed cannot maintain action to have it set aside for fraud or undue influence. *Bizzell v. Bizzell*, 535.

1-64. Denial of motion for alimony *pendente lite* does not preclude same motion later upon changed conditions. *Flynt v. Flynt*, 754.

1-97. Action based on accident occurring in another state involving plaintiff's car and truck of motor freight carrier may be instituted in this State in county in which carrier maintains principal office. *Howle v. Express, Inc.*, 667.

1-105; 1-106. Service may not be had under statutes on resident while temporarily out of State in armed forces. *Foster v. Holt*, 495.

1-122 (2) (3). Complaint should contain statement of ultimate facts only, together with prayer for relief. *Parker v. White*, 607.

1-124; 1-171; 1-172. Adjudication on merits cannot be had until issues have been joined on pleadings, and defendant may raise issue only by demurrer or answer and not by motion. *Flynt v. Flynt*, 754.

1-127; 1-133; 1-134. When pendency of prior action does not appear on face of complaint, objection cannot be taken by demurrer, and if objection is not taken by answer it is waived. *Flynt v. Flynt*, 754.

1-151. Pleading will be liberally construed upon demurrer. *McKinney v. High Point*, 66.

1-180. Failure of court to explain law arising on evidence constitutes reversible error. *Adams v. Service Co.*, 136. Declaration of law in general terms, together with a statement of the contentions *held* insufficient. *Hawkins v. Simpson*, 155. In processioning proceeding, court must instruct jury as to what constitutes true dividing line and explain law and apply it to the evidence. *Goodwin v. Greene*, 244. Instruction in this prosecution for conspiracy *held* not to charge that if jury found any two defendants guilty to find all guilty. *S. v. Smith*, 1. Exception that judge failed to comply with statute is ineffective as broadside. *S. v. Bright*, 475.

1-189 (3). Doubt as to whether processioning proceeding involves complicated question of boundary will be resolved in favor of order of compulsory reference. *White v. Price*, 347.

1-240. Newspaper sued for libel may have person having matter printed as paid advertisement joined for contribution. *Taylor v. Press Co.*, 551. In employee's suit against negligent third person, employer may not be joined for contribution, since under G.S. 97-10 he is not liable as tort-feasor. *Hunsucker v. Chair Co.*, 559. Prior judgment between owners of vehicles involved in collision *held* properly pleaded by one of them in subsequent action by administratrix of passenger in other car in which he was joined for contribution. *Stansel v. McIntyre*, 148.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-271. Party required to pay loss in suit under terms of judgment construed in light of record is party aggrieved. *Coach Co. v. Coach Co.*, 697.

1-288. Requirements are mandatory and jurisdictional, and failure to comply requires dismissal. *Dobson v. Johnson*, 275.

1-339.54. Failure of sheriff to serve copy of advertisement of sale on judgment debtor ten days before sale is irregularity entitling debtor to set aside sale against all but stranger purchasing without notice. *Walston v. Applewhite & Co.*, 419.

1, Art. 30. Filing claim for betterments by several claimants cannot constitute misjoinder. *Comrs. of Roxboro v. Bumpass*, 143.

1-540. Acceptance of check purporting to be payment in full is settlement of disputed item. *Moore v. Greene*, 614.

1-581. Notice must be given of all motions made before the clerk. *Collins v. Highway Comm.*, 277.

1-581; 1-585; 1-588. When notice is necessary it must be in writing, be served or accepted, unless notice by publication is authorized. *Collins v. Highway Comm.*, 277.

1-582. Judgment rendered without notice when notice is required is irregular, and may be attacked only by motion in the cause. *Collins v. Highway Comm.*, 277.

1-597. Newspaper must have general paid circulation. *Jones v. Percy*, 239.

2-13. Deputy clerk has only derivative authority, and should issue summons in name of clerk by deputy. *Beck v. Voncannon*, 707.

7-43; 114-2. Solicitor is constitutional officer and Attorney-General has no authority to issue directive to him. *S. v. Loesch*, 611.

9-1. Qualifications are relevant and do not offend either the State or Federal Constitutions. *Miller v. State*, 29. County boards should carefully observe statutory provisions. *S. v. Ingram*, 197. Fact that person whose citizenship has been forfeited by service of a term in prison serves as juror does not *ipso facto* vitiate verdict. *Young v. Mica Co.*, 644.

14-1; 90-111. Punishment for violation of Narcotics Act is for misdemeanor and not felony. *S. v. Miller*, 427.

14-33. Mere look from distance, without overt act or threat of violence, is insufficient to constitute assault. *S. v. Ingram*, 197. Simple assault is misdemeanor. *S. v. Norman*, 205.

14-54. Maximum imprisonment for felonious breaking or entering is a period of ten years. *S. v. Templeton*, 440.

14-70. All simple larceny made petit larceny, and therefore accessory to felonious larceny is principal. *S. v. Bennett*, 749.

14-71. In prosecution for feloniously receiving stolen goods, verdict need not fix value of goods. *S. v. Hill*, 764.

14-223. Warrant is presumed valid, and therefore when validity of warrant is not challenged the State is not required to prove its validity. *S. v. Honeycutt*, 595.

14-335 (8). Where warrant does not charge public drunkenness within territory specified by statute, it fails to charge crime. *Moser v. Fulk*, 302.

15-144. Evidence of defendant's culpable negligence in driving car *held* sufficient for jury. *S. v. Triplett*, 604.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

15-221. Post-Conviction Hearing Act is not for purpose of reviewing questions which defendant could have presented for adjudication at the trial; findings *held* to support conclusion that Negroes were not intentionally excluded from grand and petit juries. *Miller v. State*, 29.

15-153. Indictment will not be quashed for mere informality. *S. v. Loesch*, 611; *S. v. Brady*, 675.

15-180. Appeal from denial of motion to remand to recorder's court will be dismissed as premature. *S. v. Gaskins*, 438.

18-6. Findings *held* insufficient to support judgment on lienor's counterclaim for independent tort of infant purchaser in using car in liquor traffic. *Williams v. Aldridge*, 352.

18-64. Warrant *held* sufficient to charge unlawful possession of liquor and to permit inference that it was nontax-paid. *S. v. Wilson*, 746.

20-71.1. Proof of ownership of vehicle raises *prima facie* case sufficient to take case to jury on issue of *respondeat superior*, but evidence may be such as to justify directed verdict in favor of defendant on the issue notwithstanding. *Travis v. Duckworth*, 471.

20-130.1. Upon facts alleged, negligence of demurring defendants was not proximate cause and did not concur in producing injury. *Hollifield v. Everhart*, 313.

20-131 (d); 20-174 (a) (e). Evidence *held* for jury on question of negligence and contributory negligence in action for death of pedestrian. *Goodson v. Williams*, 291.

20-138. Instruction defining "under the influence" of intoxicants *held* without error. *S. v. Lee*, 263.

20-141 (a); 20-155 (b). Car from right does not have right of way when car from left is already in intersection and could cross in safety except for excessive speed of car from right. *Cook v. Hobbs*, 490.

20-149 (b). Before attempting to pass another vehicle traveling in same direction, driver must exercise due care to see he can pass in safety and must sound horn in reasonable time to give warning. *Lyerly v. Griffin*, 686.

20-155. Respective duties of motorists meeting at intersection. *Bennett v. Stephenson*, 377.

20-156 (a). Driver of vehicle entering highway from private drive must look for vehicles approaching along highway at time when precaution can be effective, and yield to them right of way. *Garner v. Pittman*, 328.

20-161. Evidence *held* not to invoke proviso of the statute. *Parrish v. Bryant*, 256.

20-174 (a) (d) (e). Failure of pedestrian to yield right of way as provided by statute is not negligence or contributory negligence *per se*. *Simpson v. Curry*, 260.

20-227 (2) (4). Policy covering use or operation of particular described vehicle does not cover insured's liability arising out of operation by him of vehicle other than that described. *Howell v. Indemnity Co.*, 227.

20, Art. 9. Operator's policy does not cover accident involving insured's vehicle while being operated by another. *Russell v. Casualty Co.*, 220.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

22-2; 47-18. Where landlord sells premises to innocent purchaser without notice of parol lease for three years, lease is destroyed and lessee has cause of action for wrongful termination. *Perkins v. Langdon*, 159.

24-2. Usury does not invalidate contract. *Wilkins v. Finance Co.*, 396.

28-170. Executor has no right to determine and charge compensation to be received by him, but clerk must determine commissions unless definitely fixed by the will. *Trust Co. v. Waddell*, 342.

29-1 (14); 28-149 (10); 48-23. Have no bearing upon whether adopted child takes under will. *Bradford v. Johnson*, 573.

40-11. Ordinarily, general rules respecting civil procedure and notice are applicable to special proceedings in condemnation. *Collins v. Highway Comm.*, 277.

40-16; 40-17. Where answer in condemnation proceedings challenges right of petitioner to maintain the proceeding, notice of hearing is necessary and clerk must hear matter before appointing commissioners. *Collins v. Highway Comm.*, 277. Commissioners must give parties notice of their meetings. *Ibid.* Clerk must hear exceptions only upon notice. G.S. 40-17; 1-404. *Ibid.*

41-7. Legal and equitable titles merge when trust is passive. *Craven County v. Trust Co.*, 502.

44-38.1. Whether mortgaged vehicle acquired *situs* in this State *held* question for jury. *Finance Co. v. O'Daniel*, 286.

47-27. Grantees take title to land subject to duly recorded easements which have been granted by their predecessors in title. *Borders v. Yarbrough*, 540.

50-6. Husband need not establish as part of cause of action that he is injured party, but wife may establish as affirmative defense that separation was occasioned by his willful abandonment of her. *Johnson v. Johnson*, 383.

50-11; 50-6. Decree of absolute divorce obtained by wife does not annul her right to permanent alimony under judgment rendered prior to commencement of proceeding for absolute divorce. *Deaton v. Deaton*, 487.

50-13. Probative force of conflicting evidence as to suitability of respective parents to have custody of child is for court, and court has power to divide custody between parents for alternative periods or award custody to one with visitation privileges to other. *Griffin v. Griffin*, 404.

50-15. Wife is entitled to alimony *pendente lite* if she sets up a cross-action, an affirmative defense, or merely denies validity of his cause. *Johnson v. Johnson*, 383.

55-56. Officer or director making no misrepresentations *held* not liable for misrepresentation made by other officer. *Knitting Mill Co. v. Earle*, 97.

58-246 (b). Statute does not authorize imposition of increased premium rates on cab companies having a higher loss experience than average. *In re Taxi Co.*, 373.

62-108. Under terms of contracts in suit, lessor's liability insurance covered lessor's buses while being operated on lessee's route, but not lessee's vehicle while being driven to aid of lessor's bus. *Coach Co. v. Coach Co.*, 697.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

62-121.52; 62-121.47. Utilities Commission has jurisdiction over carrier transporting passengers to and from military reservation unless carrier is under control of U. S. or has been procured by Federal Government to carry passengers. *Bryant v. Barber*, 480.

62-121.72 (2). Carrier may maintain action to restrain another carrier from interfering with its franchise rights. *Bryant v. Barber*, 480.

65-29. Cemetery may sell land to municipality upon its agreement to assume obligation of perpetual care of lots, G.S. 65-26. *Memorial Park v. Bank*, 547.

90-18. Indictment which follows language of statute is sufficient and not subject to quashal for failure to allege compliance with G.S. 90-21. *S. v. Loesch*, 611.

90-88; 90-108; 90-111; 15-147. Indictment must allege that offense in subsequent offenses in order to justify punishment as habitual offender. *S. v. Miller*, 427.

96-14 (d). Time reasonably required to resume normal operations after strike is work stoppage due to labor dispute. *In re Stevenson*, 528.

96-15 (i). Findings of fact of Commission are conclusive on appeal if supported by evidence. *In re Stevenson*, 528.

97-2 (f); 115-67; 115-370. Evidence *held* insufficient to support finding that murder of high school principal by inmate of orphanage who was also high school student arose out of principal's employment by school. *Sweatt v. Board of Education*, 653.

97-10. In employee's suit against negligent third person, employer may not be joined for contribution as joint tort-feasor or for indemnity on ground that his negligence was secondary. *Hunsucker v. Chair Co.*, 559.

97-24; 97-26. Employer's voluntary payment of medical bills cannot have effect of waiving requirement of filing timely claim. *Biddix v. Rex Mills*, 660.

97-24; 97-87. Jurisdiction of Industrial Commission must be invoked by filing of claim or submission of voluntary settlement. *Biddix v. Rex Mills*, 660.

97-47. Amendment does not affect provisions of G.S. 97-24. *Biddix v. Rex Mills*, 660.

103-1. Clause repealing all laws in conflict therewith does not repeal G.S. 160-52 or 160-200 (6) (7). *S. v. McGee*, 633.

105-391. Owner may redeem land from tax lien at any time before entry of valid judgment confirming sale. *Chappell v. Stallings*, 213. Foreclosure is civil action and not special proceeding. *Ibid.* Failure to file exceptions does not preclude motion in the cause attacking validity of judgment of sale. *Ibid.*

106-442. Where true owner is deprived of title to cotton by operation of this statute he must be compensated therefor under due process of law. *Ellison v. Hunsinger*, 619.

110-21 (3); 17-39; 50-13. *Habeas corpus* will not lie in contest for custody of minor between its father and maternal grandmother. *In re Melton*, 386.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

110-36. Denial of motion for modification of order for custody of child does not preclude subsequent motion for changed conditions. *In re De Febio*, 269.

115-83. Resolution of county administrative units and board of education *held* sufficient. *Parker v. Anson County*, 78. Board of county commissioners may not initiate school project. *Ibid.*

136-18 (g). Expense of improving highway within city limits under facts of this case *held* expense of Highway Commission and not of city, and city could not levy assessments against abutting property owners. *Motor Co. v. Statesville*, 467.

136-89.1, *et seq.* *Held* unconstitutional as attempt to delegate lawmaking power to non-municipal corporation. *Coastal Highway v. Turnpike Authority*, 52.

143, Art. 31. Evidence *held* to sustain finding of Industrial Commission that school bus driver was guilty of negligence proximately causing death of child who had alighted from bus. *Greene v. Board of Education*, 336.

153-77; 153-91; 153-93. Where county has assumed indebtedness of all its school administrative units, electors of the county have right to vote in bond election for improvements for any unit. *Parker v. Anson County*, 78.

153-83; 153-87. Where county has assumed debt of district, limitation is to be ascertained on basis of assessed valuation for entire county. *Parker v. Anson County*, 78.

153-87. County commissioners may not change basic purpose for which school bonds were approved. *Parker v. Anson County*, 78.

153-96; 163-150. Both are in effect and must be construed *in pari materia*. *Parker v. Anson County*, 78.

160-52; 160-200 (6) (7). City has authority to pass ordinance requiring observance of Sunday, and ordinance in this case *held* constitutional. *S. v. McGee*, 633.

160-59. Has no application in partition of land owned by city as tenant in common. *Craven County v. Trust Co.*, 502.

160-173. Proviso that when two or more corners at intersection have been zoned for business, owner of another corner is entitled to have it zoned for business, *held* constitutional, not a delegation of legislative power, and to provide for adequate hearing. *Marren v. Gamble*, 680.

160-204; 160-205. Upon payment of permanent damages caused by storm sewer line, city is entitled to easement to maintain line in proper repair. *McLean v. Mooresville*, 498.

160-229; 153-152. City and county which exempt themselves from general statutes have no authority to expend moneys for care of indigent sick without vote. *Board of Managers v. Wilmington*, 179.

163-95; 163-150. Ballot for school bond election *held* to comply with statutes. *Parker v. Anson County*, 78.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.
(For convenience in annotating.)

ART.

I, sec. 12. Person charged with misdemeanor may not be tried initially in Superior Court except upon indictment unless he waives indictment. *S. v. Norman*, 205.

I, sec. 17. Constitutional right to notice relates to original process and not to procedural matters. *Collins v. Highway Comm.*, 277. Municipality may be held liable in damages for depreciation of property incident to erecting water storage tank in residential district. *McKinney v. High Point*, 66. Sunday ordinance *held* to apply equally to all within classifications, based upon reason, and is not discriminatory as applied to drive-in theatres. *S. v. McGee*, 633. No property right that zones remain unchanged, and proviso of G.S. 160-173 that when two corners at intersection have been zoned for business, owner of another corner at intersection is entitled to have it zoned for business, applies uniformly and hearing under the statute is sufficient. *Marren v. Gamble*, 680. Negro has constitutional right that members of his race be not intentionally excluded from grand and petit juries. *Miller v. State*, 29.

I, sec. 26. Municipal ordinance requiring observance of Sunday *held* not to impinge freedom of religion. *S. v. McGee*, 633.

II, sec. 1. G.S. 136-89.1 *held* void as unconstitutional attempt to delegate power to determine public policy. *Coastal Highway v. Turnpike Authority*, 52. Proviso of statute that when two or more corners at intersection have been zoned for business, owner of another corner is entitled to have it zoned for business is not delegation of legislative power. *Marren v. Gamble*, 680.

II, sec. 29. While inferior court must be established by general law, its jurisdiction may be changed by local act. *S. v. Norman*, 205. Chap. 993, Session Laws of 1951, *held* unconstitutional as local act relating to ferries or bridges. *Coastal Highway v. Turnpike Authority*, 52. Local acts authorizing city and county to provide funds to hospital for care of indigent sick *held* void as local acts relating to health. *Board of Managers v. Wilmington*, 179.

III, sec. 18. Solicitor is constitutional officer and Attorney-General has no authority to issue directive to him. *S. v. Loesch*, 611.

IV, sec. 2; Art. IV, sec. 10. Superior Court is but single court with statewide jurisdiction. *Lovegrove v. Lovegrove*, 307. County recorder's court is wholly independent of any other court or system of courts, and cause may not be transferred from one recorder's court to another. *Ibid.*

IV, sec. 12. Act transferring prosecution from recorder's court to Superior Court upon defendant's demand for jury trial is valid, and defendant may be tried in Superior Court upon indictment. *S. v. Norman*, 205.

IV, sec. 23. Solicitor is a constitutional officer and Attorney-General has no authority to issue directive to him. *S. v. Loesch*, 611.

IV, sec. 27. Jurisdiction of justice of the peace is not exclusive. *S. v. Norman*, 205.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED—*Continued.*

ART.

V, sec. 5. Corporation created for purpose of constructing and operating toll roads and bridges *held* not municipal corporation. *Coastal Highway v. Turnpike Authority*, 52.

VII, sec. 7. Providing for indigent sick is not necessary expense of city or county unless authority is delegated. *Board of Managers v. Wilmington*, 179.

VII, VIII, IX. Lawmaking power cannot be delegated except to municipal corporations. *Coastal Highway v. Turnpike Authority*, 52.

X, sec. 6. Written assent of husband is not required in deed from wife to husband. *Perry v. Stancil*, 442.

XI, sec. 7. Providing for indigent sick is State responsibility and not that of counties or cities unless authority is delegated. *Board of Managers v. Wilmington*, 179.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

IV, sec. 2. Nonresident may bring action in this State on transitory cause. *Howle v. Express, Inc.*, 667.

I Amendment. Municipal ordinance requiring observance of Sunday *held* not to impinge freedom of religion. *S. v. McGee*, 633.

V Amendment. Municipality may be held liable as for taking for depreciation of property incident to erection of water storage tank in residential district. *McKinney v. High Point*, 66.

XIV Amendment. Constitutional right to notice relates to original process and not the procedural matters. *Collins v. Highway Comm.*, 277. Sunday ordinance *held* to apply equally to all within classifications, based on reason, and is not discriminatory as applied to drive-in theatres. *S. v. McGee*, 633. No property right that zones remain unchanged, and proviso of G.S. 160-173 that when two corners of intersection have been zoned for business, owner of another corner at intersection is entitled to have it zoned for business, applies uniformly and hearing under the statute is sufficient. *Marren v. Gamble*, 680. Negro accused of crime has constitutional right that members of his race be not intentionally excluded from grand and petit juries. *Miller v. State*, 29.